

IN THE MATTER OF THE ARBITRATION BETWEEN:

METRO TRANSIT

and

**AMALGAMATED TRANSIT UNION LOCAL 1005
(Barbara Patterson Grievance)**

BMS Case No. 12PA0595

DECISION AND AWARD OF ARBITRATOR

**RICHARD A. BEENS
ARBITRATOR
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APPEARANCES

For the Employer:

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For the Union:

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**Date of Award:
April 4, 2012**

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement (“CBA”)¹ between Metro Transit (“Employer”) and Amalgamated Transit Union Local 1005 (“Union”). Barbara Patterson (“Grievant”) was employed by Metro Transit and a member of Local 1005.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on March 28, 2012 in Minneapolis, Minnesota. The parties stipulated that the matter was properly before the arbitrator. Both were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Following oral closing arguments the record was closed and dispute deemed submitted.

SYNOPSIS

On the early afternoon of August 15, 2011, Grievant was operating a Metro Transit bus on Route 22A which begins at the agency’s South Garage in Bloomington, runs generally northward through downtown Minneapolis, and ends at the agency’s Brooklyn Center Transit Center.² When the bus was near the intersection of 7th Avenue North and Olson Highway at about 12:30 PM, another Metro Transit employee reported seeing the operator of bus 22A apparently talking on a cell phone while driving. Subsequent investigation, including a review of tapes from onboard video cameras, showed that Grievant was the operator and that she had not powered off her cell phone an

¹ Joint Exhibit 1.

² Employer Exhibit 28.

stowed it properly. Additionally, relying on circumstantial evidence in addition to the eyewitness, the agency believe Grievant was actually talking on her cell phone while operating the bus. Following investigatory and Loudermill hearings, the Employer suspended Grievant for 20 days without pay and issue her a Final Record of Warning which remains on her record for 36 months. The disciplinary action was based on Grievant's violation of the Metropolitan Council's Cell Phone Use Procedure.³ Patterson talking on her cell phone while driving the bus and contends the disciplinary action was not "just and merited" as required by the CBA and filed the current grievance.⁴ For reasons set out below, the grievance is denied.

ISSUE

The parties stipulated that the issue before the arbitrator is:

Was the discipline imposed on Grievant just and merited and, if not, what is the remedy?

BACKGROUND FACTS

Metro Transit is a service of the Metropolitan Council and has the primary mission of providing public transportation in the Twin Cities area. 1.8 million people reside in their service area, which exceeds 600 square miles. They run 889 buses and employ 1438 operators plus 200 support staff. Two types of buses are used: a 40 foot model weighing 15 tons and a 60 foot, articulated model weighing 20 tons. Metro buses travel over 30 million miles per year.

As a common carrier, Metro Transit regards safety as its first priority. Full-time

³ Joint Exhibit 2.

⁴ Joint Exhibit 3.

drivers like Grievant are given 13 weeks of training, much of it devoted to instilling safety awareness and procedures in the operators. In recent years, the use of cell phones while driving has become an increasingly serious safety concern. Major public transit accidents in Los Angeles and Boston were caused when operators were distracted by cell phone use.⁵ These incidents heightened official awareness of the dangers inherent in distracted driving. In June, 2009, the Federal Transit Administration (“FTA”) recommended that all public carriers tailor policies to address the problem.⁶ At the same time, an industry group, The American Public Transportation Association, recommended policies for reducing driver-controlled distractions.⁷ The serious danger of cell phone use while driving has been corroborated and reinforced by numerous academic studies.⁸

The Employer did its own analysis and came to the conclusion that cell phone use during transit operations was an unacceptable hazard.⁹ As a consequence, Metro Transit sent a bulletin to all employees on December 4, 2009, stating:

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.¹⁰ (Emphasis in original)

On December 14, 2009, the Metropolitan Council formally adopted a policy prohibiting the use of cell phones or other electronic devices while operating any bus or light rail vehicle.¹¹ Operators violating the rule for the first time receive a Final Record of

⁵ In September, 2008, 25 people were killed when the engineer, who was texting on his cell phone, crashed his commuter train into a freight train. In May, 2009, 50 people were injured in Boston when a trolley rear ended another trolley. The conductor admitted to texting when the crash occurred.

⁶ Employer Exhibit 1.

⁷ Employer Exhibits 2 and 3.

⁸ Employer Exhibits 5, 6, 7 and 8.

⁹ Employer Exhibit 4.

¹⁰ Employer Exhibit 10.

¹¹ Employer Exhibit 11.

Warning for 36 months and up to a 20 day suspension.¹² A second violation within the 36 month warning period results in immediate termination. As an indication of its seriousness, the cell phone policy is explicitly made separate from the Employer's regular disciplinary procedures which provide for more traditional progressive punishments.

Grievant's alleged violations of the cell phone policy occurred on August 15, 2011. Most of Grievant's actions leading to the charges were recorded on video. Each Metro Transit bus has five video cameras that are recording whenever the buses engine is running. One is aimed forward, showing the road ahead. A second camera is located in the right front, aimed backwards, and shows the front-to-back interior of the bus. A third camera is located on the left interior side, and centers on the rear door of the bus. A fourth camera is located in the left rear of the bus and presents a back-to-front view of the interior. The last is located above and behind the driver and is aimed at the buses' front door. This last video camera also shows a part of the Plexiglas shield located immediately behind the driver, the electronic and mechanical fare apparatus to the driver's right, and the upper right segment of the buses' steering wheel.

On August 15, 2011, Grievant was scheduled to drive a bus on Route 22 between 11:10 AM and 6:03 PM.¹³ Her shift entailed two circuits of a route beginning at the Employer's South Garage in Blooming, running through downtown Minneapolis, turning around at the Brooklyn Center Transportation Center, and returning to the South Garage. Grievant arrived at the South Garage at 11:00 AM, spent about 10 minutes prepping the

¹² The original policy provided for a mandatory 20 suspension and a Final Record of Warning that would remain on the operator's file throughout their employment at Metro Transit. However, the policy in effect on the date of the present case had been amended through arbitral decisions and negotiations to provide for "up to a 20 day suspension and a Final Record of Warning for 36 months."

¹³ Employer Exhibit 28.

bus, and departed at 11:10 AM for the first stop, Veteran's Hospital. The portion of Route 22 just after leaving downtown Minneapolis runs on 7th Street North from the Twins baseball stadium to Lyndale Avenue. This course passes by the Employer's Heywood Garage. At approximately 12:30 PM, another Metro Transit employee, Connie DeVolder, was taking a lunchtime walk on the north side of 7th Street North and just behind the Heywood Garage. DeVolder saw the Route 22 bus approach and observed the female operator driving with her right hand over her right ear. The operator's arm position, facial expressions and mouth movement led DeVolder to believe the operator was talking on a cell phone. DeVolder, the Employer's manager of Occupational Health, was aware of the cell phone policy and immediately reported the incident. DeVolder did not know the operator, but, based on the Route number and the time of observation, supervisors were able to determine that Grievant was driving the bus. Grievant's direct supervisor, Jim Perron, retrieved the video record for her August 15th shift. Two segments were retained and shown at the arbitration hearing.¹⁴

The first segment begins at 11:08 AM and ends three minutes later. There is no dispute over what is revealed. Grievant is talking on her cell phone while prepping the bus. She ends the conversation, places the phone in her shirt pocket without powering it off and departs for the Veteran's Hospital.

The second video segment runs from 12:14 PM to 12:34 PM has engendered considerable disagreement between Grievant and Employer. During the 20 minutes, the bus travels from Washington Avenue at about 6th Avenue, through downtown

¹⁴ Employer Exhibit 29.

Minneapolis via 7th Street, out of downtown via 7th Street North, and ending near Lyndale and Broadway. The Employer alleges that circumstantial evidence on the video corroborates the eyewitness and shows Grievant on her cell phone from 12:26:13 to 12:30:44.¹⁵ Both before and after this segment, the video shows Grievant calling out approaching bus stops and engaging in conversation with passengers. Neither occurs during the four and a half minute segment while allegedly on her phone. Further, an image of Grievant's back and right arm is reflected on the Plexiglas screen immediately behind the driver. The Employer contends the segment in question shows Grievant's right arm bent in a position consistent with cell phone use.

Grievant strenuously denies engaging in any cell phone conversations after leaving the South Garage in Bloomington. She has produced a letter from Sprint purportedly supporting her assertion.¹⁶ Grievant also asserts she sometimes raises her right hand to shield her face from overly attentive gazes of male passengers sitting in the right hand "peanut seats."¹⁷ She also speculates that she might have been adjusting her hair, her cap, or earrings. Finally, the Union contends the reflected image is too vague and unclear to make any reasonable conclusion regarding Grievant's hand position.

After an investigatory hearing¹⁸ and a Loudermill hearing¹⁹ the Employer suspended Grievant for 20 days and gave her a Final Record of Warning for 36 months.²⁰

¹⁵ A digital timer on the video displays hours, minutes, and seconds.

¹⁶ Employer Exhibit 31.

¹⁷ In bus jargon, the two center-facing, bench seats immediately behind the operator are called the "peanut seats."

¹⁸ Employer Exhibits 32 and 33.

¹⁹ Employer Exhibits 34 and 35.

²⁰ Joint Exhibit 2.

The Union grieved the disciplinary action on the ground it was not “just and merited.”²¹

APPLICATION CONTRACT AND POLICY PROVISIONS

Contract Provision²²

Article 5

Grievance Procedure

Section 1. *Metro Transit reserves to itself, and the Agreement shall not be construed as in any way interfering with or limiting, its right to discipline its employees, but Metro Transit agrees that such discipline shall be just and merited.*

Metropolitan Council Cell Phone Policy²³

*PROCEDURE - Restrictions Regarding Cell Phone and Personal Electronic Devices
While Operating a Bus or Light Rail Vehicle*

I. Policy:

The primary focus for Metro Transit’s Operating Policy is to maintain 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 provider of public transportation, Metro Transit is held to the highest degree of care in safety in the delivery of its services. This responsibility lead to certain rules that must be taken outside the operation Policy: the Cell Phone and Personal Electronic Device Procedure 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, their patrons, the public and their coworkers.

Metro Transit bans cell phones and other personal electronic devices while

²¹ Joint Exhibit 3.

²² Joint Exhibit 1.

²³ Employer Exhibit 11.

operating a bus or light rail vehicle. Violations of the procedure are being taken outside the Operating Policy for both Bus and Rail Operators.

...

While operating any bus or light rail vehicle, all cell phones and other personal electronic devices must be powered off - not on vibrate or silent - stowed off the person in such a manner that it is not visible to either the operator or a passenger. Suggestions for stowing include but are not limited to placing the device in the approved operator bag, personal backpack or purse; stowing in a mesh pocket of such an item will not be considered a violation of this procedure.

...

Failure to comply with this rule will result in a Final Record of Warning for 36 months and up to a 20 day unpaid suspension for the first offense. Day off overtime will not be allowed during the unpaid suspension. The second time an employee is found in violation of this procedure, within 36 months, they will be terminated from employment.

DISCUSSION

The stipulated issue to be resolved is whether Employer's discipline of Grievant was just and merited and, if not, what is the remedy. The parties' CBA provides that all disciplinary actions must be, "...*just and merited.*"²⁴ As in all discipline cases, the Employer has the burden of proof. While there is a wide range of arbitral opinion on the nature of that burden, I agree with the majority who hold it to be "a preponderance of the evidence."

A review of discipline for alleged employee misconduct requires an analysis of several factors. First, has the Employer relied on a reasonable rule or policy as the basis for the disciplinary action? Second, was there prior notice to the employee - express or

²⁴ Joint Exhibit 1, Article 5, Section 1. Neither party indicated that the wording of their CBA, that discipline be "just and merited," differs from the more common phrase, "just cause." I cannot find any meaningful distinction between the two. In either case the Employer cannot discipline based on mere whim or caprice. (See, *How Arbitration Works*, Elkouri & Elkouri, Sixth Edition (2003), Chapter 15.2.B.ii.

implied - of the relevant rule or policy, and a warning about potential discipline? A third factor is whether the disciplinary investigation was thoroughly conducted and whether or not the employee was given due process and the right to rebut allegations. Fourth, did the employee engage in the actual misconduct as charged by the Employer?

While the Union does not dispute the reasonableness of the Employer's policy, the seriousness of the problem addressed bears discussion. Federal and state agencies have repeatedly decried the use of cell phones while driving.²⁵ The Harvard Center for Risk Analysis issued a study in which they estimated 330,000 total injuries, 12,000 serious to critical injuries and 2,600 fatalities were attributed to cell phone distraction while driving during 2003.²⁶ The Minnesota Department of Public Safety estimates that distracted driving contributes to 20% of all accidents. In 2009, the department said, inattention caused 58 deaths and 8,354 injuries in Minnesota alone.²⁷ The National Transportation Safety Board recently recommended a near total ban on cell phones while driving.²⁸ Other academic and public studies corroborate the danger of distracted driving.

The Employer's buses operate in mixed traffic on public highways and streets. Anyone driving these highways and streets in the past few years has increasingly observed drivers on their cell phones turning without signaling, weaving in and out of their traffic lane, and often driving much slower than the normal traffic flow. Banning cell phone use while operating a 15 to 20 ton bus is eminently reasonable. Given the size and omnipresence of buses, distracted driving by a Metro Transit operator endangers a

²⁵ Employer Exhibits 1, 8 and 9.

²⁶ Employer Exhibit 4.

²⁷ Employer Exhibit 9, quoting the Minneapolis Star Tribune, December 14, 2011.

²⁸ Employer Exhibit 9.

disproportionably high number of people. Under these conditions the Employer's cell phone policy was, if anything, overdue. It is a reasonable response to an extremely serious problem.

The Cell Phone Policy's penalty provisions are commensurately serious. A first violation of the cell phone policy results in, "up to 20 days suspension without pay and Final Record of Warning for 36 months." A second violation results in termination.²⁹ The Employer's standard Operating Policy provides for traditional progressive discipline beginning with verbal and written warnings. Given the possible serious consequences of distracted driving, the Employer specifically drafted the Cell Phone Policy to apply outside the Operating Policy. Simple verbal or written warnings for a first offense would not be proportional to the risk posed by operator cell phone use while driving. A lengthy suspension without pay and Final Record of Warning are reasonable given the level of risk.

Was Grievant aware of the Cell Phone Policy and the consequences of violation? Yes. The Grievant acknowledges completely understanding the policy, its purpose, and the penalty for violation. The Employer has gone to great lengths to inform employees of the policy. They issued employee bulletins outlining the policy before and after its formal adoption by the Metropolitan Council.³⁰ Grievant acknowledged in writing receipt of the policy.³¹ She attended "Right-To-Know" refresher courses that included cell phone use in 2009, 2010, and 2011.³² Last, signs urging "No electronic devices while you're behind

²⁹ Employer Exhibit 11.

³⁰ Employer Exhibit 10, 15, and 16.

³¹ Employer Exhibit 17.

³² Employer Exhibits 22, 23, and 24.

the wheel,” are prominently displayed throughout the Employer’s facilities and on employee bulletin boards.³³

Was the Employer’s investigation thorough, fair, and was Grievant accorded due process. Again, yes. The eyewitness was interviewed. Video tapes of Grievant’s shift were obtained and viewed. An Investigative hearing was held on September 15, 2011 where Grievant and her Union representative were allowed to present her version of the August 15, 2011 incidents.³⁴ On September 21, 2011, the Employer notified Grievant of their intent to suspend her for 20 days and issue a Final Warning. A Loudermill Hearing was set for the following day.³⁵ Grievant was again accompanied by her Union representative on September 22, 2011. Her various defenses to the proposed disciplinary action were exhaustively discussed.³⁶ While the Grievant clearly disagrees with the conclusions drawn by the employer from the second video segment, she raised no objection to the thoroughness of the investigation or her opportunity to respond to the allegations.

Finally, did Grievant engage in the conduct charged? The Employer alleges two violations of the Cell Phone Policy: first, Grievant fail to power off and properly stow her phone and, second, Grievant operated the bus while using her phone.

The first segment of video³⁷ clearly shows a violation as alleged in the first charge. Conversing on the phone while prepping the bus, Grievant freely acknowledges that she did not power off her phone or properly stow it prior to leaving the South Garage.

³³ Employer Exhibit 25.

³⁴ Employer Exhibit 33.

³⁵ Employer Exhibit 34.

³⁶ Employer Exhibit 35.

³⁷ Employer Exhibit 39.

She simply terminated the conversation and placed the phone on her person. However, she contends she complied with the policy about 12 minutes later and before any customers boarded at the first stop on Route 22, the Veteran's Hospital. The Cell Phone Policy makes no exceptions for non-compliance when the bus is empty. It unequivocally states,

“While operating any bus or light rail vehicle, all cell phones and other personal electronic devices must be powered off - not on vibrate or silent - stowed off the person in such a manner that it is not visible to either to operator or a passenger.”³⁸

I find that Grievant violated the Employer's Cell Phone Policy when she failed to power off or properly stow her cell phone prior to leaving the South Garage in Bloomington.

The second allegation, that Grievant actually used her cell phone while driving, is more problematic. The best evidence was produced by an eyewitness who observed Grievant drive by with her right hand, apparently clutching something, at her right ear. The witness' observation of Grievant's moving lips and facial gestures led her to conclude Grievant was talking on a cell phone. However, the eyewitness could not actually see a cell phone in Grievant's hand. Nevertheless, the witness, the Metro Transit Manager of Occupational Health, is very credible. She viewed Grievant for 3 to 4 seconds from a distance of 20 to 25 feet. She did not know Grievant and has no discernable reason to fabricate.

The remaining evidence regarding Grievant's actions is circumstantial. The 20

³⁸ Employer Exhibit 11.

minute segment of bus video³⁹ covering the bus trip from 12:14 PM to 12:34 PM is instructive. After repeated viewings, the Employer drew two conclusions. First, they assert the reflection of the driver in the Plexiglas divider immediately behind her seat shows that Grievant had her right arm bent and her right hand over her right ear from about 12:26:13 to 12:30:44 a period of about four and a half minutes. Additionally, the Employer concludes Grievant was not calling out streets or engaged with passengers during this same time period. This latter conclusion appears to be accurate.

The Union contends the reflected image is, at best, inconclusive. After repeated viewings, I agree with the Union. The ghost-like reflection combined with the low quality of the video leave doubts in my mind about this piece of evidence. While the reflected image of Grievant's upper arm appears relatively immobile, a position consistent with holding a phone, it isn't possible to definitively view the placement of her right forearm and hand.

However, my repeated viewings of Employer Exhibit 29 did confirm another piece of circumstantial evidence. The upper right hand quarter of the bus steering wheel is clearly visible in the lower left corner of the screen throughout the 20 minute video. Every time Grievant pulls away from a bus stop before and after the four and a half minutes when she's alleged to be on the phone, her gloved right hand and forearm come into view from the bottom of the screen as she steers the bus to the left, away from the curb. As she pulled away from the bus stop at North 7th St. and Olson Highway, her ungloved left hand comes into view from the left side of the screen reaching across to

³⁹ Employer Exhibit 29.

steer the bus to the left away from the curb. This aberration in her driving pattern indicates Grievant's right hand was otherwise occupied and not available to steer the bus. This occurred at 12:28:07, about nine seconds before the eyewitness is in a position to view Grievant and right in the middle of the four and a half minutes at issue.⁴⁰

Grievant strenuously denies using her cell phone while driving Route 22 on August 15, 2011. She has given different accounts of why her right hand might be at her ear on different occasions. At the Investigatory hearing, Grievant state that she has a habit of holding her right hand to her face as a shield if unsavory male passengers are sitting in the "peanut seats."⁴¹ At the Step 2 Grievance Hearing, her representative attributes it to being a "gum chewer."⁴² At the hearing, Grievant testified her right hand might be raised to the right side of her head to adjust her hair, or her cap, or her earrings.

While there was a male passenger sitting in the "peanut seats" across from Grievant, he appears to be paying little or no attention to her. Neither being a "gum chewer" nor adjusting something on the head is consistent with the witness' testimony or the length of time her upper arm appears immobile.

Grievant provided a letter from Sprint indicating no record of calls on her cell number between 11:30 AM and 1:00 PM on August 15, 2011.⁴³ Two problems exist with this letter. First, Grievant subscribes to Boost, a Sprint prepaid phone service. The Sprint letter carries the following admonition:

Search results indicate one or more of the numbers listed on the above-referenced

⁴⁰ The Director of Bus Operations, Christy Bailly, came to the same conclusion in her Analysis and Conclusions section of the Step 2 Grievance Response, Joint Exhibit 5.

⁴¹ Employer Exhibit 33.

⁴² Joint Exhibit 5.

⁴³ Employer Exhibit 31

legal demand may belong to Boost, a Sprint prepaid phone service. Our office maintains subscriber information for Boost accounts, but this information is often inaccurate or incomplete, as no identification is required when purchasing a Boost phone...

Second, Bus Operations Manager Bailly testified that she has researched and seen Boost reports many times before. They did not look like the one provided by Grievant.

The qualifier alone is sufficient to raise significant doubts about the report in this context.

The final evidence on Grievant's behalf is her adamant denial that she used her cell phone at any time after leaving the South Garage on August 15, 2012. However, details of her story have varied over time. At the investigatory hearing, Grievant said she stowed the phone properly at the Veteran's Hospital after making a call at that location.⁴⁴ At the same meeting she indicated her phone was usually on "vibrate." At the arbitration hearing, she denied making a call at the VA and could not recall exactly when or where she stowed her phone. She also insisted that she clearly recall that her phone was on "silent" on the day in question. At the same hearing, she denied that cell phone records were available from Boost, but later produced a letter from Sprint. These variations call into question Grievant's credibility.

As counsel is well aware, relevant circumstantial evidence is admissible in any court. It is up to the fact finder to determine the weight to be given.⁴⁵ Given the credibility of the eyewitness and the other circumstantial factors discussed above, I find, by a preponderance of the evidence, that Grievant did use her cell phone while operating a Metro Transit bus in the vicinity of North 7th Street and Olson Highway on August 15,

⁴⁴ Employer Exhibit 33.

⁴⁵ Minnesota Civil Jury Instruction Guide, CIVJIG 12.10.

2011. Consequently, I find that the Employer had just cause to discipline Grievant.

The Union contends the punishment imposed is out of proportion to the offenses committed. I disagree. While an arbitrator has the power to determine whether or not an employee's conduct warrants discipline, his discretion to substitute his or her own judgment regarding the appropriate penalty from management's is not unlimited. Rather, if an arbitrator is persuaded the penalty imposed was within the bounds of reasonableness, he or she should not impose a lesser penalty. This is true even if the arbitrator would likely have imposed a different penalty in the first instance. On the other hand, if an arbitrator is persuaded the punishment imposed by management is beyond the bounds of reasonableness, he or she must conclude that the employer exceeded its managerial prerogatives and impose a reduced penalty. In reviewing the discipline imposed on an employee, an arbitrator must consider and weigh all relevant factors.

Grievant is a four-year employee who appears to greatly enjoy her job and have generally good relations with her riders. She has received a number of customer commendations and congratulatory notes from Metro Transit General Manager Brian Lamb.⁴⁶ Although the Employer indicated she had also received some customer complaints, none were specified or placed in evidence. She has received a Record of Warning for two minor accidents and was obligated to attend a Safety Conference.⁴⁷ All in all, Grievant's record is what one might expect from an average operator with four years experience. Her record must be weighed against application of the Employer's discipline policy.

⁴⁶ Union Exhibit 2.

⁴⁷ Employer Exhibit 37, 38, and 39.

The Employer's Cell Phone Policy contains a form of progressive discipline; 20 day unpaid suspension and a Final Record of Warning for the first offense and immediate termination for a second offense within three years. This is a good deal more punitive than traditional progressive discipline. However, the problem being addressed, distracted driving, is far more serious than the usual employee misconduct. Using a cell phone while driving can not and should not be equated with being a tardy for work, failure to use a seatbelt, or swearing at a fellow employee. The consequences of a single distracted driving accident are potentially catastrophic. Obviously the Employer designed the sanctions to encourage maximum compliance.⁴⁸ Further, they have rigorously and uniformly enforced the policy. Precisely the same discipline has been applied for each of the over 30 first-time policy violations.⁴⁹ This was true whether the misconduct involved improper stowing, texting, talking, or some combination of the three. The public should expect no less from a public carrier. Compliance by employees is a simple matter of turning off and stowing their cell phone while driving. Failure to comply demonstrates that the employee puts his or her personal interests above the public good. That attitude is antithetical to the primary concern of a transit agency, safety, and cannot be condoned.

Grievant's record does not outweigh the seriousness of the misconduct. Penalties for violation of the Cell Phone Policy, while severe, are proportionate to the gravity of the misconduct. Under the policy, the Employer (or an Arbitrator) has the flexibility to impose a lesser penalty if extraordinary circumstances so warrant. There are no extraordinary circumstances in this case. Grievant's intentional failure to power off and

⁴⁸ Employer Exhibit 4. Other large metropolitan transit agencies, notably Atlanta and Boston, are even more strict, ordering or recommending termination for a first offense.

⁴⁹ Employer Exhibit 36.

properly stow her cell phone, standing alone, would warrant the discipline imposed.

Talking on her cell phone while driving a loaded bus only underlines the appropriateness of the penalty imposed. I find the punishment imposed to be well within the bounds of reasonableness.

AWARD

The Grievance is DENIED.

DATED: _____

Richard A. Beens, Arbitrator