

IN THE MATTER OF ARBITRATION BETWEEN

AMALGAMATED TRANSIT UNION LOCAL 1005)	OPINION AND AWARD
MINNEAPOLIS AND ST. PAUL)	
and)	BMS 16-PA-0941
METROPOLITAN COUNCIL)	
METRO TRANSIT DIVISION)	Grievance re: Discipline

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ARBITRATOR: Charlotte Neigh

HEARING: September 22, 2016

CLOSING ARGUMENTS: September 30, 2016

AWARD: October 21, 2016

REPRESENTATIVES

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JURISDICTION AND PROCEDURE

Pursuant to the parties' collective bargaining Agreement and the procedures of the Minnesota Bureau of Mediation Services, Charlotte Neigh was appointed to arbitrate this matter. A hearing was held in Minneapolis at which time both parties had a full opportunity to offer evidence. The parties made oral arguments by telephone on September 30, and the record was closed.

ISSUE

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

PERTINENT AUTHORITY

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

Section/Number 4-7 f states that this policy is necessary in order to perform at the highest degree of care and safety. It lays out a procedure, which for several years has required that:

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

It further states:

- “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.”
- “Bus and Rail Operators will be able to use cell phone and personal electronic devices only at designated layovers.”
- “Use the following procedures for Transit-Related emergencies if the radio is not working. This procedure will apply to both Bus and Rail Operators:
 - Stop the vehicle in a safe location.
 - Secure the vehicle
 - Get out of the seat
 - Retrieve the phone and make the call
 - Then power off and stow the phone before moving the vehicle.”

BACKGROUND AND UNDISPUTED FACTS

The Grievant has operated a bus for the Employer since 1998. Early on February 12, 2016, he pulled out of the garage and headed for the first stop on his route. His repeated attempts to boot up the Mobile Data Terminal (MDT) that is the means of communication with the Transit Control Center (TCC) failed. In order to inform the TCC of this problem, he reached behind his seat and retrieved his cell phone from his jacket pocket and called the TCC. When the Grievant told the TCC operator that he was southbound on a particular street, the operator asked if he was driving, to which the Grievant responded in the affirmative. The TCC operator told him to get off his phone and to call back after he had reached the spot at the beginning of his route where he was scheduled to stop. The Grievant did so, the problem was resolved, and the Grievant finished driving his route that day.

The Grievant was off work on vacation time for several days and when he returned he was informed by his Supervisor that an investigative hearing regarding his violation of procedure 4-7 f would be held on 2/24/16 to determine what course of action should be taken. The Grievant attended the hearing, accompanied by a Union representative. Management's notes from the hearing state that he "chose NOT to view the video or audio of the incident"; however the Supervisor testified that prior to this meeting she gave the Grievant and his Union representative the video and watched them enter a room where they would be able to view it. In response to questions the Grievant stated that: the weather was bad; the MDT wasn't working; and he was concerned for his safety. The Grievant admitted that using the phone while driving was wrong but he didn't realize what he was doing until the TCC asked him if he was driving and that he couldn't believe he had done it.

By memo dated 2/25/16 the Supervisor notified the Grievant of the Employer's intention to suspend him and of a Loudermill hearing where he could present any information that would support his not being suspended. The Grievant attended this hearing with his Union representative and, according to Management's memo, stated that the weather was bad due to snowing, traffic was horrible, he was late, and "I think I was having trouble with the front and rear door". The Grievant explained that: he needed the radio because of two different incidents on his bus when shots had been fired, including one where a passenger was killed, and the time the windshield blew in on the freeway; he was making a work-related call rather than calling a friend; although it was foolish to call the TCC on his cell phone, he wasn't thinking because he felt uncomfortable and unsafe without communication.

The Employer issued a Final Record of Warning (FROW) and a 20-day suspension based on his using a cell phone while operating a bus, in violation of the policy. The Grievant lost 20 days of work during the month of March. The Union filed a grievance dated 3/1/16. The parties were unable to resolve this dispute and it proceeded to arbitration.

SUMMARY OF THE PARTIES' ARGUMENTS

THE EMPLOYER ARGUES THAT:

- Using a cell phone while operating a bus is as dangerous, and a violation as grave, as being under the influence of drugs or alcohol, which has been demonstrated by many studies.
- The employees have been repeatedly trained and reminded regarding the policy and the consequences of violating it, and the Grievant acknowledged that he understood this.
- The Employer has consistently imposed the maximum penalty for using a cell phone while operating, with only a couple of exceptions in cases involving failing to turn it off or properly stow it.
- Even if the Grievant's violation was due to negligence rather than intentional, it was just as dangerous to public safety and management has taken extensive measures to assure it doesn't happen.
- The Grievant's claimed anxiety due to previous shootings on his bus could have been accommodated by following the procedure of pulling over, securing the bus, and exiting the seat before retrieving or using the cell phone. The Grievant was only a few minutes away from his first scheduled stop and there was no reason not to wait.
- The mitigating circumstances claimed by the Union do not measure up to other cases and it is attempting to water down the level of discipline for this offense.
- The Employer judges all of these incidents on a case-by-case basis and was more lenient in a couple of cases in 2010 and 2011 when management was involved in causing the employee to violate the policy.
- The maximum penalty has been imposed in almost all of the 60 violations since 2010 and has been upheld in most of the arbitration cases. Arbitrators have reduced the penalty in a minority of cases that are distinguishable from this case.
- The penalty is reasonable, considering that the Employer's relative leniency contrasts with the majority of similar employers in the country that provide for termination of employment upon the first violation.
- The penalty imposed was within the bounds of reasonableness and the Arbitrator's judgment should not be substituted for the Employer's.

THE UNION ARGUES THAT:

- This is an 18-year employee with a good record and substantial mitigating circumstances make the penalty unreasonable compared to similar cases. The Union is selective about taking cases to arbitration and does so only when there are mitigating circumstances.
- The Employer prefers cookie-cutter uniformity and tries to impose the maximum penalty in all cases where a cell phone is used despite the circumstances.
- The maximum penalty is not warranted here since the policy was revised from “20 days” to “up to 20 days”, reflecting that discretion should dictate a lesser penalty for less egregious violations. The penalty should distinguish between a negligent, unintentional violation and an intentional one.
- Other arbitrators have reduced the penalty imposed by the Employer, even for a violation worse than the Grievant’s.
- The Grievant was understandably anxious about proceeding without an operational MDT given his 2001 experience of a deadly shooting on his bus, another shooting on his bus, the increasing number of assaults on bus drivers, and the dangerousness of his route.
- The Grievant doesn’t usually bring his cell phone to work but was relieved to realize that it was in his jacket pocket as he was anticipating a stop at a trouble spot on his route. His anxiety caused him to make a mistake and use his cell to call the TCC. He didn’t realize the violation until he was asked by the TCC operator if he was driving.
- No passengers were on board, there was a buffer of space ahead of the bus, it was not on a highway or traveling fast, and the call was in the interest of the Employer. These mitigating circumstances argue against the loss of a month’s pay; a Final Warning that lasts 36 months is sufficient to deter the Grievant from another violation.

ANALYSIS AND DISCUSSION

The Employer’s impressive effort to change the culture of constantly using cell phones and other personal electronic devices has effectively reduced the number caught doing so while operating Transit vehicles. It is likely that the consistent imposition of the standard severe penalty of an FROW and a 20-day suspension has been a key factor in this reduction.

Since January 2010, there have been 60 disciplinary actions against operators for violating the cell phone procedure by: talking - 36; texting - 9; or use (holding or looking) - 13. Other than cases where a probationary employee was discharged or the employee resigned, the Employer imposed the severest penalty in all cases except: two early cases of a 2-day suspension because of management involvement in causing the violation; one case of a 19-day suspension because of accidental dialing while sitting on the phone; and one case of a 15-day suspension because the violation occurred in a layover rather than on a street.

Analysis and Discussion (continued)

Eight of these cases went to arbitration and two to a veteran's preference hearing officer: the penalty was upheld in seven cases; the penalty was reduced to 15 days in one case because the violation occurred in a layover rather than on a street; in one early case the FROW was removed and the suspension reduced to ten days because the arbitrator disagreed that it was serious enough to warrant the severest penalty; and in one case the grievance was sustained because the arbitrator found insufficient evidence to prove the violation.

Although management has discretion to impose a lesser penalty, it has exercised this option judiciously while explaining the reasons for deviating from the standard discipline. The majority of the arbitrators and hearing officers have likewise shown restraint and deference to management's reasonable exercise of its authority in this important area of public safety. This creates a high hurdle for the Union in seeking to challenge the penalty in this case.

Although the Grievant's early excuses of multiple problems with weather, traffic and his bus that morning were not borne out by the evidence, his claim of temporarily forgetting the ban on using his cell phone while driving is credible. His sudden recognition of the violation when asked by the TCC operator whether he was driving was palpable. It is understandable that he would be frustrated after many attempts to boot up the MDT and that he would be concerned about operating without it on a relatively dangerous route, given his prior horrific experiences as an operator for the Employer, as well as when previously operating a train in Chicago. Moreover, the Employer does not dispute that the Grievant's violation was unintentional and for work-related reasons.

However, the Grievant had a ready alternative, as he was only a few minutes from his first stop, where he could follow the proper procedure. The Employer persuasively argues that: the rule and the penalty are meant to cover all instances of talking on a cell phone while operating; and its ongoing efforts to remind operators of this should cause them to think before reaching for one while driving.

It is concluded that the standard penalty for talking on a cell phone while driving is a reasonable response to a serious safety violation and that the circumstances in this instance do not warrant a deviation.

AWARD

The grievance is denied.

October 21, 2016

Charlotte Neigh, Arbitrator