
In Re the Arbitration Between:

BMS 11-PA-0821

Metropolitan Council,
Metro Transit Division,
Minneapolis, St. Paul, MN,
Employer,

and

**GRIEVANCE ARBITRATION
OPINION AND AWARD**

Amalgamated Transit Union, Local 1005,

Union.

Pursuant to **ARTICLE 13** of the collective bargaining agreement between the above parties effective August 1, 2010 through July 31, 2012 the above matter was brought to arbitration.

James A. Lundberg was appointed by the parties to serve as the neutral arbitrator from a list of arbitrators provided by the Minnesota Bureau of Mediation Services.

The parties stipulated that that no procedural issues have been raised and the matter is properly before the arbitrator for a final and binding decision.

A grievance was submitted on November 8, 2010.

A hearing was conducted on August 17, 2011.

The parties made oral arguments following the hearing and the record was closed on August 17, 2011.

APPEARANCES:

FOR THE EMPLOYER

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FOR THE UNION:

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ISSUE:

Whether the Employer had just cause to impose on the grievant a twenty (20) day suspension together with a final warning for his use of a cell phone while driving a Metro Transit Bus on September 7, 2010?

If not, what is the proper remedy?

FACTUAL BACKGROUND:

The grievant, Doni Jones, was hired as a Metro Transit Bus Operator on November 4, 2006. Until he was disciplined on November 5, 2010, Mr. Jones did not have a disciplinary history. He testified that he had one minor accident but it appears that the accident was not due to Operator error and he was not disciplined for the incident.

The Employer, Metro Transit, has a cell phone policy which says that Operators may not have a cell phone powered on and on their person, while driving. The policy clearly provides that an Operator's cell phone must be powered off and stowed, while the Operator is driving. Operators have been provided with the written policy. Meetings have been conducted by the Employer, wherein the cell phone policy has been presented to employees. Furthermore, there are signs posted in the bus terminals, which alert Operators to the cell phone policy.

The cell phone policy is a safety rule that has been clearly and repeatedly communicated to employees. The reason for the rule is to protect the public that is served by Metro Transit, to protect other vehicles and to protect property on or near the roadway, to protect Metro Transit equipment and to protect the organization. Studies have confirmed that the use of a cell phone while driving a city bus is extremely dangerous.

On September 7, 2010 at 9:13 AM, Mr. Jones was driving a Metro Transit bus route in St. Paul, MN. He dropped passengers at the corner of Wabasha and 6th. As he prepared to pull the bus away from the stop, the sidewalk near the bus stop collapsed into a sink hole. A pedestrian who had been a passenger on the bus dropped into the hole, as the sidewalk beneath him collapsed.

Mr. Jones observed the collapse of the sidewalk and the disappearance of the pedestrian into the sink hole. He contacted the Metro Transit Control Center by radio. He also called 911 using his cell phone to report the emergency. During the first few minutes following the sidewalk collapse, Mr. Jones was in contact with police, paramedics and the fire department. Mr. Jones moved the bus away from the scene of the sidewalk collapse and provided information to emergency workers. His bus was delayed for roughly ten (10) minutes. The last communication from the Metro Transit Communication Center to Mr. Jones at the site of the sidewalk collapse directed Mr. Jones to do the following:

1. Give his information to the police.
2. Collect courtesy cards
3. Fill out a report when he pulls in (at the end of his route.)

Following the incident the Employer required that video recordings of the collapsing sidewalk incident be removed from cameras mounted on the bus for the purpose of sending the recordings to “risk management” for review.

While reviewing the video recordings for the purpose of locating pictures of the incident, the individual reviewing the video recording observed reflections in the glass barrier near the Bus Operator’s seat. In the reflections Mr. Jones appeared to be using his cell phone, while driving. Upon closer examination, it was determined that for an extended period of time near the

end of his run, Mr. Jones had his cell phone in his hand. The cell phone was turned on and the grievant was manipulating the phone, while driving. A report of the apparent cell phone rule violation was made by e-mail dated September 9, 2010 as a result of the discovery.

Upon further review of the video recording made at the end of grievant's run, management determined that the reflection in the glass near the Bus Operator's position was the screen on a cell phone. Mr. Jones had the cell phone in his hand. Mr. Jones had the cell phone activated and Mr. Jones was splitting his attention between the cell phone and his operation of the bus. Management determined that the conduct was in violation of the cell phone policy.

Based upon the video evidence Mr. Jones was notified of the Employer's belief that he had violated the Company's cell phone policy. A *Loudermill* hearing was conducted on September 22, 2010 to give Mr. Jones an opportunity to explain his conduct. Throughout the investigation Mr. Jones had Union representation.

The investigation was closed.

Following the investigation on November 5, 2010 Mr. Jones was given a twenty (20) day suspension and a final warning was issued. The final warning is effective for a period of thirty six (36) months.

The discipline was grieved on November 8, 2010.

At the Second Step grievance meeting the Union asked the Employer to pull video recording from the period of time immediately before and during the sidewalk collapse for the purpose of demonstrating the severity of the incident and the degree of trauma suffered by Mr. Jones.

The video images taken at the time that the sidewalk collapsed at 6th and Wabasha by cameras on the bus did demonstrate the frightening nature of the incident. However, the cameras

also picked up reflections in the glass plate near the Bus Operator's seat that revealed Mr. Jones had his cell phone turned on and in his hand as he approached 6th and Wabasha. He had his cell phone in his hand, during the sidewalk collapse. He had his cell phone in his hand following the incident, which made it unnecessary for him to retrieve his cell phone from stowage in order to call 911.¹ Mr. Jones testified at hearing that he never turned off and stowed his cell phone between the time the sidewalk collapsed and the end of his run, which was approximately thirty (30) minutes after the sidewalk incident.

The parties were unable to resolve the grievance and the matter was brought to arbitration for a final and binding determination.

SUMMARY OF EMPLOYER'S POSITION:

The Employer created a safety work rule requiring Bus Operators to power off and stow cell phones at all times while they are operating a Metro Transit Bus. The rule was created to protect the safety of people who ride the bus system, to protect people and property that come into close proximity to Metro Transit buses and to protect the organization. A bus collision caused by an inattentive driver can cause serious injury, death and property damage. Moreover, people will not ride on a bus system that is believed to be dangerous. Multiple safety studies have determined that the use of cell phones while driving a bus is dangerous and increases the possibility of an accident.

The cell phone rule was introduced to employees by written notice. The rule was reinforced through multiple meetings before implementation. Drivers are reminded daily of the cell phone rule by written posters placed throughout the workplace. There is no question that the

¹ Mr. Jones testified that he had to retrieve his phone from stowage before he called 911, despite the contrary video evidence.

grievant knew that his cell phone was to be powered off and stowed, while he was driving a Metro Transit bus.

The cell phone policy, including the penalties that have been imposed under the policy, has been reviewed by a number of arbitrators. The validity of the rule has been questioned and the rule has been found to be valid. In arbitrations wherein the level of discipline has been challenged, most arbitrators have upheld the degree of discipline imposed. In this case, the Employer argues that Mr. Jones' conduct was the most egregious violation of the cell phone policy encountered, since the policy was developed.

The grievant knowingly and voluntarily broke a serious safety rule. He provided a series of excuses for his conduct but failed to take responsibility for his conduct and did not establish any basis for mitigation.

Mr. Jones not only made a call to his wife at the end of this run on September 7, 2011 but he continuously violated the cell phone rule for more than one half hour. He argued that he was traumatized by the sidewalk collapse and needed to talk to his wife to vent following a traumatic experience. However, he could have asked to be relieved from duty at any time following the incident, if he felt traumatized. If he needed to call his wife, he should have done so after he stopped driving and was off the bus. At no time was grievant able to explain why by thirty (30) to forty (40) minutes after the incident he was unable to wait a few minutes longer to call his wife from his cell phone.

There is no legitimate argument for mitigation in this situation. The grievant is a short term employee. The grievant took no steps to seek peer support, although he had knowledge of the availability of peer support. The grievant knew he could ask for a relief driver but did not seek relief.

There is no evidence that corroborates “trauma”. No medical or psychological or psychiatric reports were submitted in support of grievant’s claim of trauma.

Finally, the trauma, if caused by the sidewalk incident, does not explain why Mr. Jones violated the cell phone policy before the sidewalk collapsed.

The grievant had knowledge of the cell phone policy and he knowingly violated the policy over an extended period of time on September 7, 2010. His conduct was found to be more egregious than the conduct of approximately twelve other employees who were disciplined in the past for violating the cell phone rule. The discipline imposed on grievant was the same as the discipline received by other employees who violated the rule. The employer had just cause to discipline the grievant for violating the cell phone policy. The discipline imposed was reasonable and consistent with the discipline imposed upon other employees under similar circumstances. Hence, the grievance should be upheld.

SUMMARY OF UNION’S POSITION:

The grievant admits that he violated the Employer’s cell phone policy. However, the Union contends that the discipline imposed was inappropriate. In determining whether there was just cause all of the circumstances surrounding the incident must be considered. While Mr. Jones committed a technical violation of the cell phone policy, the nature of the traumatic event he witnessed was not given sufficient weight by the Employer. The level of discipline imposed upon the grievant was too severe under the circumstances.

The grievant was traumatized by the collapsing sidewalk incident. In essence, he was “emotionally disturbed”, after seeing a sidewalk collapse and a pedestrian, who had just been a passenger on his bus, disappear.

Mr. Jones did not know what to do following the incident and was unable to determine what he needed, because he was so upset. It is not an operator's duty to request peer support or other support in a situation like the one experienced by the grievant. Grievant's supervisor should have offered peer support and suggested or required a relief driver for the grievant, once he described what he had seen.

Traumatized and without guidance from his supervisors, the grievant finally reached out for some help coping with the experience by calling his wife. The telephone call was made at the end of the grievant's run, when no passengers were on the bus. The situation for which the grievant was discharged did not place passengers at risk.

The Employer should have reduced the penalty in this situation based upon the circumstances surrounding the rule violation and the grievant's spotless disciplinary history. In this case he committed a technical rule violation at the end of his run, when no passengers were on the bus. He had recently been exposed to a traumatic situation and he had no history of discipline. The Employer could have impressed upon the grievant the serious nature of the cell phone policy by imposing something less than a twenty (20) day suspension and a final warning effective for a period of thirty six (36) months.

The Union asks the arbitrator to reduce the discipline based upon the technical nature of the rule violation and the circumstances leading up to his violation of the cell phone policy.

OPINION:

The employer established that the grievant violated the cell phone policy on September 7, 2010. In fact, the grievant admitted that he violated the policy that day. The video evidence submitted by the Employer taken during the last portion of the grievant's run demonstrated far more than a technical violation of the cell phone rule. The grievant had the cell phone in his hand

and was continuously manipulating the device while he was driving the bus. The device was not stowed and it was not powered off. The driver was periodically attending to his cell phone not the task of driving the bus. Standing alone, the video recording taken during the last portion of grievant's run on September 7, 2010 is sufficient to establish a violation of the cell phone policy and the circumstances are severe enough to warrant a twenty (20) day suspension and a final warning effective for thirty (36) months.

A video recording of the period of time immediately prior to the sidewalk collapse and following the sidewalk collapse on 6th and Wabasha was requested by the Union at the Second Step of the grievance process in order to develop a defense for grievant's conduct on September 7, 2010. While the video recording does demonstrate that grievant observed a horrific incident, it also demonstrates that the grievant had his cell phone in his hand and powered on prior to the collapse of the sidewalk. Evidence once submitted may not be used only for a desired purpose. In this instance, the evidence submitted in defense of grievant's conduct became a tool of impeachment. Furthermore, grievant testified that he never stowed his cell phone from the time of the sidewalk collapse until he completed his run. It is impossible to establish that the traumatic incident was the cause of his violation of the cell phone policy, since his cell phone was powered on and in his hand from prior to the sidewalk collapse.

The portion of video recording that reflects the use of a cell phone by the grievant at the end of his run demonstrates that grievant violated the cell phone policy for an extended period of time on September 7, 2010.

The Employer established that grievant knew about the cell phone policy and that he knew he was violating the policy on September 7, 2010.

The cell phone policy is reasonable and is designed to protect Metro Transit, to protect the driver, to protect Metro Transit vehicles, to protect public ridership, to protect individuals traveling or located proximately to any moving bus, and to protect public and private property that may come into the path of a bus that has been mishandled. There is extensive research that demonstrates that driving a bus while manipulating a cell phone is hazardous. Moreover, common sense should dictate that the driver of a 15,000 pound vehicle should not be distracted by a cell phone, while driving over the public streets. The Employer clearly established that the cell phone rule is reasonable and necessary.

The sanctions imposed upon the grievant are consistent with the discipline that has been imposed upon other drivers, who have violated the cell phone rule. Based upon arbitration awards submitted at hearing, the grievant's misconduct was more egregious than the misconduct of other operators who have been suspended for twenty (20) days and received a final warning effective for a period of thirty six (36) months. The level of discipline is consistent with the nature of the misconduct.

The grievance should be denied.

AWARD:

The grievance is hereby denied.

Dated: September 5, 2011

James A. Lundberg, Arbitrator

