

BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between

Metro Transit
a division of Metropolitan Council

and

Amalgamated Transit Union, Local 1005
Minneapolis and St. Paul

BMS Case No. 11-PA-0091

Grievant:

Arbitrator: Sharon K. Imes

APPEARANCES:

Anthony Edwards, Attorney, Parker Rosen, appearing on behalf of Metro Transit.

Roger Jensen, Attorney, Miller O'Brien Cummins, PLLP, appearing on behalf of Amalgamated Transit Union, Local 1005 and the Grievant.

JURISDICTION:

Metro Transit, a division of the Metropolitan Council, referred to herein as the Employer, and Amalgamated Transit Union, Local 1005, referred to herein as the Union, are parties to a collective bargaining agreement effective August 1, 2008 thru July 31, 2010 and from year to year thereafter unless changed, revised or amended as provided for the in the collective bargaining agreement. Under this agreement, the undersigned was selected to decide a dispute that has occurred between them on May 12, 2010. Hearing was held on February 10, 2011 in Minneapolis, Minnesota. The parties, both present, were afforded full opportunity to be heard and the hearing was closed with oral arguments. The matter is now ready for determination.

STATEMENT OF THE ISSUE:

Although the collective bargaining agreement under Article 5 states that discipline shall be "just and merited", the parties stipulate that the issue is framed as follows:

Is there just cause to discipline the Grievant? If so, what is the appropriate remedy?

The parties also agree, however, that the primary issue in this dispute is focused on the remedy.

RELEVANT CONTRACT LANGUAGE:

**ARTICLE 4
MANAGEMENT PREROGATIVES**

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.

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**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. No employee shall be suspended without pay or discharged until the employee's immediate superiors have made a full investigation of the charges against that employee and shall have obtained the approval of the applicable department head. No discipline, excepting discharge without reinstatement, shall be administered to any employee that shall permanent impair the employee's seniority rights. 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.

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**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 will 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.

**ARTICLE 13
ARBITRATION PROCEDURES**

In the event a dispute or controversy arises under this Agreement which cannot be settled by the parties

. . . the written decision . . . shall be final, binding and conclusive and shall be rendered within forty-five (45) days from the date the arbitration hearing is completed.

. . . .

OTHER RELEVANT DOCUMENTS:

Metropolitan Council

PROCEDURE - Cell Phone Use While Operating a Bus or Light Rail Vehicle

. . .

I. **Policy:**

The primary focus for Metro Transit's Operating Policy is to develop the capacity of the workforce to meet the mission of the organization. Metro Transit will use the Operating Policy in communicating the Agency mission and purpose, to clearly define performance expectations, and provide feedback to support work efforts linked to work unit and agency business goals. 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:**

Metro Transit is dedicated to providing safe, dependable transportation services to the public and providing a safe work environment for Metro Transit employees. 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 and 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 cell phones and other 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 cell phones and/or personal portable electronic devices only at designated layovers. At all other times, cell phones and other personal portable electronic devices must

be off powered and stowed. They cannot be placed on "vibrate" and they cannot be on the Operator's belt or in a pocket.

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.

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.

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.

Third party observations regarding Operator's cell phone use when verified with audio, video or a picture will be treated the same as a direct observation by a Supervisor.

This procedure applies to all Metro Transit personnel when operating a bus or light rail vehicle, regardless of their primary job title.

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.

Metro Transit Bulletin Number 74 - December 4, 2009

Beginning December 14, 2009, Metro Transit is issuing a new procedure regarding the use of cell phones and personal electronic devices 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.

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 violation.

- 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 suspensions.
- 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.

Numerous studies show that use of cell phones by vehicle operators is a dangerous distraction that can result in accidents. There is clear evidence that using cell phones while operating motor vehicles diverts our attention.

Our business is to provide safe service and we must make it our obligation to do so without undue distractions without our control. There has been an increased awareness of the safety risks of cell phone use based on the high profile transit accidents across our nation in the last several years.

We trust that you join us in a strong desire to keep public transit as one of the safety transportation choices for the metropolitan area. We appreciate your support and compliance.

BACKGROUND AND FACTS:

Metro Transit operates buses and LRT trains in the Twin Cities area. In providing this service it has prohibited its operators from talking on cell phones since 1977 when it treated the violations as Class B offenses, a second tier violation. In 2004, the Employer began treating this misconduct as Class A offenses which meant that a second violation within twelve months could be grounds for discharge.

On June 26, 2009, the Employer received a letter from the Federal Transit Administration urging it to review its "policies, procedures and enforcement mechanisms targeting inappropriate use of cell phones and other personal electronic devices by safety critical personnel" and asking it to make improvements as needed to "effectively address the hazards that inappropriate use of . . . (the) devices can create." In response, the Employer created a task force who completed a draft of a new cell phone policy on November 29, 2009. The draft was presented that same day to the Union at a meet and confer session.

On December 4, 2009, the Employer issued a bulletin summarizing the policy it had drafted and advising its bus and rail operators as to the penalties that would be imposed if the

policy were violated.¹ On December 15, 2009, the Union grieved the cell phone policy and argued that by failing to limit the time the final record of warning would be in effect, the Employer had violated Article 5, Section 2 of the collective bargaining agreement. At hearing, on this grievance, the Employer argued the policy is not subject to arbitration; that the Union could only grieve application of the policy, and that it was premature to argue that the 36-month rule conflicts with the collective bargaining agreement provisions. The arbitrator ruled on June 1, 2010 that the cell phone policy is not subject to arbitration since it is a rule and regulation requisite to safety and is specifically exempted from the agreement's arbitration provision and that because the issue is not arbitrable it was not necessary to determine whether the discipline meted out under the policy is reasonable or just and merited for a particular employee.

In November 2010, following a hearing concerning whether the Employer had just cause to discipline an employee for violating the phone cell policy, a second arbitrator addressed only the issue of whether the Employer had established that the grievant had committed the alleged offense and whether the grievant had been afforded due process. Further, the arbitrator denied the grievance finding that the Employer had provided sufficient evidence of misconduct to justify discipline and that the employee had been afforded due process; that the penalty set by the policy was appropriate and that the grievant did not introduce any facts to mitigate it.

That same month, a third arbitrator, also was asked to determine whether the Employer had just cause to discipline another employee for violating the cell phone policy. That arbitrator concluded that the employee had violated the cell phone policy and stated that while "the mere violation (of the policy). . . does not require an automatic 20-day suspension" since the nature of such violations vary, a 20-day suspension for the employee's misconduct was the "most appropriate penalty to be imposed". As remedy, based upon the evidence presented,

¹ The bulletin indicated that an employee would receive a final record of warning and a 20-day unpaid suspension if caught using an electronic device or with a personal cell phone on their person while operating a bus or train and that a second violation would result in termination regardless of the length of time between the first and second offense. It also stated that a rail operator violating the policy during his or her evaluation period would receive a final record of warning and a 20-day unpaid suspension and would be returned to bus operations. And, finally, the bulletin stated that if an operator was involved in an accident while violating the procedure, further discipline up to and including discharge may be applied.

the arbitrator upheld a 20-day suspension but ordered the employee be made whole for the remaining 10 days of his suspension and that the final record of warning be removed from the employee's record.

In January 2011, a fourth arbitrator was asked to determine whether the suspension and final record of warning issued another employee was just and merited. At that hearing, according to the arbitrator, in addition to arguing whether there was just cause to discipline the employee, the Union argued that a final record of warning which never expires conflicts with the contract's provision which limits consideration of disciplinary action to 36 months after the incident occurs. Finding failure to address this argument in the dispute could result in a future finding that the Union "has acceded to . . . or loss the right to challenge . . . (the restriction) because of laches," the arbitrator concluded that the Employer's failure to establish an expiration date for the final record of warning conflicts with Article 5, Section 2 of the collective bargaining agreement and that "reducing the reach of the Final Record of Warning to 36 months does not result in an insignificant disciplinary action." In the award, the arbitrator found that imposing the 20-day unpaid suspension and a final record of warning was just and merited but that the final record of warning shall expire 36 months from the day the incident occurred.

Violation of the cell phone policy and the appropriateness of the imposed discipline are now before this Arbitrator. In this dispute, the Grievant who has worked for Metro Transit as a bus operator since 2007, was "out of service" and heading back to the garage on April 21, 2010. At the corner of Washington Avenue at Marquette, he stopped for a red light. In front of him were a truck and a squad car. When the light turned green, the truck failed to move forward and the driver of the squad car who had taken his foot off the brake to move forward again applied the brakes. The grievant, failing to realize that neither vehicle had moved forward, proceeded to move forward and rear-ended the squad car. The accident was reported.

A day or two after the accident, the Assistant Transportation Manager overheard the District Street Supervisor describing an accident involving a bus and a police car in which the video taken from the bus' DVR system seemed to indicate that the driver had been talking on a cell phone. Since the Grievant's accident was the only one the Manager knew of she decided to

review the video and investigate the matter further. A review of the audio on the video indicated that a cell phone conversation, approximately two minutes long, had taken place just before the accident and had ended about one minute earlier.

An investigative hearing was scheduled and at that hearing the Grievant was asked if he had been talking on his cell phone prior to the accident. He admitted that he had; that he had used a radio phone that allowed him to talk on a speaker phone with his wife who was having difficulties with her pregnancy, that no passengers were on the bus when the conversation took place; that it had taken place while he was on his way to the garage, and that he had turned the phone off and stowed it in his jacket pocket at the end of the conversation. He also admitted that he knew about the cell phone policy. Because of the seriousness of the discipline, the Employer scheduled a Loudermill hearing to give the Grievant a final opportunity to explain the situation and provide mitigating circumstances which might reduce the penalty. Following the Loudermill hearing on May 4, 2010 the Grievant was issued a final record of warning and a 20-day unpaid suspension for having violated the cell phone policy. This action was grieved on May 12, 2010 and denied at each step of the grievance procedure. It is now before this Arbitrator.

ARGUMENTS OF THE PARTIES:

Both parties recognize that the Grievant violated the cell phone policy and that some discipline is appropriate. They differ, however, over the degree of discipline to be imposed. The Employer rejects the Union's argument that the Grievant's misconduct is on the low end of potential violations and argues that the 20-day unpaid suspension and the final record of warning are just and merited given the seriousness of the Grievant's misconduct. The Employer also argues that while the duration of the final record of warning is the Union's real issue in this dispute it is premature to address that issue and that it should be considered only if the Grievant receives a second violation 36 months out.

Although the Employer maintains that the duration issue is not ripe for disposition, the Employer declares that nothing in the collective bargaining agreement states that discipline imposed shall fall off after 36 months but only that management shall not consider that discipline after 36 months. Further, it asserts that it believes the arbitrator who ruled that the

final record warning violated Article 5, Section 2 of the collective bargaining agreement was misled by a Union argument regarding statutory authority superseding rights bargained as part of the agreement and reached the wrong conclusion.

And, finally, referring to the fact that only the bulletin states that the final record of warning shall remain indefinitely on an employee's record, the Employer asserts that the bulletin is enforceable as a rule even if the policy does not make the same statement. It also argues that it is not convinced that the 36 month issue is a part of this grievance since the grievance only references Article 5, Section 1 and the grievant step memos do not reference the 36 month issue.

The Union, however, states that while it agrees that it is inherently dangerous to operate a bus, light rail or any vehicle while talking on a cell phone and that discipline for violating the policy is appropriate it takes exception to the Employer's "cookie cutter" approach in disciplining employees for violating the policy. Adding that an employee's misconduct may range from a very serious violation of the policy to an inadvertent one, the Union posits that while management should consistently discipline employees for violating the policy it should not use the same penalty for all violations. Continuing, it maintains that the Grievant's misconduct, while serious, is not among the most serious violations and that under the just and merited clause of the agreement his penalty should be modified. It also asserts that the Grievant's penalty should be modified since the facts show there are mitigating circumstances and since no expiration date in the final record of warning not only violates the collective bargaining agreement but bars the Grievant from ever being able to transfer to a light rail operator position.

Expanding upon its argument that the imposed penalty is not just and merited since the final record of warning violates the collective bargaining agreement, the Union states that the warning's length of time has been an issue in three of the last four arbitrations and that it has been an issue in this dispute throughout the grievance procedure. As proof of its assertion, it points to the fact that the arbitrator in the first arbitration ruled that how the policy is implemented is an issue for another day; that the second arbitrator did not rule on the issue since the argument was not raised in the arbitration hearing; that the third arbitrator ruled that

the "cookie cutter" approach for all violations was not appropriate, and that the fourth arbitrator concluded that the warning's lack of duration violated the collective bargaining agreement and ordered that the final record of warning expire at 36 months.

Continuing, the Union notes that the cell phone policy is silent with respect to the duration of the final record of warning and declares that the rule's interpretation by two deputies in the bulletin diminishes the legitimacy of the provision and discipline imposed in this grievance. Accordingly, the Union seeks that the final record of warning be eliminated and that the Grievant's 20-day unpaid suspension be reduced.

DISCUSSION:

Although the Employer states that the parties are only asking whether the Grievant's actions justify the discipline imposed, the parties have agreed in their grievance procedure that any discipline an employee receives shall be "just and merited" or, in other words, for just cause. Incorporated in the concept of just cause is the understanding that not only must there be a finding that the employee committed an offense for which discipline is appropriate but that the degree of discipline imposed for the violation reasonably relate to the seriousness of the offense and is not affected by any mitigating factors.² Consequently, in this dispute, although the parties agree the Grievant violated the cell phone policy, a finding that the discipline is "just and merited" requires an analysis of whether the discipline imposed for violating the cell phone policy reasonably relates to the seriousness of the Grievant's offense and whether there are any factors that mitigate against imposing it. After reviewing the record

² **Discipline and Discharge in Arbitration**, ABA Section of Labor and Employment Law, The Bureau of National Affairs, Washington, DC, 1999, Chapter 2; **Management Rights**, BNA Books Arbitration Series, The Bureau of National Affairs, Inc., Washington, DC, 1986, pp. 95-104; **How Arbitration Works**, Sixth Edition, Elkouri and Elkouri, The Bureau of National Affairs, Washington, DC, 2003, pp. 931-933; *Arbitral Discretion: The Tests of Just Cause*, John E. Dunsford, **Arbitration 1989 The Arbitrator's Discretion During and After the Hearing, Proceedings of the Forth-Second Annual Meeting, National Academy of Arbitrators**, The Bureau of National Affairs, Washington, DC 1990, Chapter 3, pp. 23-64; **Labor and Employment Arbitration**, Second Edition, Bornstein, Gosline, Greenbaum, Lexis Publishing, 2000, Volume 1, Chapter 14; Chapter 15, p. 15-7; 613 F.2d 716, 103 LRRM 2380 (8th Cir.), *cert. denied*, 446 U.S. 988 (1980); **The Common Law of the Workplace, The Views of Arbitrators**, Second Edition, National Academy of Arbitrators, The Bureau of National Affairs, Washington, DC, 2005, Chapter 6, and **Just Cause, The Seven Tests**, Second Edition, The Bureau of National Affairs, Washington, DC, 1992.

and the arguments of the parties it is concluded that the discipline the Grievant received is not "just and merited".

In previous arbitrations, the Union has argued that the discipline imposed for violating the cell phone policy is not "just and merited" and has challenged the "one size fits all" nature of the discipline and declared that the indefinite duration of the final record of warning violates Article 5, Section 2 of the collective bargaining agreement. Both of these issues could have been decided in June 2010 when the parties asked an arbitrator to rule not only on whether the establishment of a cell phone policy was arbitrable but whether the discipline to be imposed for violating the policy violated the collective bargaining agreement. In that decision, however, the arbitrator ruled only that establishment of the policy was not arbitrable and left the question of whether the discipline provisions in the policy violated the collective bargaining agreement to future arbitrations.

Since then, there have been three other arbitrations concerning whether the cell phone policy has been violated, two of which addressed in some detail whether the imposed discipline was "just and merited". These two arbitrations, while hinting at problems with the proposed penalty, have failed to set a precedent which the parties or other arbitrators might follow. In the first dispute, the arbitrator, asked to determine whether the employee had violated the cell phone policy stated in the discussion that the "accelerated discipline" was "appropriate for the hazard it seeks to prevent" and upheld the Employer's action finding that the grievant committed the offense and that there were no mitigating circumstances. In the next dispute, the arbitrator, finding problems with "one size fits all" discipline and that the discipline was too harsh given the seriousness of the grievant's offense, removed the final record of warning from the grievant's record; modified the 20-day unpaid suspension to a 20-day suspension, and ordered the grievant be made whole for the remaining 10 days imposed. The third arbitrator found that a 20-day unpaid suspension and final record of warning were "just and merited" but that the indefinite duration of the final record of warning violated Article 5, Section 2 of the collective bargaining agreement and ordered that the record of warning's duration be restricted to 36 months from the date the incident occurred. As a result, the Union again challenges the "one size fits all" nature of the discipline and charges that the indefinite duration of the final

record of warning violates the collective bargaining agreement and the Employer again argues a severe penalty is required in order to effectively prevent employees from using a cell phone or other electronic device and that it is premature to consider whether the indefinite duration of the final record of warning must comply with Article 5, Section 2 of the collective bargaining agreement.

This Arbitrator, like those before her, agrees that a cell phone policy is needed and that the discipline imposed for violating the policy should be serious enough to act as a deterrent for violating the policy. The evidence clearly establishes that using one's cell phone, even hands free, or any other electronic device while driving is not only a distraction but endangers the employee's safety, the safety of any passengers and the safety of others on the road. This Arbitrator also agrees that Article 4 of the collective bargaining agreement grants the Employer the authority to establish a policy requisite to safety and does not require the Employer to submit the reasonableness of that policy to arbitration even though Article 11 requires many other work rules to be reasonable and to not conflict with the contract.³ The unfettered rights granted the Employer under Article 4, however, do not apply to the penalty the Employer has imposed for violating the policy since Article 5, Section 1 of the agreement requires that any discipline imposed by the Employer for any misconduct, be "just and merited". This means not only that the degree of discipline imposed for violating the policy must reasonably relate to the seriousness of the employee's conduct but that the imposed discipline cannot conflict with other provisions in the collective bargaining agreement unless specifically agreed to by the parties.⁴

In this arbitration, the only issue to decide is whether the discipline imposed is "just and merited" since there is no dispute over whether the Grievant violated the cell phone policy. The Grievant admits he used his cell phone to call his wife while he was deadheading back to the garage. Despite this admission, however, the evidence does not establish that the

³ These are principles frequently applied by arbitrators when considering whether management's creation of a new work rule is appropriate.

⁴ While the Employer cited a study published in *Human Factors* which concluded that impairments associated with using a cell phone while driving can be as profound as those associated with driving while drunk as reason for it to adopt a penalty identical to the one in its drug and alcohol use policy, its argument is not persuasive since one who is driving while drunk is continuously impaired while employees who use cell phones are not.

Grievant's use of his cell phone is misconduct serious enough to warrant a 20-day unpaid suspension and a final record of warning of indefinite duration. This finding is based upon the fact that the discipline the Employer seeks to impose is not reasonably related to the seriousness of the Grievant's misconduct and the fact that the final record of warning violates Article 5, Section 2 of the collective bargaining agreement.

In this dispute, the record establishes that the grievant was talking to his wife while deadheading back to the garage; that no passengers were on the bus when he used his cell phone; that he had used a speaker phone while talking to his wife; that the conversation lasted approximately two minutes; that he had ended the conversation and turned the cell phone off approximately a minute before rear-ending a squad car stopped at a red light in front of him and that he immediately reported the accident. Further, there is no allegation that the Grievant's cell phone was on prior to the call he admits making or that the phone was not turned off and stowed once the call was completed. Based upon this evidence, it is apparent that the grievant was issued a 20-day suspension and an indefinite final record of warning solely for using his cell phone for two minutes while operating the bus.⁵

Although the Grievant's use of his cell phone while operating the bus is a serious violation of the Employer's cell phone policy, his offense is far different from and much less serious than the offenses cited in the previous two arbitrations which resulted in lesser discipline than that received by the Grievant. In one arbitration, the arbitrator concluded that the discipline was too harsh even though he found the employee had his cell phone on while he was driving; struck the mirror on a vehicle within seconds after his cell phone rang; failed to stop to investigate the damage that had occurred when he struck the vehicle, and failed to secure his bus while he was stopped and reaching back to turn off his cell phone even though there were pedestrians walking in front of the bus. In the other, the arbitrator found that the discipline was "just and merited" since the employee, while driving, had talked on his cell phone to his wife for one minute and to another person for more than nine minutes but denied having made the second call. In this arbitrator's opinion, both incidents of wrongdoing in the previous

⁵ The Employer argues that it is likely that the Grievant's accident was caused because he had been distracted by the cell phone call, but agrees no correlation between the cell phone conversation and the accident was established and that the Grievant is not charged with using his cell phone when the accident occurred.

arbitrations are more serious violations of the Employer's cell phone policy than the Grievant's since the Grievant's offense represents a lapse in judgment while their actions clearly reflect an intent to ignore the policy and an attempt to cover up the violations.⁶

In addition to finding that the discipline the Grievant received is not "just and merited" since the seriousness of the penalty is not reasonably related to the seriousness of the Grievant's offense, it is concluded that the discipline is also not "just and merited" since the final record warning the Employer seeks to impose conflicts with Article 5, Section 2 of the collective bargaining agreement. While the Employer argues that it is premature to consider whether the warning violates Article 5, Section 2 since we are not dealing with a second violation 36 months out, this Arbitrator agrees with the previous arbitrator who concluded that failure to grieve the penalty's duration at the time it is imposed could result in a future finding that the Union acceded to the warning's indefinite duration or lost its right to challenge it as a result of laches. Further, as proposed by the Employer, the final record of warning serves to act like a non-negotiated last chance agreement which would preclude any just cause considerations should a cell phone policy violation occur and limit a grievant's right of review solely to whether he or she violated the cell phone policy. This is an extremely harsh penalty without proof that a lesser penalty would not work.⁷ It is also an extremely harsh penalty for the misconduct proven in this dispute.

As discussed above, it has been concluded that there is a need for the policy promulgated by the Employer and a need for the discipline to be serious enough to deter employees from using cell phones or other electronic devices while operating buses or LRTs. It is also determined, however, that under the "just and merited" clause in Article 5, Section 1 of the collective bargaining agreement, the seriousness of the discipline imposed for violating the policy must reasonably relate to the seriousness of the employee's offense and that the imposed discipline must not conflict with other provisions in the parties' collective bargaining

⁶ The conclusion that the Grievant's misconduct reflects a lapse in judgment is based upon the transcript of the call submitted as evidence which indicates the Grievant attempted to end the conversation a number of times during the two minutes the conversation took place.

⁷ While the Employer provided evidence of the need for a penalty serious enough to deter the use of cell phones while operating its buses or LRTs, it provided no evidence to show that a lesser penalty would not accomplish the same goal.

agreement unless parties agree. In addition, after reviewing the record and the arguments of the parties, it is further concluded that the discipline the Grievant received was too harsh since employees whose offenses were more serious than the Grievant's received lesser penalties and that a final record of warning of indefinite duration not only violates Article 5, Section 2 of the collective bargaining agreement; is too harsh a penalty without proof that a lesser penalty will not accomplish the Employer's goal and is too harsh a penalty in this dispute given the seriousness of the Grievant's offense. Accordingly, based upon the above discussion and findings, the following award is made:

AWARD

The grievance is sustained in part and denied in part. The Employer is ordered to modify the discipline imposed upon the Grievant by reducing the 20-day unpaid suspension to a 10-day unpaid suspension and by removing the final record of warning from the Grievant's record. The Employer is also ordered to make the Grievant whole for any wages and benefits lost as a result of the additional 10-day unpaid suspension that was imposed.



By: _____
Sharon K. Imes, Arbitrator

March 11, 2011