In Re the Arbitration Between

Amalgamated Transit Union Local 1005, Union
and
Metro Transit, a division of Metropolitan Council, Employer

BMS Case # 10-PA-1030

Carol Berg O'Toole
Arbitrator

June 1, 2010

Representatives:

For the Employer:
Andrew Parker, Esquire

For the Union:
Roger A. Jensen, Esquire

Appearances:

For the Employer:
Julie Johanson, Deputy Chief of Business Operations

For the Union:
Michelle Sommers, President and Business Agent

In Attendance:

For the Employer:
Christy Bailly, Director Business Operations
Marcia M. Keown, PHR, Labor Relations Specialist
Michael Conlon, Director of Rail and Business Safety
Sandi Blaeser, Assistant Director Labor Relations

For the Union:
Dan Abramowicz

Preliminary Statement

The hearing in the above matter commenced shortly after 9:00 A.M. on April 22, 2010, at the law offices of counsel, Roger A. Jensen, Miller O'Brien Cummins, PLL, One Financial Plaza, 120 South Sixth Street, Suite 2400, Minneapolis, Minnesota. The parties involved are Metro Transit, a division of Metropolitan Council (Employer) and Amalgamated Transit Union Local 1005 (Union). The parties are signatories to a collective bargaining agreement, Joint Exhibit 1 (Agreement). The parties presented opening statements, oral testimony, oral argument, and exhibits and agreed on closing statements in lieu of post hearing briefs. The arbitrator closed the hearing on April 22, 2010.

Issues Presented

1. Should the hearing be bifurcated with the arbitrability of the establishment of the cell phone policy decided separately from a hearing on whether the cell phone policy provisions on discipline violate the Agreement?
2. Does the arbitrator have jurisdiction to decide if establishment of the cell phone policy is subject to arbitration?
3. Does the arbitrator have jurisdiction to decide if the provisions of the cell phone policy related to discipline are arbitrable?

Contractual and Statutory Jurisdiction

The issues in the grievance were submitted to Carol Berg O'Toole, acting as the sole arbitrator under the terms of Article 13 of the Aagreement between the parties. At the hearing the parties waived the requirement for a tripartite panel as provided in Article 13 of the Agreement and agreed that the sole arbitrator had been properly selected from a list of arbitrators put forth by the State of Minnesota Bureau of Mediation Services. The parties agreed that the issue of arbitrability was properly before the arbitrator. The parties disagreed on how the issue of arbitrability and merits be heard by the arbitrator.

The Union favored hearing both at the same session. The Employer favored and moved for a bifurcated hearing with the issue of arbitrability decided first.

Background

The Union is the certified bargaining representative for the transit employees covered by the collective bargaining agreement. The Employer operates the public bus and light rail transportation operation for the Minneapolis and Saint Paul, Minnesota metropolitan area. The Employer and the Union are signatories to a collective bargaining agreement covering the period from August 1, 2008 to and including July 31, 2010, which provides in Article 13 that if a dispute arises under the Agreement which cannot be resolved by he parties it shall be submitted to arbitration.

On June 26, 2009, Peter M. Rogoff, Administrator, Federal Transit Authority, issued a letter, Union Exhibit #1, asking that the Employer "closely review your policies, procedures, and enforcement mechanisms targeting the inappropriate use of cell phones and other personal electronic devices by safety critical people". On November 19, 2009, the Employer's task force completed a draft of the cell phone policy. The draft policy was presented to the Union at a meet and confer session on the same day.

On December 4, 2009, the Employer issued Bulletin No. 74, Joint Exhibit 2, to all operators, miscellaneous operators, dispatchers, coordinators and instructors which provided that , "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". The bulletin specified penalties including termination after the second violation, regardless of the length of time between the first and second offense. It also provided that a rail operator violating the policy would be returned to bus operation.

On December 15, 2009 the union grieved the Employer's cell phone policy, alleging a violation of Article 5, Section 2, and Article 11. The grievance stated that the Employer's actions violated the provisions of Section 2 stating, "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." They alleged violation of Article 1, specifically, the language reading, "Work rules and/or practices may not be in conflict with the contract" and "New work rules and/or practices must be reasonable."

Issue Number 1: Should the hearing be bifurcated with the arbitrability of the establishment of the cell phone policy decided separately from a hearing on whether the policy provisions on discipline violate the Agreement ?

Employer's Position

1. The Employer argues that there is no agreement to arbitrate disputes involving safety issues because they are policy issues. The policy on use and carrying of cell phones is not arbitrable, but the punishment items related to them are.
2. The Employer moves for a bifurcated hearing to address the issues separately.
3. The Employer states that the cell phone issue is similar to drugs and alcohol, a safety issue. Further, the mere ringing of a cell phone may be enough to distract and that driving with a cell phone turned on is akin to driving with a .08 alcohol reading.
4. In support of the argument for bifurcation and for a ruling that the establishment of a policy on the use of cell phones and electronic devices is not arbitrable, the Employer points to Joint Exhibit 1, Article 4. The employer argues that the language of Article 4 is clear and must be enforced. This policy issue is

grievable, but not arbitrable, by virtue of the exclusion as a safety issue. The provision reads that "The ATU recognizes…the following matters specifically mentioned are a function of management of the business, including…rules and regulations requisite to safety." The policy on use of cell phones and electronic devices are matters requisite to safety.

5. The Employer urges giving deference to a 1995 arbitration dealing with another safety issue, a drug and alcohol policy. In that arbitration the identical issue was raised, the arbitrator ruled that the policy was not subject to arbitration, and the arbitrator declined to decide the merits.
6. The Employer states that the parties agree that they met and conferred on the cell phone policy and that a policy on cell phone usage is a safety matter covered by Article 4 as a rule and regulation requisite to safety.
7. The Employer also argues that the language of Article 5, Section 1, providing that discipline shall be just and merited, is arbitrible when an employee is disciplined for an infringement of the policy on cell phone use. It is well-settled in labor relations that the employer can establish rules and a union can grieve the carrying out of the rules. The Employer also argues that the work rules must also be reasonable under Article 11
8. The Employer argues that to arbitrate this safety policy would render meaningless the last sentence of the first paragraph of Article 4 which reads Metro Transit shall not be required to submit such matters to the Board of Arbitration.
9. The Employer argues that the reason bifurcation is appropriate is that the case is not a standard case and that *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960) supports that position, specifically, "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any

dispute which he has not agreed so to submit." The arbitrator does not have the jurisdiction to hear parties unless the parties agree.

10. The Employer argues that the Union has a right to grieve the application of the policy, specifically the three application issues. Discipline for safety violations is contractual matter that is arbitrable. The Employer states, "Union, you will have your day." If the 36 month rule is in conflict with the contract, "grieve it when it comes up."
11. The Employer points out that there are currently very specific emergency procedures available to operators so that prohibition of cell hone use does not leave the employees defenseless in an emergency. The Employer points to the radio system in each vehicle and rail car.

Union's Position

1. The Union argues that Article 5 of the Agreement titled Grievance Procedure incorporates the arbitration procedure for issues such as this, by reference in the 3rd Step. The Union opposes the motion to bifurcate the hearing.
2. The Union argues that the decision in the 1995 arbitration involving the drug and alcohol policy was wrong and, nevertheless, not binding, as there is no *stare decisis* in arbitration. They state that the arbitrator "got it wrong", was not a lawyer and didn't understand the arguments.
3. The Union does not disagree that the prohibition of using cell phones is a safety issue. But, the Union contends that the policy contains many other issues than safety. The Union objects specifically to the "stowed off the person" provision of the policy. as well as the disregard of the length of time between the first and second offense. The Union claims that the Agreement's provision that states that "Metro Transit shall not give consideration to adverse entries on an employee's disciplinary record involving incidents occurring more than thirty–six months prior to the date of the incident which gives rise to the contemplated discipline."

4. The Union argues that the Employer “pack[ed] that same policy with lots of peripheral matters” and that each issue must be examined to see if it is safety-related.
5. The Union urged that all the evidence be heard at one time, including evidence on the merits of the issue.
6. The Union argues that it is ironic that the Employer argues that the precedent of *United Steelworkers* be applied in the instant dispute, given the message of the case: that is, *United Steelworkers* stands for the proposition of deferral of matters to arbitration so that the “rule of the shop” can be applied. Therefore, the policy, merits and all, should be arbitrated.
7. The Union indicates that the policy is flawed as there is no emergency provision for cell phone use and that if a “bad guy [is] on the bus and the radio is not in working order…” the employee will be in trouble. They argue that if an operator is shot at while operating the bus [the operator] will not be able to report the location.” The Union believes that there should be an emergency exception built into the policy.

Discussion and Decision on Issue Number 1

At the close of argument which included arguments and multiple rebuttals by the Union and the Employer, a short recess was held, followed by a bench decision. The arbitrator ruled that the hearing should be bifurcated; that, in the absence of present violations of the disciplinary provisions of the policy, the only matter to be arbitrated at this time was whether the policy was arbitrable. The parties proceeded, after a short recess, to present their cases in chief.

Issue Number 2

Does the arbitrator have jurisdiction to decide if establishment of the cell phone policy is subject to arbitration?

Employer's Position

1. Julie Johanson, Deputy Chief of Business Operations, was the first and only witness for the Employer.
2. Johanson indicated that she had thirty-five years experience with the Employer. Her duties included directing personnel, overseeing health and safety training, hiring, representing the Employer to the outside, and acting as assistant and general manager. A year ago she was appointed Deputy Chief of Business Operations. The Employer transports 76 million people over 29 million miles on 15 tons of buses and 100 tons of trains. The operation include both bus and light or commuter rail.
3. Johanson testified that she was involved in development of the drug and alcohol and cell phone policies. She said she did not attend the arbitration hearing on the drug and alcohol policy,
4. Johanson stated that the number one priority was safety. In 2008, there was a very significant accident in California involving cell phone use where 25 people died. "Many things cames together" during that time to draw attention to cell phones.
5. Rogaff's letter dated June 26, 2009, (Union Exhibit #1) dealt with "inappropriate use of cell phones and other personal electronic devices by safety critical personnel". Rogaff asked that policies, procedures and enforcement mechanisms be reviewed, evaluated, and improved as necessary "to address the hazards that inappropriate use of these devices can create".
6. Johanson described the response of the American Public Transportation Association. This group set up a committee to establish best practices across

the country. Johanson described these efforts as helping to shape the early recommendations for a policy at Metro Transit. Johanson said she helped to develop the policy. On November 19, 2009, the Employer and Union convened for a "meet and confer" session on the cell phone policy. The policy was issued on December 4, 2009 with a two week grace period and implementation on December 14, 2009. Johanson said that the Union suggested the two week grace period and the Employer agreed to it. Once the policy was issued, extensive communication was undertaken. The garage managers and assistant garage managers individually contacted operators who acknowledged such contact by signing forms. Posters were prepared and disseminated telling operators to "Turn It Off, Stow It Away".

7. The Union grieved the Cell Phone Policy and on December 15, 2009, the third step grievance hearing was held. Johanson was present and stated that the Union made "no objection to it being a policy".
8. On cross examination, Johanson said that it was necessary to have cell phones turned off and stowed off the person. If not, it would be a "temptation too great". Johanson answered that the disciplinary rule about termination after the second violation was necessary because there should be no opportunity to make a "second mistake' and that such a rule would guarantee safety.
9. When asked about the provisions for emergencies, Johanson said that perhaps emergency exceptions should be spelled out. She added that it was not "our intention to preclude" such exceptions.
10. When asked about the Union's right to arbitrate cases like this, Johanson testified, "Individual cases related to discipline have been arbitrated" in the past. When asked if the Employer tried to take advantage of the prior arbitration ruling on the drug and alcohol policy, she stated they put the reference to drug and alcohol in the preamble to the procedure (Joint Exhibit 3) "because we thought it

was similar". She could think of no other examples that were similar, stating "nothing comes to mind".

11. During redirect, Johanson stated that the language of the Agreement, specifically Article 4, 5, 11, and 13, was the same as it had been when the drug and alcohol policy was enacted and arbitrated.
12. The Employer argues that this arbitrability issue compels looking at the issue established rather than the application of a rule. The Employer argues that Article 4 allows the Employer to establish such policies requisite to safety as a management right.
13. The Employer says that the specific provisions, such as the 36 month rule which the Union says is violated by the provisions in the policy, can be grieved on a case by case basis.

Union's Position

1. The Union called its sole witness, Michelle Sommers, President and Business Agent of the Union. She testified that she had served nine and one-half years as a bus operator and agreed that using a cell phone or electronic devise while operating a bus or light rail is a recognized safety issue.
2. Sommers testified that the provisions the Union objects to are, first, the second bullet in the policy, Joint Exhibit 2. The policy reads, "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." Sommers stated that the provision violates the Agreement, Article 5, Section 2.She states that the provision is not necessary.
3. Sommers testified that when asked if she thought the disciplinary rule was related to safety, "No, I do not." She said, that the Employer "hides behind safety on everything".

4. Sommers testified that every policy does not relate to safety and gave as an example, attendance.
5. Sommers stated that the Union also objects to the recent change on the Employer using reflection from a camera image. She stated that the Union and the Employer had a “verbal agreement” with the Employer, specifically, Sam Jacobs, that cameras won’t be focused on drivers and that reflections would not be used. She said that Steve McLaird indicated that Jacobs was gone and the use of reflections is necessary to obtain information re the rules.
6. Sommers also testified that she objected to the third bullet in the policy, Joint Exhibit 2. It provides that, “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.” Sommers said the policy was unnecessary and the Union objects to it.
7. Sommers pointed out a third provision of the policy the Union objected to, the last bullet in the policy, Joint Exhibit 2, which states, “Should an Operator be involved in an accident while violating this procedure, further disciplinary action up to and including discharge may apply.” She stated that the language can be interpreted “very widely” and that it was “not causal between violation of policy and accidental. Sommers states that Union believes the policy provisions are “not requisite to safety”. On cross examination, she indicated that the policy provision violated Artcle 5, Section 1.
8. On cross examination, Sommers was asked if the Union interpreted the term “requisite as required”? She indicated “yes”.
9. Sommers stated when asked on redirect whether she thought it was not necessary to have explicit disciplinary rules. She said, “No”. She was also asked if she thought the policy of turnoff and stow was necessary. She again said, “No”.

10. The Union argues that any reasonable person would find that the policy and procedure at issue deal with a lot more than “matters requisite to safety”. They argue, for example, that the rule on using reflective images as evidence is an evidentiary rule not to be decided by a policy or procedure.
11. The Union maintains that “requisite to safety” is not the same as “related to” safety.
12. The Union claims the prior arbitration on the drug and alcohol policy where the arbitrator found that the policies were rules and regulations requisite to safety and, therefore, not subject to arbitration was not conclusive to this issue. They argue that other arbitration decisions are advisory, and may be helpful, but not final and binding on other issues.
13. The Union argues that the arbitrator has the authority to determine if the rule is in conflict with the Agreement.

Discussion and Decision on Issue Number 2

The following articles in the Agreement as pertinent to this inquiry: Article 11, Article 13, Article 4; Article 5. Article 11 provides that, work rules and/or practices must be reasonable and are subject to the Grievance Procedure. Article 13 describes the arbitration procedures.

Article 5 states that discipline must be “just and merited” and that “[a]ny dispute or controversy regarding the application, interpretation or enforcement of any of the provisions of this Agreement, shall constitute a grievance”. No grievant testified that he or she had been wrongly disciplined under the new cell phone policy. No case was presented where an employee was moved from light rail to bus operation at the first infraction of the cell phone policy, using a phone or electronic device while operating light rail. No testimony was presented regarding unmerited discipline based on reflections off windows in showing improper stowing of a cell phone.

Article 4 specifically mentions that certain items are a function of management of the business including rules and regulations requisite to safety and that the Employer is “not required to submit those matters to the Board of Arbitration provided by Article 13”. The inquiry then is whether this is a rule and regulation requisite to safety.

If such a case had been presented, the Employer would have the burden of proof. The Employer would have to prove the discipline of the particular employee was just and merited under all the circumstances. Evidence on the employee’s record, disparate treatment of other employees with similar transgressions, knowledge of the policy, the disciplinary investigation and the employee actions, as well as a myriad of other specifics, would be considered to determine if the grievance should be sustained or denied. No actual issues, such as those, are present here. There is not a specific allegation by a grievant about violation of the Agreement.

In 2009 the Employer implemented a policy urged by the federal government after numerous accidents involving use of cell phones and electronic devices. The Union was consulted during the process and was successful in gaining a two week delay in implementation. The Agreement between the parties allows the Employer to implement safety policies and procedures without submitting such matters to arbitration under Article 13. The language is clear that policy establishment requisite to safety and health is an exception. There is no exception to the exclusion of safety policies from arbitration. There is no showing that the parties intended to have such an exclusion. “Management may establish… work rules unilaterally to ensure the health and safety of employees and others.” *Gerstenslager Co.* 114 LA 1290, 1293 (Lalka, 2000) as cited by Elkouri & Elkouri (2003) at 778.

Whether the discipline meted out under such a policy is reasonable under specific circumstances or just and merited for a particular employee is a matter for another day. No evidence of discipline meted out by the Employer under the cell phone policy was presented. To decide an issue based on what might happen is inappropriate, unnecessary, and improper under the Agreement. The Union seeks to prevent the Employer from establishing rules and regulations on cell phone use. The Agreement clearly permits such establishment, but leaves open the ability of the Union to grieve the application of the policy when such an application occurs. Finding otherwise would fly in the face of the clear prerogative of the Employer outlined in Article 4. The arbitrator is bound by the Agreement between the parties where there is clear and unequivocal language providing that the establishment of safety policies is not arbitrable.

Decsion The establishment of the cell phone policy is not subject to arbitration. The establishment of the cell phone policy is a rule and regulation requisite to safety and specifically exempted from the arbitration provision of the Agreement. Because the issue is not arbitrable it is not necessary to reach the merits and the third issue.

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Carol Berg O'Toole June 1, 2010