

IN RE ARBITRATION BETWEEN:

METROPOLITAN COUNCIL TRANSIT OPERATIONS, (MCTO)

and

AMALGAMATED TRANSIT UNION (ATU), Local 1005

DECISION AND AWARD OF ARBITRATOR

JEFFREY W. JACOBS

ARBITRATOR

November 15, 2010

IN RE ARBITRATION BETWEEN:

MCTO,

and

DECISION AND AWARD OF ARBITRATOR
BMS CASE # 08-PA-0900
Jay Webber Grievance

ATU, #1005.

APPEARANCES:

FOR THE EMPLOYER:

Andrew Parker, Attorney for the Employer
Frank Stumpf, Garage manager of south Garage
Christy Bailly, Dir. of Bus Operations

FOR THE UNION:

Roger Jensen, Attorney for the Union
Jay Webber, grievant
Michelle Sommers, Union President

PRELIMINARY STATEMENT

Hearings in the above matter were held on October 11 and October 18, 2010 at the Law Offices of Parker Rosen in Minneapolis, MN. The parties presented oral and documentary evidence at that time. The parties waived Post-Hearing Briefs.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement dated August 1, 2005 through July 31, 2008. Article 13 provides for submission of disputes to binding arbitration. The parties agreed to a single arbitrator. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

ISSUES PRESENTED

Was the discipline of the grievant just and merited as required by Article 5 of the Collective Bargaining Agreement? If not what shall the remedy be?

PARTIES' POSITIONS

EMPLOYER'S POSITION

The MCTO took the position that the discipline of the grievant was just and merited. In support of this position, the MCTO made the following contentions:

1. The MCTO stated that its number one priority in all its operations is safety of its passengers and the public. It has drummed this into its drivers and all its employees that safe operations of its vehicles of whatever kind, whether they are transit vehicles or other types of vehicles is critical.

2. Recently the MCTO, in response to several terrible tragedies around the country involving operators of public transit vehicles who were on cell phones immediately before accidents, see Employer exhibits 24 and 25, and in response to communications from various experts and the US Department of Transportation. See Employer exhibit 23, communication from Peter Rogoff, Administrator US Dep't of Transportation, has promulgated a policy regarding the use of cell phone and other hand held devices. The MCTO asserted that it was quite clear in what it expected from all of its drivers – cell phone and other hand held devices should *never* be used while driving and that they *must* be stowed, i.e. in a bag or other container and not on the person of the operator.

3. The MCTO provided ample training to the grievant and indeed all of its operators about this new rule. See Employer exhibits 16 and 17. The MCTO pointed out that the grievant was well versed in the rules and requirements of a bus operator and indeed performed well in those tests, See Employer exhibits 2, 4, 5, 6 and 10. It was thus clear that he understood what was required of him and that he knew the rules, including specifically the no cell phone rule.

4. The cell phone policy was distributed to all operators, Employer exhibit 7, and posted prominently in garages where all operators could see the rule. See Employer exhibit 11. The MCTO made sure that the rule was made known to all operators and that it reinforced the rule every time it could, including posting a red and white poster on the walls of the garages, including the south garage, so that the drivers saw it every day.

5. The MCTO also pointed to multiple articles and studies done on the dangers of driving while distracted and specifically driving while using a cell phone or other hand held device. The MCTO argued that even hearing one's cell phone ring is distracting enough, and enough of a different sort of distraction from the other types of noises and bumps that bus operators frequently experience, to make them as dangerous even when they are in someone's pocket as they are if one was actually using it while driving. See, Employer exhibits 33 and 36. Other studies show similar data and the MCTO, with its emphasis on safety, decided that a policy requiring cell phones and other hand held devices to be stowed and in the "off" position was not only reasonable but mandated by safety analysts across the country.

6. The MCTO pointed out that other RTA's and bus companies have even stricter requirements and prohibit even having the phones or PDA's with the driver on the vehicle. Others call for immediate termination upon even a first offense, whereas here the policy calls only for a 20-day suspension on the first offense with a final record of warning. The policy itself, which has been the subject of a prior arbitration, discussed below, is reasonable and even somewhat lenient when compared to other similar employers in the industry.

7. As noted above, the ATU was given ample notice of the intent to promulgate this new rule and its implementation was delayed by several weeks in order to allow for more discussion about it. The Union assailed the policy as unreasonable but Arbitrator Carol O'Toole denied the Union's claim in her arbitration between these same parties. She ruled that the cell phone policy was "not subject to arbitration" under the clear terms of the labor agreement and that it was a rule that related to safety and as such was well within the employer's discretion to promulgate the rule.

8. The policy is thus clear and provides as follows:

"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.

- 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.

- Should an operator be involved in an accident while violating this procedure, further disciplinary action up to and including discharge may be applied. (Emphasis in original). See Employer exhibit 7.

9. The MCTO asserted that the rule is thus clear – all electronic devices must be stowed and off and if they are not there is an automatic 20 day suspension plus a final record of warning imposed for the first offense. If there is an accident further discipline may be imposed.

10. Here the grievant clearly violated the policy. He was operating a bus near Ford Road and Cleveland Ave, which is a busy intersection with many cars and pedestrians around, on February 4, 2010. The video and audio security cameras on the bus recorded that the grievant was nearing the stop and was about to turn into the stop itself to discharge and pick up passengers when a loud ringing sound is heard. That was the ring for the grievant’s cell phone, which he later admitted to having on. Within a second or to, there is a loud “cracking” sound that is clearly audible. This was so loud that the passengers on the bus all turn toward the back right hand side of the bus. It was later determined, and admitted at the hearing, that this sound was the bus hitting the mirror of a parked car and literally knocking it off.

11. The MCTO asserted that it was absolutely clear to everyone on the bus, including the grievant that he hit something. Policy required that he then stop the bus and secure it and walk back to see what he had hit. It could have been anything, a car, a person on a bike or a pedestrian. He simply did not know – but it was clear that he hit something but he kept on going in what the MCTO asserted was an obvious attempt to simply leave the scene of an accident in the hope that no one would notice.

12. To make matters worse, he then stopped the bus but did not secure it by placing it in neutral and setting the brake. He is seen fumbling for the cell phone to turn it off and his head is not facing forward. His foot is apparently on the brake but in such a precarious position that it could have slipped off since he was turned around almost 180 degrees to deal with his cell phone. All the while several pedestrians are seen walking directly in front of the bus. Had his foot slipped off the brake while his attention was on the phone someone could easily have been hit and injured or killed. This, the Company asserted, is exactly why the cell phone rule was promulgated.

13. A member of the public who witnessed the grievant's bus hit the mirror called in to the dispatch center to report it. The TCC called the grievant and the MCTO asserted that it was obvious from his conversation and demeanor that he knew he had done something wrong but felt that he could get away with it. He further would have known that the video and audio would have caught the fact that his cell phone went off immediately before the accident and that he would have known from the clear warnings provided to all drivers that he was in serious trouble for violating the cell phone policy. The MCTO asserted that the grievant panicked, which he also later admitted, and attempted to run away from his responsibility. This too was a serious offense and warranted serious discipline.

14. The MCTO noted that there need not be a nexus between the violation of the policy and the accident per the policy stated above. All that is required is that the accident occur while he was violating this procedure. The MCTO further alleged however that on these facts there likely was that connection between the violation of the cell phone policy and the accident. Turning a bus into a stop is a routine maneuver that all drivers do hundreds of times a week. The grievant had been a driver for some 8 years without an accident of any kind. Here it was apparent that the phone went off and, while the camera is not focused on the grievant's face at the exact time it did, it was within a second that the loud crack is heard when he hit the mirror of the car. The most reasonable inference is that he was distracted for a second and that was all it took to cause him to momentarily lose concentration and move the bus too close to the car.

15. The MCTO argued that it could have imposed a discharge, indeed there were some within the Company who wanted to terminate the grievant due to the clear violation of the cell phone policy, the failure to follow the policy for reporting an accident, the clear failure to properly secure the bus while he was fooling around with the cell phone and the danger he placed the public in while all this was happening. Instead they cut him a break and started with the 20-day suspension for the first violation of the policy and a 10-day suspension for the fact that he was involved in an accident while violating the policy. The MCTO argued quite demonstratively and vehemently that the starting point is not from “zero” and work up as the Union asserted, but rather from termination and work down. Here the amount of discipline was reasonable under the circumstances and should be upheld.

The MCTO seeks an award denying the grievance in its entirety.

UNION’S POSITION

The Union took the position that there was no just cause for the grievant’s discipline. In support of this position the Union made the following contentions:

1. The Union pointed to the excellent work record of the grievant and noted that he has been with the MCTO for approximately 8 years without any prior accidents or discipline of any kind. See Union exhibit 1. His overall work record is thus quite good and his honesty in coming forward with the details of this incident are exemplary.

2. Initially, the Union questioned whether there even was an actual accident. All they had, at least until the hearing, was the unsubstantiated call-in by an unnamed member of the public claiming that a bus had hit a mirror on a car parked near the stop at Ford Road and Cleveland on February 4, 2010. Significantly, the driver of the car never called in to report an accident or damage to the car, a white Chevy Malibu apparently. The Union asserted that the sound on the bus heard on the video recording was inconclusive as to whether it was an accident or just another of the hundreds of sounds that occur on city buses every day. None of the passengers reported that the bus had hit anything and none seemed terribly alarmed during any of this incident.

3. Nor was that car ever found again after the incident in question. By the time the grievant returned to that stop on the return route the car was gone.

4. The Union did finally acknowledge that the grievant had in fact hit the mirror but only after there was actual testimony from a person under oath who claimed to have witnessed the accident and described the bus and the car.

5. The Union acknowledged that the grievant's cell phone had gone off while he was at this stop, and asserted that if not for the total honesty of the grievant this case might never have happened. Had he simply alleged that it was a passenger's phone there would have been no way to determine that on the recording. Passenger's phones frequently ring during rides and the ring heard on the video was a "typical" cell phone ring and was not so unusual as to distinguish it from the grievant's. Driver's are trained not to be distracted by such things and are trained to concentrate on driving even though cell phones and radios and other devices are often heard on buses.

6. The Union asserted that the grievant had no knowledge that he had hit anything when it happened and never intentionally left the scene of the accident. He indicated that he had heard something but did not believe it was his bus hitting anything. He further acknowledged that he was going to stop and see if there was damage to his bus when he got to the turnaround and requested a supervisor meet him there to verify if there was or was not any damage to the bus. Indeed, when he and the supervisor examined the bus they found no damage at all and no evidence of an accident or collision of any kind. As noted, when he got back to the stop where the member of the public told the TCC the accident had happened, the car in question was gone and there was no evidence of the mirror being knocked off. The grievant was not being dishonest; he simply did not know he had hit anything.

7. Further, while he violated the technical language of the policy, he did so unintentionally. He thought he had turned his cell phone off but apparently it had not gone completely off. He had it stowed in a bag behind him; just as the policy requires and believed in good faith that it was off.

8. The Union and the grievant asserted most strenuously that he was not distracted by the cell phone going off and that he simply got too close to the car at the stop and must have inadvertently struck the mirror. This was due to poor weather conditions and the road being slightly narrower due to snow packed up near the curb. The Union pointed to the Company's own report at Joint Exhibit 5 where Ms. Bailly acknowledges that "the cell phone ringing may or may not have contributed to this accident." It was clear that there was insufficient evidence to show that the cell phone going off was in any way distracting enough to cause or contribute to this accident.

9. The Union noted that drivers are frequently confronted with all sorts of possible distractions, from passengers' conversation, cell phones going off, things dropping to the floor and other assorted and sundry rattles, bangs and bumps on buses. They are trained to keep their attention focused on their task – which is to operate the bus safely and are taught not to be distracted by these frequent noises. The grievant asserted that the phone had nothing to do with the accident whatsoever.

10. The Union pointed to the video as well and noted that the grievant immediately took steps to shut the phone off after it rang and that he waited until the bus was safely stopped at the intersection and that no passengers were alighting on or off the bus before doing so. He testified that he kept attention on the road and that his foot was always on the brake and that there was no danger of it slipping off as the Company suggested. The Union asserted that the Company's parade of horribles argument was so speculative and hypothetical as to be without any evidentiary merit at all.

11. The Union further asserted that the policy is per se unreasonable because it treats dissimilar offenses similarly. The penalty for simply forgetting to turn off the phone, as the grievant did, is the same as that for actually texting on a PDA while driving. Clearly, both the studies relied on by the MCTO as well as common sense dictates that those two actions are vastly different in terms of the potential danger to the public yet are treated the same under the policy. The Union asserted that this "one-size-fits-all" approach presents a classic case of disparate treatment – dissimilar violations of the policy should not be treated the same, just as similar conduct should be treated differently.

12. The Union noted that Arbitrator O'Toole's award, Employer exhibit 8, affirmed that even though the Company had the right to promulgate the policy, the application of that policy to a specific case and whether the penalty imposed is appropriate in an individual case is up to the arbitrator. The Union argued that this is therefore mostly a "penalty" case involving the appropriate level of discipline for the offense proven.

13. The Union also took issue with the studies submitted by the MCTO. The Union argued that the articles about the studies have no evidentiary value since they are merely some reporter's view of them and not actual peer reviewed scientifically verified studies. Some of the studies themselves are of no value since they only look at the actual use of cell phones while driving, which is not what happened here, while others look only to drivers' sense of comfort as they get more used to using cell phones. Others still look only at a tiny sample and are not scientifically valid and none demonstrate the point that the distraction of actually texting or talking and dialing a cell phone is equal to that of a cell phone in a stowed bag ringing.

14. The Union argued that while these studies may provide some basis for the cell phone policy itself, which was already the subject to the O'Toole arbitration, none prove that the distraction and therefore the danger to the public of simply having it on in a bag is anything close to the same as actually using it while driving. The Union's point is again that the two offenses are vastly different and should not be treated the same by the policy and when reviewed by commonly accepted notions of industrial discipline and that this disparity must be taken into account by the arbitrator in reviewing the appropriateness of the penalty in this case.

15. Here the offense proven was the technical violation of having the phone stowed but in the "on" mode. The grievant was not "using" it nor did he have it on his person. Thus, even though he may have violated the policy he did not violate that *part* of the policy calling for a 20-day suspension and final record of warning. The Union argued that 20 days for this offense is far too high, especially when compared to someone who actually is using it or has it on their person while driving.

16. The Union further asserted that there must be a showing that the violation of the cell phone policy was a contributing factor to any accident and here there was not. The policy further does not call for discharge but rather “further disciplinary action up to and including discharge.” Given the grievant's exemplary prior work record, there was no grounds for termination and the employer so recognized that by meting out an additional 10 days suspension.

17. The essence of the Union’s case was that even though there was an accident and even though there was a technical violation of the cell phone policy, the penalty in this particular case on these facts is far too harsh. The Union noted quite pointedly that had there been only the accident involved in this incident the grievant would have been given a warning and perhaps remedial training but no suspension. The Union asserted that this level of discipline, i.e. a warning, should be the starting point for the arbitrator in this matter. The Union asserted most strenuously that the penalty imposed here was far too harsh for the proven offense and should be greatly reduced.

The Union seeks an award overturning the discipline that was meted out; expunging the grievant’s record of all discipline herein and reinstating any lost back pay and accrued benefits as the result of the discipline in this matter.

MEMORANDUM AND DISCUSSION

The MCTO operates a transit system in and around the Twin Cities area. They operate both buses and LRT trains and it is clear from the evidence that safety of the traveling public as well as the public in general is the company’s number one priority. It is of course a common carrier and by common law held to a very high standard of care in the operation of its vehicles.

The grievant is a driver for the MCTO operations and has been with the company for approximately 8 years. His record is devoid of any prior discipline or accidents of any kind. He is by all accounts a careful and conscientious driver for the most part.

The evidence showed that on February 4, 2010 he was operating his bus and was nearing the stop at Ford Road and Cleveland Avenue. The video from the security cameras in the bus show him stopped short of the stop awaiting a red light to change and that as he proceeded forward a phone is heard to ring. Within seconds a loud “crack” is heard and the passengers on the bus immediately look to the right rear of the bus. The sound is indeed quite different from the other sounds that are heard on the bus. The preponderance of the evidence showed that this crack sound was indeed the sound of the bus hitting a mirror on a car that was parked near the stop. The car can be seen on the video and is a white Chevy Malibu.

The grievant is then seen on the tape reaching backwards in his seat to get what was certainly his cell phone out of the bag and shut it off. This operation took approximately 9 seconds. All the while he is stopped at the intersection waiting for another red light. He did not secure the bus and simply had his foot on the brake. Several pedestrians are seen walking in front of the bus while he is dealing with the cell phone while others are at the curb within a few feet of the bus.

The grievant did not check to see if he hit anything while at the stop. Sometime later, a member of the public called the TCC to report that the grievant's bus had hit a mirror of a white car at the intersection in question and that it had knocked the mirror off the car. The caller was quite specific and gave the make and model of the car as well as the license plate number. The Union, as noted above, argued that there was no actual evidence of an accident but after this testimony acknowledged that indeed a collision had occurred and that the grievant was involved.

The audio tapes of the conversations between the grievant and TCC were also reviewed at some length. It was clear from these that he likely knew he had hit something and yet failed to stop and inspect the bus or surrounding vehicles to see what had happened. He indicated that he was going to check for damage at a later stop but this is clearly not the proper procedure for dealing with a potential accident while operating a bus.

The evidence showed that he should have secured the bus and checked for damage and reported the incident. It was also clear that he had some very real sense that he had hit something. Why he did not immediately stop and check was never adequately explained.

There was further some evidence that he turned almost the entire way around when checking for his phone that was in the bag. The tape is not completely clear but it does show the back of the grievant's head and it appears he is not looking forward. Certainly there are times when drivers are not always looking forward and that they frequently interact with passengers and attend to other matters even while the bus is moving. The fact that he was not looking forward in and of itself was not the end of the story. What was a bit concerning was that he was leaning backwards while he was dealing with the cell phone and that his foot could have slipped from the brake pedal as he was doing that. Fortunately this did not occur but there was some potential for that to have happened. The evidence did not show what precise rule was violated or what the consequences were for the acts he undertook to turn off the phone while failing to secure the bus but this too was a violation of policy.

Finally there was the question of the violation of the cell phone policy itself. It was clear that if there had been only the accident he would not likely have faced even a short suspension but rather would have been given a warning of some sort. This however might well have been the case had he properly secured the bus, checked out the scene and reported the accident immediately. As discussed below, that was not what happened.

Certainly too, he would not be facing the suspension he faces now due to his failure to secure the bus when looking backwards to turn off his cell phone or the failure to immediately report the accident. While these things may have conspired to result in some level of suspension it was clear that the main reason for the severity of this suspension was the issue of the cell phone policy.

The parties argued long and hard about the reasonableness of the rule and whether it was reasonable to subject one employee to a 20 day suspension for the mere failure to properly turn off a cell phone even if it does not ring, as was one hypothetical posited by the Union's counsel, and giving that same penalty to a driver who is actually driving while texting. There was some merit to the claim that while the company clearly had the right to promulgate the policy, the application of that policy and the penalty imposed is subject to arbitral review.

There is no question based not only on the studies submitted as well as common experience that there is nothing (short of driving while under the influence of drugs and alcohol) more dangerous and stupid than driving while texting or operating a cell phone. It should be noted that there were some studies that suggested that even a hands free conversation on a cell phone is equally dangerous or even more so than holding the phone to one's ear.¹ These studies, while clearly demonstrating the danger of actually using a cell phone while driving, were not dispositive of this issue.²

At the end of the day, these studies and these discussions surrounding them are interesting reading but are not particularly germane to the issue at hand. As Arbitrator O'Toole correctly noted in her recent decision on this question, the employer has the right under the labor agreement to promulgate the policy and certainly there is more than ample support for a strict rule against the use of cell phone, etc. while driving.

¹ The evidence on this even based on the studies themselves was not convincing enough to overcome the Union's claim that the two types of behavior are radically different. As noted below, much of the evidence on this point was not from peer reviewed scientific studies but from commentators who rendered opinions on that score. On this record such evidence was insufficient to warrant a full 20-day suspension for the violation of the policy found here.

² It should be noted that the articles written by third part commentators were given no evidentiary weight at all. They were merely comments by reporters and other lay people discussing the dangers of cell phone use while driving. They were neither scientific studies nor peer-reviewed experiments with some expertise behind them. They were also in no cases dealing with anything similar to the situation presented here. In other cases, the articles were not only internally inconsistent but inconsistent with each other. One such article, Employer exhibit 28, asserts that looking at a GPS device is somehow acceptable even though the person looks away "for only a few seconds" but that looking at a cell phone or hand held device for that same period is not. Frankly, such startlingly incongruent statements undercut the validity of the studies and of the overall effort to curb the use of these kinds of devices and fly directly into the jet stream headwind of common sense and experience. Common experience, for which no particular scientific expertise is necessary, demonstrates amply that looking away, taking one's eyes off the road creates a danger, whether one is looking at a GPS device, a cell phone, a magazine or a tube of lipstick. Other studies dealt only with the actual use of these devices and do not directly discuss the level of distraction by simply having them stowed in a bag or jacket and not directly on the person. Those latter studies do not address the events on this record.

As noted above, and agreed by both parties, only the most foolish would drive a city bus through traffic while attempting to use such a device and no one should ever condone such dangerous and irresponsible behavior. However, as Arbitrator O'Toole also correctly noted, the labor agreement leaves open the Union's right to grieve the application of the policy to any specific situation and it is for an arbitrator to determine "whether the discipline meted out under such a policy is reasonable under specific circumstances or just and merited for a particular employee." See Employer exhibit 8, slip op at page 14. Clearly, not only the labor agreement but also the well established just cause, or as here, the "just and merited" standard requires a review of each set of individual facts to determine if the discipline meted out in specific circumstances is warranted.

There was some merit to the Union's assertion that while the grievant violated the policy against stowing his phone in the off position, he did not violate that part of the rule that automatically requires a 20-day suspension. It was noteworthy that even the employer used that part of the rule in the determination of the appropriate discipline in this case. See joint exhibit 5 at page 2.³ A close reading of the policy requires a 20-day suspension and a final record of warning for 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." Simply stated; that was not what happened here. The phone was in a stowed bag and was not on the grievant's person.

Neither was he "using" it while operating a bus. It is true enough that he shut it off but clearly that does not fit any definition of the term "use" by any standard. There is further some merit to the Union's assertion that the imposition of the identical penalty for a person who merely forgets to turn off a cell phone but has it stowed in a bag to that of a person actually using one while driving fits an almost classic definition of disparate treatment. The employer asserted that the first time there is any violation of the rule there is an automatic imposition of a 20-day suspension.

³ Employer exhibit 7 was shown to be the document relied upon by management to impose this discipline. It was further apparent that Ms. Bailly used that document when discussing the appropriate response to this matter.

That may be the employer's view but the Union disputed that fervently and, more importantly, it is not what the rule itself actually says. Thus, while it is clear that a person using the phone and having it on his or her person falls squarely within the rule, this grievant's conduct did not. There is thus considerably more discretion by both management and arbitrators to determine the appropriate penalty here.

Had the grievant been found guilty only of the violation of the cell phone policy the determination here would have been for a penalty far less than 20 days and a final record of warning. That however is not our issue and the question of what that penalty might be in a future case must, as Arbitrator O'Toole again correctly pointed out, await a future set of facts.

As noted above, the exhaustive studies and commentary provided by the employer may well support the wisdom of having such a rule but the appropriateness of the penalty to be imposed in each set of facts is a matter governed by the labor agreement and well established standards for just cause rather than studies, no matter how well intentioned they may be.

The Union also argued that there must be a connection or a nexus between the use of the cell phone and an accident if one is involved. The Union further pointed to Ms. Bailly's comment in joint exhibit five in which she indicated that the cell phone ringing may or may not have contributed to the accident. The employer's assertion on this question is more in line with the terms of the policy. No such nexus is required. All the rule requires is that there be an accident while the operator is violating the policy. That part of the rule itself does not require termination but allows the employer the discretion to impose a further penalty up to and including discharge, even for a first offense.

The sole remaining question is what the appropriate penalty is in this case. As noted above, the mere violation of the cell phone policy in this instance does not require an automatic 20-day suspension nor would such a penalty have been reasonable given the nature of the identical penalty for far worse conduct. Here there was far more to the grievant's conduct than the violation of the cell phone policy.

He hit a parked car, likely had a very strong sense that he had and did not stop to report it or call the incident in. Instead he kept driving even though he obviously had time to shut off his cell phone while stopped at a red light. While stopped there he fumbled with his phone to turn it off for some 9 seconds or so and while the bus did not creep forward at all, it certainly could have given his divided attention to the phone and the brake pedal. Most troubling was that he apparently knew that he had hit something yet decided not to check until later and perhaps not at all, until he received a call from dispatch telling him that someone had seen him hit the car and reported it.

The grievant's overall record of good conduct and otherwise good driving was strongly considered and that was certainly a plus for the grievant's case. Juxtaposed against that was the conduct in which he engaged on the date of this incident; specifically, hitting the car, driving away from it without properly reporting it, failing to properly secure the bus while dealing with the cell phone and of course the technical violation of the cell phone policy itself. Based on all of the above and the record as a whole, a 20-day suspension was the most appropriate penalty to be imposed.

Other options were considered. Certainly there was some thought to leaving the penalty in place. This was rejected due to the nature of the penalty clause in the cell phone policy itself as described above. There was also some thought given to imposing something less. This was rejected due to the grievant's apparent lack of attention to the fact that he probably knew he had hit something and could have been trying to ignore it hoping that the incident would just go away. As the employer noted, his honesty later can be attributed to either his contrition and desire to be forthright or to the fact that he knew by then that the video on the bus would have shown it all anyway. Such conduct cannot be allowed to occur again and a 20-day suspension should suffice to send a clear message that employees must comply with the employer's policies.

Accordingly, the penalty is reduced to a 20-day disciplinary suspension. The grievant is thus to be made whole for the remaining 10 days that was imposed and this record will be expunged of the final record of warning.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART. A 20-day suspension is upheld. The grievant is to be made whole for the remaining 10 days of suspension and his record shall be expunged of the final record of warning.

Dated: November 15, 2008

MCTO and ATU – Webber.doc

Jeffrey W. Jacobs, arbitrator