

IN THE MATTER OF ARBITRATION BETWEEN

AMALGAMATED TRANSIT UNION)	OPINION AND AWARD
LOCAL 1005)	
Minneapolis and St. Paul)	
)	BMS 11-PA-0180
AND)	
)	
METRO TRANSIT)	
A Division of Metropolitan Council)	Grievance re: Discipline

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ARBITRATOR: Charlotte Neigh

HEARING: January 6, 2011

AWARD: January 28, 2011

REPRESENTATIVES

For the Union:
Roger A. Jensen, Esq.
Miller O'Brien Cummins, PLLP
120 South 6th Street - #2400
Minneapolis, Minnesota 55402

For the Employer:
Anthony G. Edwards, Esq.
Parker Rosen LLC
300 First Ave. No. - #200
Minneapolis, Minnesota 55401

JURISDICTION AND PROCEDURE

Pursuant to the parties' collective bargaining Agreement and the procedures of the Minnesota Bureau of Mediation Services, Charlotte Neigh was appointed to arbitrate this matter. A hearing was held in Minneapolis, Minnesota at which time both parties had a full opportunity to offer evidence. The parties made oral arguments and the record was closed.

ISSUES

(Stipulated by the Parties)

1. Whether the suspension and final record of warning issued to the Grievant was just and merited, and if not, what is the appropriate remedy?

(Framed by the Arbitrator)

2. Whether the extension of the Final Record of Warning beyond 36 months violates Article 5, Section 2 of the collective bargaining Agreement.

PERTINENT AUTHORITY

COLLECTIVE BARGAINING AGREEMENT

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.

Section 2. . . . When contemplating disciplinary action, Metro Transit shall not give consideration to adverse entries on 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. . . . If a case of discipline involves suspension or discharge of an employee, and such employee is not found sufficiently at fault to warrant such suspension or discharge, the employee shall then be restored to their former place in the service of Metro Transit with continuous seniority rights and shall be paid for lost time at the regular rate of pay.

CELL PHONE POLICY (effective 12/14/09)

Special Note: Applies to all Metro Transit Bus and Rail Operators and
all other employees while operating a bus or light rail vehicle.
Supersedes all prior Cell Phone Use Bulletins

I. Policy:

. . . . As a provider of public transportation, Metro Transit is held to the highest degree of care in safety in the delivery of its services. This responsibility leads to certain rules that must be taken outside the Operating Policy; cell phone use and the drug and alcohol policy are just two examples where this is necessary.

II. Procedure:

. . . . Distracted operators pose a serious safety threat to themselves, the public and their coworkers.

Metro Transit bans the use of cell phones and other personal electronic devices while operating a bus or light rail vehicle. Violations for using or having a cell phone or other personal electronic device on your person are being taken outside the Operating Policy for both Bus and Rail Operators. Electronic devices which will cause a violation of this procedure include but are not limited to - as technology is ever changing - a cell phone, iPod or iPhone, PDA or Blackberry, MP3 player, glasses or apparel containing an earbud or receiver device, or any Bluetooth device.

Bus and Rail Operators who wish to carry . . . personal portable electronic devices must have the devices powered off and stowed; these devices may not be on your person or visible in any manner while operating any transit revenue vehicle. Failure to comply with this rule will result in a Final Record of Warning and a twenty (20) day suspension for the first offense. The second offense will result in termination from employment. Should an Operator be involved in an accident while violating this procedure, further disciplinary action up to and including discharge may be applied.

Bus and Rail Operators will be able to use (such) devices only at designated layovers. At all other times, cell phones and other personal portable electronic devices must be powered off and stowed. They cannot be placed on "vibrate" and they cannot be on the Operator's belt or in a pocket.

Cell Phone Procedure (continued)

Metro Transit recognizes that there are agency controlled distractions that may impact an Operator's attention. In order to assist in reducing these types of distractions, Bus Operations management will limit text messages from TCC, Street Operations and Dispatch. Messages should be read only at terminals or layovers. Buses must be safely stopped at curbside or a terminal when speaking on the radio; TCC and Street Operations will make every effort not to call when a bus is operating on the freeway; however circumstances may dictate the necessity of contact based on the information to be relayed. Unless specified otherwise in this procedure, the radio procedures in the Rail Operator rulebook remain in full force and effect.

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Since the use of an electronic device is a serious safety violation, any camera images including reflections and audio will be used to verify a complaint or violation. . . .

Bus and Rail Operations Management has emergency procedures in place for family and other serious emergencies. We will restate these procedures to ensure that Dispatchers, Supervisors and Managers are fully aware of emergency procedures.

Emergency Contact information cards will be printed and distributed for operators at each garage.

If appropriate, another Operator will be sent out to replace the Operator with the emergency.

As a further reminder, it has been illegal under Minnesota law to compose, read or send text messages or access the Internet on a wireless device while driving since August 01, 2008.

BACKGROUND AND UNDISPUTED FACTS

The Employer has prohibited its operators from talking on cell phones while driving since 1997, when violations were treated as Class B offenses, a category with lesser penalties. Beginning in 2004 violations were treated as Class A offenses, meaning that a second violation within 12 months could be grounds for discharge.

In December 2009 the Employer promulgated a new policy that not only prohibited talking on a cell phone while driving but also required that it be turned off and stowed, not on the driver's person. The policy provided that a first violation would receive a 20-day suspension without pay and a Final Notice of Warning that would remain in effect for the entire term of employment. This meant that no matter how much later a second violation occurred it could be grounds for discharge.

On 2/25/10 a supervisor reported having observed the Grievant talking on a cell phone while driving his bus. The report was investigated and the Grievant received the prescribed penalties of a 20-day suspension and a Final Notice of Warning, to remain effective with no expiration date.

The Union grieved the disciplinary action and it proceeded through the grievance steps without being resolved.

SUMMARY OF THE PARTIES' ARGUMENTS

THE EMPLOYER ARGUES THAT:

- The Grievant admits that he was talking on his cell phone while driving a bus, which constituted foolish, dangerous and irresponsible conduct.
- The new cell phone policy resulted from ample research demonstrating the serious danger and the necessity of a more severe penalty to deter violations. A more stringent policy was needed because the lesser penalty did not work. Other public transportation agencies have adopted even more severe policies.
- Talking on a cell phone while driving is as dangerous as driving while under the influence of drugs or alcohol; the problem may be even more pernicious because drivers know that they can't drive under the influence but some, like the Grievant, still believe they can safely drive while talking on a cell phone and should get away with it.
- In one case where the arbitrator removed the Final Record of Warning, the facts were less serious because the only violation was the failure to turn the cell off; that driver did not have it on his person and did not talk on it.
- The circumstances in this case should not serve to mitigate the penalty, as argued by the Union, even if the Grievant's doubtful version were true. The cell phone was turned on, which is a violation.
- While driving, the Grievant retrieved the phone from the pocket of his jacket behind the seat, made two calls, and gabbed away for ten minutes while driving on busy freeways. The Grievant's claim that he made only one call and that one was to his wife out of concern for her precarious psychological state is not believable. The audio and video show that after a brief call to his wife he made a more extended and chatty call to someone he called "Stan".
- The Grievant's explanation involving his wife is a cynical ruse designed to escape the consequences of his misconduct. He did not offer this explanation during his first interview regarding the violation and continued to claim that he received rather than placed the call until the arbitration hearing.
- The Grievant's violation and his attitude illustrate why the policy is necessary and demonstrate why it is important to enforce the rule.
- It is premature to consider the Union's argument that the policy conflicts with the CBA's provision that violations older than 36 months cannot be used to enhance penalties.
- The discipline was just and merited, as required by the CBA.

THE UNION ARGUES THAT:

- The CBA's requirement that discipline be just and merited is the equivalent of a just cause requirement and an arbitrator has discretion to modify a penalty based on the evidence.
- Although the Union is not claiming that it is not unsafe for any driver to talk or text on a cell phone while driving, it is challenging the idea that one punishment fits all violations; the Grievant's conduct was not as severe as other possible violations of this policy.
- Although the circumstances did not justify the Grievant's violation, they do provide a mitigating explanation that mollifies the egregiousness. The Grievant truthfully described his wife's condition. It would be cruel to ask his wife to testify regarding her problems and it would be absurd to do so in this case.
- The Final Record of Warning should be eliminated so that a second violation would not result in immediate discharge, and it would also be nice to reduce the 20-day suspension, which is too serious for this violation.
- Prior arbitration awards regarding this policy do not dictate the outcome here: one said that decisions should be made case by case; another did not consider whether there were mitigating circumstances; and a third resulted in the removal of the Final Record of Warning.
- An important separate issue is the lack of expiration of the Final Record of Warning. This violates Article 5, Section 2 of the CBA which provides a maximum period of 36 months for considering prior violations to enhance a disciplinary action. There is no authority for the Employer to adopt a policy taking precedence over the CBA. The CBA controls policy, even regarding safety violations.
- Although the drug and alcohol policy provides for discharge for a second offense at any time, that is authorized by Minnesota statute; no such statute authorizes similar treatment for cell phone violations.
- The lack of an expiration date for the Final Record of Warning violates the CBA and the principle that a policy can't trump contractual language.
- A prior arbitrator declined to rule on the 36-month conflict based on finding no case and controversy in the absence of a specific allegation of a violation of that provision. Such a violation exists in this case, and so this issue is ripe to be decided by an arbitrator.

ANALYSIS AND DISCUSSION

It is undisputed that this grievance is to be evaluated pursuant to the just cause standard. Although the parties stipulated that the issue is whether the penalty was just and merited, both addressed an additional issue. The Union argues: the fact that under the policy the Final Record of Warning never expires unpermissibly conflicts with the contractual provision that no disciplinary actions occurring more than 36 months previously are to be considered in determining the level of discipline for a later incident. The Employer did not object to the arbitrability of this issue, but argued that it is premature to consider it because this case does not involve discharge for a second violation. This second issue is deemed to have been submitted in this arbitration.

FACTS AND MITIGATING CIRCUMSTANCES

The Union's argument that the penalty should be reduced is based partly on mitigating circumstances claimed by the Grievant, relating to his wife's psychological condition. The Employer argues that the Grievant's claims are not believable and were contrived after the fact to avoid the consequences of his misconduct. It is necessary to review the facts and the claimed mitigating circumstances.

On 2/25/10 a supervisor reported at 5:27 p.m. that she had observed the Grievant, while operating the bus, holding a cell phone up to his right ear with his mouth moving as though he was talking. The Grievant was immediately notified by radio of this report. On 2/26/10 the Grievant's supervisor formally notified him and the Union that an investigation was being conducted regarding this reported violation of the cell phone policy and procedure.

On 3/1/10 an investigatory interview was held where the Grievant had union representation. The Grievant acknowledged having received the new cell phone procedure and did not deny that he understood it. The Grievant chose to view the video from the bus camera: although no camera is pointed directly at the driver, some frames show the shadow of the driver's head apparently with a cell phone at his right ear; and the Grievant's voice could be heard on the audio. When asked if he would acknowledge that he was in fact talking on his cell phone while operating the bus, he replied that he would neither confirm nor deny that he had talked on his phone. He stated that the video did not actually show him talking on a phone and he could have been simply talking to himself. The Employer correctly points out that at this time the Grievant did not claim any mitigating circumstances related to his wife's condition. It is noted that the Grievant was less than forthcoming and even coy in his attempt to discount the video/audio evidence.

At the Loudermill hearing on 3/2/10, the Union offered mitigating factors to support why the intended discipline of a 20-day suspension and a Final Record of Warning should not be rendered. The Grievant claimed that: due to his wife's medical issues she suffered from depression, which requires him to cheer her up; he answered a call placed by his wife from home; it was a fluke that the phone was not turned off and stowed, as he usually had it off and in his bag; and that he was calling his wife "Stan" during the conversation because that is her nickname. The Grievant declined to provide his cell phone records, which leads to an adverse inference about what they would show.

Analysis and Discussion - Facts and Circumstances (continued)

On 3/3/10 a Final Record of Warning was issued for violation of the cell phone procedure. In addition, a 20-day unpaid suspension was issued, although the dates had to be adjusted due to an imminent change in the Grievant's schedule. It cautioned the Grievant that he "may be subject to discharge" for a future violation. It stated: "This warning will expire on ... no expiration date".

A timely filed grievance alleged contractual violations, including: discipline not just and merited; conflict of work rules with contract; unreasonable new work rules; and discipline lasts beyond 36 months. Throughout the grievance procedure the Union argued, among other things, that the new policy was unreasonable. However, an arbitration award in June 2010 held that the cell phone policy was: requisite to safety; within management's right to establish; and the establishment was not arbitrable, although its application to a specific case would be arbitrable.

During every discussion prior to the arbitration hearing the Grievant and the Union claimed that he had not placed a call but had chosen to receive a call from his wife because of his concern about her psychological condition, and that it was providential that he had accidentally left his phone turned on. The Employer concluded that the reason given by the Grievant did not mitigate the serious safety infraction and refused to reduce the penalty set forth in the cell phone policy.

Video/Audio Evidence

At the arbitration hearing the Employer played the video from the Grievant's bus using an enhanced speaker system, which made the Grievant's voice more audible than it had been at previous meetings or as previously heard by the Grievant and the Union. This revealed that the Grievant's call tone was heard at 17:16:08 while two passengers were still on the bus; the Grievant's voice was not heard at this time. Within one minute after the last passenger left the bus, without the sound of any incoming call, the Grievant's voice is heard saying that he will stop at the store and get some stuff and then "I'll be home". After a one-minute conversation he says what sounds like "Bye". The Grievant's denial that this call terminated at this point is not credible. The audio persuasively demonstrates that what followed was a second call to a different person.

Eighteen seconds later the Grievant can be heard telling someone he calls "Stan" that his cell phone was telling him to call; a lively conversation covering various subjects ensues for more than nine minutes, ending when the Grievant says "I'm at the garage. See ya, bud." As the Grievant is about to pull into the garage he receives a radio call from the control center, telling him that he has been reported for a cell phone violation. The Grievant shared this bad news with the coworker who came onto the bus to attend to the fare box and they discussed the seriousness of the situation.

Shortly after the start of this second conversation the bus was turning, which caused the Grievant's shadow to appear in the picture, apparently with a phone to his right ear. The Grievant then used his other hand to pull down the sun shade to his left, leaving no hands on the steering wheel. During the cell phone conversation the Grievant was traveling north on highway 35W and east on highway 494 until he exited onto the service road at 24th Avenue. It is noted that 5:30 p.m. on a weekday is a time of heavy traffic on Twin Cities freeways and that the Employer's policies relating to distractions treat freeways as especially hazardous roadways.

Analysis and Discussion - Facts and Circumstances (continued)

After hearing the enhanced audio at the arbitration hearing, the Grievant admitted that he had placed the call to his wife. He maintained that it was in response to her having called him because “everything in my soul and spirit tells me to call my wife back” out of concern for her depression, although he subsequently testified that she has not been diagnosed with depression. The Grievant had no good explanation for not: waiting ten minutes to call his wife after he arrived at the garage; or following some other authorized procedure for making emergency calls. The Grievant’s extensive testimony about his wife’s numerous problems and his role in dealing with them was contrived and unbelievable. The Grievant’s testimony regarding his usual manner of stowing his cell phone was equivocal, contradictory and unconvincing.

The Grievant stated that it was fear of losing his job that would prevent him from committing a second violation of the cell phone procedure, rather than a belief in the soundness of the policy. The Grievant’s claim that his experience enables him to safely control a bus while multitasking suggested that he disagreed with the prohibition against talking on cell phones while driving. On cross examination he said so:

Q - Do you feel you could safely place calls while driving?

A - I’ve done that.

Q - On occasions other than this one?

A - No.

With this final “no” the Grievant appeared to have recognized the trap he had just blundered into.

Conclusion

It is concluded that the proven facts of the Grievant’s conduct constitute a violation of the cell phone procedure and that there were no circumstances warranting mitigation of the penalty. However, the legitimacy of the penalty as set forth in the policy is an issue to be considered separately.

LEGITIMACY OF PENALTY AS PRESCRIBED IN CELL PHONE POLICY

The official policy states “The second offense will result in termination from employment” but does not expressly address the applicable time limits or lack thereof. However, Bulletin No. 74, dated 12/4/09, states: “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”.

The Union has been concerned about this provision since the time of the required “meet and confer” before the policy was implemented. The Union raised this issue in the first arbitration over the cell phone policy but that arbitrator did not reach this issue. The issue in the second arbitration was, for reasons unknown to this arbitrator, limited to whether the employer proved that the grievant committed the acts alleged. In the third arbitration this issue was not reached because the arbitrator removed the Final Record of Warning on other grounds based on facts different from this case.

Analysis and Discussion - Legitimacy of Penalty (continued)

The Employer argues that it is premature to consider the Union's claim that the lack of an expiration date for the Final Record of Warning violates the CBA. However, the warning issued to the Grievant states that: it has no expiration date; and he may be subject to discharge if he violates this policy in the future. This formally puts the Grievant and the Union on notice that he is in jeopardy under this provision of the policy. Failing to grieve it now could result in a future determination that the Union has acceded to it or lost the right to challenge it because of laches. The issuance of this notice constitutes a grievance as defined in Article 5, Section 3 of the CBA, and triggers the time limits for acting set forth in Section 4. It is concluded that this issue is ripe for arbitration.

Article 5, Section 2 states: "When contemplating disciplinary action, Metro Transit shall not give consideration to adverse entries on 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." The only exception to this time limitation in the parties' universe occurs under the drug and alcohol policy, which allows discharge for a second offense at any time. The Union points out that there is authority for this severe treatment in state statute, but there is no similar statute relating to cell phone use.

The Employer offered numerous studies and reports in support of its claim that talking on a cell phone is as dangerous as driving while under the influence of drugs or alcohol. This evidence supports the reasonableness of establishing the more restrictive cell phone procedure, which was upheld by a prior arbitrator and is not at issue in this case. The evidence also supports the need for more severe discipline for violations because experience over the years demonstrated that the lesser penalties did not sufficiently deter violations. It appears that even this new policy has not yet entirely accomplished the desired deterrent effect: it did not prevent the Grievant from choosing to have an extended social conversation while speeding along the freeways during rush hour. The Employer persuasively argues that severe discipline needs to be enforced to ultimately convince drivers to conform to the cell phone procedure.

Conclusion

A general arbitral principle recognizes that although management may unilaterally establish rules to ensure safety, they must not conflict with the CBA. The lack of an expiration date for the Final Record of Warning does conflict with the CBA. In order to conform to the CBA, the Final Record of Warning must expire no later than 36 months after the incident that gave rise to it. Reducing the reach of the Final Record of Warning to 36 months does not result in an insignificant disciplinary action. An employee who violates the cell phone procedure can be suspended without pay for 20 days, which equates to nearly a month's wages. It can also be hoped that having the risk of discharge for a second violation effective for 36 months will give a driver sufficient time to become habituated to turning off and stowing the cell phone and other electronic devices.

SUMMARY OF CONCLUSIONS

1. On 2/25/10 the Grievant talked on his cell phone while driving a bus, a serious safety infraction, in violation of the cell phone policy and procedure.
2. There were no circumstances to justify this misconduct or mitigate the penalty.
3. The penalty as unilaterally promulgated by the Employer's policy violates Article 5, Section 2 of the CBA by failing to have the Final Record of Warning expire no later than 36 months after the incident.
4. In all other respects the disciplinary action of a 20-day unpaid suspension and a Final Record of Warning was just and merited.

AWARD

1. The Final Record of Warning issued to the Grievant for violating the cell phone policy and procedure on 2/25/10 shall expire on 2/25/13.
2. In all other respects the disciplinary action shall stand.

January 28, 2011

Charlotte Neigh, Arbitrator