

**IN THE MATTER OF ARBITRATION
BETWEEN**

**METROPOLITAN COUNCIL, METRO
TRANSIT DIVISION**

Employer,

and

**AMALGAMATED TRANSIT UNION,
LOCAL 1005,**

UNION.

**ARBITRATION DECISION
AND AWARD,**

BMS Case No. 13 PA 0460
(Sharon Peterson Grievance)

Arbitrator:

Andrea Mitau Kircher

Date and Place of Hearing:

February 5, 2013
Metro Transit Operations
725 North 7th Street
Minneapolis, MN 55411

Date Record Closed:

March 1, 2013

Date of Award:

April 1, 2013

APPEARANCES

For the Union:

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For the Employer:

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INTRODUCTION

The Metropolitan Council is a political subdivision and public corporation that provides services to the seven-county metropolitan area surrounding the Twin Cities of Minneapolis and St. Paul, Minnesota. Minn. Stat. Sec. 473.123. Metro Transit, a

division of the Council, is responsible for operation of the mass transit system in this metropolitan area. The Amalgamated Transit Union, Local 1005 (“Union” or “ATU”) and Metro Transit (“Employer”) are signatories to a Collective Bargaining Agreement (“CBA” or “contract”), Joint Exhibit 1, effective August 1, 2010 through July 31, 2012. Pursuant to that agreement, and in addition to it, the Employer has promulgated several policies and procedures that govern the actions of its more than 1,400 bus operators. As will be discussed below, this grievance stems from violation of an explicit safety procedure dedicated to prohibiting cell phone use by bus operators in transit.

On February 15, 2013, the Arbitrator convened a hearing at the Metro Transit Operations Support Center in Minneapolis, Minnesota. During the hearing, the Arbitrator accepted exhibits into the record; witnesses were sworn and testimony was presented subject to cross-examination. The parties agreed to file simultaneous briefs by email and the Arbitrator received briefs on March 1, 2013, whereupon the record closed.

ISSUE

Was the discipline of the grievant “just and merited” pursuant to Article 5, Sections 1 and 2 of the CBA and, if not, what is the proper remedy?

The parties agree that the working definition of the standard “just and merited” is the same as the “just cause” standard.

BACKGROUND

The Employer charged the Grievant, a bus operator, with violating its cellphone procedure and issued her a 20-day suspension and a three year Final Record of Warning.¹ The alleged violation was for a first offense of “failure to properly stow an electronic

¹ The Final Record of Warning, Er. Ex. 35, states that a second violation will result in termination of her employment.

device while operating a Metro Transit bus”. Er. Ex. 34. The Grievant had placed her Bluetooth ear device in her shirt pocket prior to starting her route rather than in an approved operator bag. There is no allegation that the Grievant used her Bluetooth device and cellphone while operating the vehicle, merely that she stowed it improperly. During the investigation, the Employer learned that the phone itself, although placed properly in a bag, had not been powered off. These actions violated its safety procedure “Restrictions Regarding Cell Phone and Personal Electronic Devices While Operating a Bus or Light Rail Vehicle”, (hereafter, “safety procedure”) first promulgated in 2009. In 2009 the procedure stated in part:

Metro Transit bans the use of cell phones and other personal electronic devices while operating a bus or light rail vehicle...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 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...
(emphasis added.)

(December 14, 2009 procedure, Er. Ex. 13.)

The safety procedure was amended in June 2011. The penalty language in the 2011 safety procedure differed. The safety procedure penalty under which the Grievant was charged stated in pertinent part:

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...

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...The second time an employee is found in violation of this procedure, within 36 months, they will be terminated from employment...

Since the violation of this procedure is a serious safety violation, any camera images including reflections and audio may be used to verify a complaint or violation...

Bus and Rail Operators will be able to use cell phone and personal electronic devices only at designated layovers...²
(emphasis added.)

The Employer presented a great deal of convincing evidence that driving while using a cell phone, even through a Bluetooth earpiece, is an unsafe practice because a telephone conversation tends to distract the driver. A distracted driver is more likely to make poor driving judgments causing harm to property and people. It is not as obvious that a cell phone located in a bag that is not being used is dangerous. The Union did not dispute the Employer's evidence about unsafe driving practices or the safety procedure itself at the hearing. Rather, it argues that the Employer has not applied the safety procedure correctly to the Grievant's circumstances.

FACTS

The Grievant has been employed by Metro Transit for 17 years. She has no record of prior discipline or accidents as a bus operator. On September 27, 2012, the Employer issued the Grievant a Record of Suspension. She was to be suspended for 20 days (October 13-November 9, 2012) for "failure to properly stow an electronic device while operating a Metro Transit bus". The incident that gave rise to this suspension took place August 13, 2012. As she was getting ready to begin her shift that day, she had

² Metropolitan Council Procedure – Restrictions Regarding Cellphone and Personal Electronic Devices While Operating a Bus or Light Rail Vehicle. Section 4-7 f, Effective 12/14/2009, as amended 6-4-2011. Er. Ex. 21.

properly placed her cell phone in a carrying bag, but an Employer's video camera on the bus recorded that she placed a Bluetooth ear device for the telephone in her shirt pocket as she left on her route.³ There was no evidence that she used the phone while driving. During the investigation, the Grievant admitted that she had placed the Bluetooth device in her pocket and that she had not physically powered the phone off before placing it in her bag on the floor of the bus. She stated that she believed she had an application (hereafter, "app") on her phone that automatically turned it off after she had completed her conversation. After considerable effort to look into the Grievant's explanation concerning the app, the Employer determined that the app did not work quite the way the Grievant described it. This meant that the earpiece was not properly stowed, and the phone, although stowed in the proper place, was not powered off while the Grievant drove the bus. These actions violated the safety procedure. The Employer issued the Grievant a 20-day suspension and a Final Record of Warning.

EMPLOYER POSITION

The Employer claims that the safety procedure correctly requires a 20-day suspension for all violations because the point of the safety procedure is to deter unsafe conduct for any violation, and the employer does not wish to weigh perceived levels of distraction caused by various fact situations. Er. Brief at. 2. The Employer argues that the amended language of the safety procedure means that all violations should be penalized with a 20-day penalty, which may then be reduced when certain types of mitigating circumstances are evident, none of which were present in this case. The Employer argues that violations for stowing electronic devices while driving should not

³ Er. Ex. 43, a video from a bus-mounted camera, was shown at the hearing. Metro Transit administrators had initially reviewed the video for another purpose, to discover why the bus route had been started five minutes late.

be treated differently than violations for using electronic devices while driving, because leaving the phone on or stowing the device on the person or in a place that is visible leads to the likelihood of using the device; instead, to avoid temptation or distraction, it must be powered off and placed out of sight. The Employer claims that its position is more favorable to employees than its only other option, not allowing electronic devices at all, because it wishes to allow employees to use their phones during layovers, so long as they remember to turn them off and stow them properly before driving. The Employer claims that to deter serious safety violations, a significant penalty, like a 20-day suspension for any violation, is necessary to protect the public from harmful driving practices.

UNION POSITION

The Union argues that imposing the maximum 20-day penalty is not reasonably related to the seriousness of the Grievant's misconduct. The Union claims that by imposing the maximum penalty on the Grievant for a violation involving the way she stowed an earpiece, the Employer is treating her as if she had actually been talking on a cellphone while driving. The Union points out that just cause requires that different levels of culpability require different levels of penalty. The Union argues that other bus operators who actually were driving while using a cell phone received less severe penalties, demonstrating unreasonable application of the safety procedure to the Grievant. In terms of mitigation, the Union argues that the Employer should have considered the Grievant's long career, her commendations, her lack of prior discipline and her leadership on the safety and safety procedure-compliance committee before deciding how severe the penalty should be.

DISCUSSION AND DECISION

Although this CBA calls for discipline and discharge only when the Employer establishes that it is “just and merited”⁴ rather than the more common language that discipline shall only be imposed for “just cause”, there is no significant difference between these two phrases. The parties essentially agree that management must have a reasonable basis for its actions and follow fair procedures when disciplining an employee. The Union does not raise significant issues about the procedures in this case.

The parties have a well-developed and detailed process that must occur under their CBA prior to imposing disciplinary action. At the hearing, it was apparent that the Employer met the basic grievance processing requirements, such as notice, investigation, and an opportunity to be heard prior to suspending the Grievant. The parties engaged in the grievance process itself without major impediments. Nonetheless, the parties were not able to resolve this matter informally because of a vast gap between their views about how to apply the safety procedure to the facts of this case. The procedure was established under the Employer’s authority to depart from the general Operating Safety procedure that sets up a progressive discipline system for most kinds of employee misconduct. Employer Exhibit (“Er. Ex.”) 4, p. 1.⁵ The Employer has demonstrated its determination to protect the public from unsafe driving by unilaterally establishing separate procedures under its retained authority to establish “rules and regulations requisite to safety” including a procedure to address use of electronic devices. Er. Ex. 1, Article 4, Management Prerogatives. The Employer’s promulgation of the procedure is

⁴ CBA, Exhibit , p. 5

⁵ For convenience, most citations will be to the Employer’s exhibit numbers. Even though many of the exhibits were joint exhibits, joint exhibits were not given separate numbers.

not at issue in this case.⁶ The question is whether the Employer has presented sufficient evidence to demonstrate that it was reasonable to impose a 20-day suspension and a Final Record of Warning upon the Grievant for her conduct on August 13, 2012.

The parties do not dispute that the Grievant placed a Bluetooth earpiece in her shirt pocket when she began driving her route, thus violating the safety procedure. Although the Grievant stated that she didn't realize that this was a violation at the time, she should have known that it was. Although the actual safety procedure is three single-spaced pages long, the Employer has made significant efforts to disseminate its safety procedure in several abbreviated forms. *See, e.g.*, Er. Exs. 17, 18, 23, 25. Bulletins and a video were distributed, and a graphic design depicting a cell phone with a line through it and the words, "Turn it off, Stow it away" was posted in many places including on the door through which the Grievant entered the garage. (Er. Ex. 42.) Metro Transit has educated its employees in numerous ways about the safety procedure and has left few stones unturned in its efforts to make clear to its employees how important it is to public safety that bus operators do not use electronic devices while driving Metro Transit vehicles. *See*, Er. Ex. 24. The Grievant signed documents admitting she had received this information, and she admitted she served on the Employer's Transit Safety committee, including serving as chair of that committee for a period of time. It is reasonable to believe she should have known that her Bluetooth device was "on her person" and that this violated the safety procedure. Thus, the main question at issue is whether the penalty imposed by the Employer is a reasonable one.

⁶ A previous arbitrator decided: "[t]he establishment of the cellphone safety procedure is not subject to arbitration. The establishment of the cellphone safety procedure is a rule and regulation requisite to safety and specifically exempted from the arbitration provision of the Agreement." *ATU v. Metro Transit*, BMS Case No. 10-PA-1030 at p. 14.) (O'Toole, 2010.)

The Employer argues that the language of the safety procedure means a 20-day suspension should be imposed for every violation, regardless of its degree of severity, subject to reduction of that time period if the Employer sees mitigating factors. This argument does not persuade me that its actions in this case were reasonable, because it overlooks several long accepted principles of the law of the workplace:

“Discipline may be considered excessive if it is disproportionate to the degree of the offense, if it is out of step with the principles of progressive discipline, if it is punitive rather than corrective, or if mitigating circumstances were ignored.”
Discipline and Discharge in Arbitration 85 (Brand, ed., BNA, 1998).

How Arbitration Works, Elkouri & Elkouri 15-43 (Elkouri & Elkouri, BNA, 7th ed., 2012)

In other words, just cause for discipline includes the idea that the penalty for an infraction must be reasonably related to the severity of each employee’s misconduct. It is generally understood that similarly situated employees should be treated the same. Additionally, commonly accepted mitigating factors were not considered in this case: the Grievant’s long-term service and her prior good work record. Imposing the maximum penalty for the Grievant’s violation of the safety procedure is disproportionate to the severity of her actions.

At least two previous arbitrators questioned the reasonableness of Metro Transit’s 2009 safety procedure requiring a twenty-day suspension for any violation of the electronic devices safety procedure. The Employer amended its safety procedure so that the penalty for violation was changed from:

1. 2009 safety procedure: 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... (December 14, 2009 procedure, Er. Ex. 13.)

2. 2011 safety 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. (June 4, 2011, Er. Ex. 21)

Although the Employer changed the language so there could be a range of penalties (“up to a 20-day suspension”), the Employer argues that it did not intend the change to require it to distinguish between levels of misconduct or to weigh levels of distraction. It wishes to impose a severe penalty for any violation in order to reduce the likelihood of dangerous driving. Nonetheless, the requirements of just cause for discipline must be met in each case because the Employer has agreed to that standard in Article 5 of the CBA.

Imposing a 20-day suspension for driving while using an electronic device may be reasonable, but automatically imposing a 20-day suspension for any violation of this rule treats a lesser violation as if it were a greater one. This concept does not meet the requirements of just cause because it leads to penalties that are disproportionate to the degree of the offense. I am not aware of any labor relations theory that allows an employer to avoid looking at each employee’s actions individually and judging them on their merits under a labor agreement that requires just cause for discipline.

There is no evidence that the Grievant talked on the phone while driving, or that the cellphone rang, distracting her from her driving duties. Despite the Employer’s admirable goal of preventing distracted driving, fining a bus driver \$6,000⁷ by suspending her for 20 days because she placed her Bluetooth device in her pocket and her phone in her bag, although not powered off, is a penalty disproportionate to the misconduct.

⁷ A loss of \$6,000.00 was stated by the Grievant in Er. Ex. 30, investigative hearing notes, and that amount was not disputed.

Just cause requires that similarly situated employees be treated the same. The parties brought to my attention several previous Metro Transit cases concerning employees disciplined for violation of the electronic devices safety procedure. In the three arbitration cases, the Employer had issued at least a 20-day suspension.⁸ In two of these cases the grievant had been driving and talking at the same time, and in one the grievant had been distracted by a ringing phone and turned around to silence it while driving. The facts of the Grievant's case are different on this important point. Her phone was technically on, but she was neither using it, nor did she engage in any unsafe activities related to it.

In other cases about which there was testimony, employees were talking on their cell phones *to the employer* while driving. The Director of Bus Operations, who is in charge of making the final decision in these cases, testified that she always starts with a 20-day suspension, but she will reduce the penalty when there are "mitigating factors". She referred to one of these factors as the "agency business exception". That is, if a driver is talking to an agency dispatcher while driving, the penalty is reduced to two days.⁹

If the point of the safety procedure is to deter people from driving and talking on the phone at the same time because it is dangerous, the identity of the person the driver is talking to is a curious reason for setting a penalty at two days instead of twenty. Unlike these employees who were given a two-day suspension, the Grievant was not talking on

⁸ Metropolitan Council Transit Operations and ATU, Local 1005, BMS Case No. 08-PA-0900, (Arbitrator J. Jacobs, Nov. 15, 2010); Metro Transit and ATU, Local 1005, BMS Case No. 11-PA-0091 (Arbitrator S. Imes, March 11-2011); Metro Transit and ATU, Local 1005, BMS Case No. 12PA1174, (Arbitrator R. Beens, April 4, 2012)

⁹ Robert Streibel called the control center while driving and was issued a two-day suspension. An employee identified as Adeleke Adeloye served only two days unpaid suspension for talking on his cellphone to an agency employee while driving. Testimony, Director Bailly.

the phone while driving. Her misconduct does not appear to be nearly as dangerous or “distracting” as the drivers who were only penalized two days wages for their actions. This disparate treatment undermines the rationale that a 20-day suspension is the appropriate penalty for the Grievant.

Not only was the Grievant’s penalty too severe for her misconduct, but the Employer also neglected to consider the Grievant’ long term employment and her previous good work record for 17 years before it decided on a penalty. The Director of Operations admitted that she gave these matters no consideration. She stated she believes she should assess the maximum penalty for all violations to discourage unsafe driving practices and then that she might reduce it by looking at mitigating factors. The mitigating factor that motivated her to reduce a 20-day penalty to a two-day penalty for the two employees who were talking to a dispatcher while driving was that the Employer was not without blame in those incidents. In this case, factors that I considered in mitigation which the Director of Operations did not are the Grievant’s admission of wrongdoing and willingness to change her conduct, and the fact that this technical violation of the safety procedure was an isolated incident in an otherwise unblemished 17-year work record.¹⁰

Conclusion:

Just cause for discipline requires that the Employer’s safety procedure be applied so that the severity of the penalty is proportionate to the degree of the Grievant’s misconduct. The Grievant violated the cellphone safety procedure by placing her Bluetooth device in her pocket instead of in her bag and for placing her phone properly in

¹⁰ See, e.g. Discipline and Discharge in Arbitration, *id.* at Appropriateness of the Penalty, 85-89.

her bag, but not powering it off. There is no evidence that she used the phone while driving or that it distracted her from her duties in any way.

The Employer testified that the safety procedure was intended to deter driver distraction by penalizing cellphone usage. If that is so, I see no reason why the Grievant's technical violation should draw a penalty 10 times greater than the penalty imposed on drivers who were actually talking on the phone to dispatchers while driving. Accordingly, the Grievant's penalty is reduced to a two-day disciplinary suspension.

AWARD

The Grievance is sustained in part and denied in part. The Employer is ordered to modify the discipline imposed by reducing the 20-day unpaid suspension to a 2-day 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 the remaining 18 days of suspension.

Dated: April 1, 2013

Andrea Mitau Kircher
Arbitrator