

IN THE MATTER OF GRIEVANCE ARBITRATION

BETWEEN)	
KANSAS CITY AREA)	FMCS Grievance No. 01222-A
TRANSPORTATION AUTHORITY,)	
)	
Employer,)	Grievant, Kevin Groves
)	
AND)	Hugh J. Perry, Arbitrator
AMALGAMATED TRANSIT UNION)	
LOCAL NO. 1287,)	
)	Award Issued October 20, 2009
Union.)	

APPEARANCES:

FOR KANSAS CITY ATA:
JEFFREY M. PLACE, ATTORNEY

FOR ATU LOCAL 1287:
SCOTT A. RAISHER, ATTORNEY

BACKGROUND

Amalgamated Transit Union Local No. 1287 represents a bargaining unit comprised of drivers, mechanics, clerical and maintenance employees of the Kansas City Area Transportation Authority, including Kevin Groves, a Class A Service worker who grieves his suspension for three days without pay for conduct which occurred on October 22, 2008. A hearing was held on April 9, 2009 at the KCATA offices in Kansas City. Following testimony and the submission of written and visual exhibits on that date, the parties submitted written arguments which were received on June 17, 2009 on which date the hearing was closed. The parties agree that the matter is properly before the arbitrator for an award.

ISSUE

The parties did not agree on a statement of the issue. I consider the following a fair statement of the issue: **Whether the Employer had just cause to suspend Kevin Groves for 3 days without pay for conduct he engaged in on October 22, 2008 and, if not, what is the appropriate remedy?**

RELEVANT CONTRACT PROVISIONS

Article I - General Provisions

Section 1.12 Management - Discipline....

(b) The Union further recognizes that the power of discipline is vested exclusively in the Authority, and it will not attempt to interfere with or limit the Authority in the discharge or discipline of its employees for just cause; subject, however, to the right of any employee to whom this Agreement is applicable and who may be discharged or disciplined, to present as a grievance, for action in accordance with the grievance procedure hereinafter in Section 1.13 set forth, the question whether he has been discharged or disciplined for just cause.....

Employer's Discipline Code

This discipline code standardizes types of penalties for various violations of rules. It also informs Transit Division employees of what may be imposed for continued violations of rules and regulations. This code is to serve as a guide to employees and supervisory personnel involved in disciplinary matters.

This code is not a hard and fast limitation upon supervisory personnel in dealing with disciplinary matters.

Penalties for multiple violations occurring at the same time will be dealt with at the discretion of the supervisory personnel.

Whenever disciplinary action is contemplated, the supervisor will consider the employee's total record or other violations of Transit Division rules before determining the penalty. It is not the intent to discipline any employee when a particular violation is minor and is an isolated incident in an otherwise good work record.

GENERAL RULES OF CONDUCT

The rules are applicable to all Maintenance and Purchasing Department Employees of the Transit Division, Kansas City Area Transportation Authority.

2. Intentional spoiling of work product or restricting output

First Offense: Suspend three (3) days

Second Offense: Discharge

31. Productivity and workmanship below standard or deliberately restricting output

First Offense: Reprimand (warning notice)

Second Offense: Suspend three (3) days

Third Offense: Suspend five (5) days

Fourth Offense: Discharge

FACTS

KCATA provides bus service to the residents of the Kansas City Metropolitan Area. Local 1287 represents drivers, mechanics, clerks and maintenance employees of the KCATA. Included

in the bargaining unit is Kevin Groves. He is a Class A Service Worker. His seniority date is March 22, 2004. Grievant's entire tenure with KCATA has been on the Service Line working the evening shift (5:30 PM - 1:30 AM with a break from 9:50 PM to 10:50 PM). As a Service Worker, Grievant's job is to pick up a bus brought in by an operator, proceed to the fueling station line and then drive the bus through the bus barn service line, having the bus washed, parking it at the end of the line ready for an operator to pick up and drive the next day and then picking up another bus, taking it to the fueling station to start the whole process again. In addition to driving the bus along the service line, a service worker is required to clean the bus of trash, vacuum it and insure that all windows are properly closed and sealed. There are sufficient breaks in driving a bus from the start of the line to the end to accomplish these tasks. No set time limit is placed on the time a service worker has to accomplish the task of starting one bus at the fueling station and driving it through the service line and then bringing up another bus for refueling, however, most workers accomplish this in an average of 12-15 minutes.

Certain written Employee Expectations were distributed by maintenance department supervisory staff. One in 2007 indicated, among other things, that the use of cell phones would be limited to break times or lunch. Employees were directed to inform family of a phone number where emergency calls could be taken. Employees were instructed to keep current with information posted on the bulletin boards and admonished that discipline could result from not adhering to the Maintenance Departments Rules and Regulations and the contract. Grievant's immediate supervisor is Tony Bragulla who started with the KCATA in 2005 as an operator. He also worked as a service worker and became night service line supervisor in February of 2008. Bragulla had white boards placed in the work area and put various messages on them including: *stay off cell phones as all times, unless on break, this includes texting*. He talked to his employees numerous times about staying off cell phones during work time. On June 30, 2008 Bragulla received a note from his lead man, A. Hackley: *Kevin never closed any windows or hatches on Sunday (June 29). He hardly left the drivers seat. Cleaning bus was slim*. Upon investigation, Bragulla determined that Grievant's bus had not been properly cleaned before being taken out on its next run. The bus was not in service until Monday when a driver complained of trash in the bus. Each bus is equipped with a video camera which documents activities of the drivers and workers. The video for this bus was pulled. It showed Grievant sitting in the driver's seat of the bus for several minutes intermittently talking on his cell phone. One topic of conversation was the preparation of puppy food. While Grievant took the bus through the service line, he picked up but one piece of trash and did not vacuum or clean the bus. The video was introduced at hearing. Based upon these events, Grievant was cited for violation of Rule 31 and given a written reprimand. This discipline was not grieved.

On October 22, 2008 an employee reported to Bragulla that he had not seen Grievant for about an hour. This was at approximately 6:45 PM, a time when Grievant should have been moving and cleaning buses on the service line. Bragulla checked the service activity report which documents the names of employees, their buses, and their times for moving buses through the service line. Bragulla's investigation revealed that some 48 minutes had elapsed between the time Grievant started one bus through the service line and the time he started his next bus, from 5:58 PM to 6:46 PM. Bragulla checked to see if Grievant had gone to the boot truck which was in the area even though he had not obtained the required permission to do so. Grievant had not been to the truck. Bragulla requested that the video from Grievant's bus be pulled. It indicated that Grievant was

talking on his cell phone during some of this time. This video was introduced at hearing. It showed that Grievant had properly cleaned and vacuumed his bus, but when finished, rather than exiting the bus and proceeding to get another, he sat in the driver's seat and commenced making cell phone calls. Due to a mixup in communication, only a few minutes of Grievant's activities were on the video as only a small part was clipped. The video does not show the entire 48 minute period. The video does show that Grievant was talking with someone about the recent death of a friend/relative. Subsequently it was established that the conversation was about the death of a family acquaintance who Grievant hadn't seen or spoken to in some 20 years. On the evening of October 22, 2008 there were 8 other service workers moving and cleaning buses. Each took 2-3 buses through the line, 26 buses total during the 48 minute period

Both Bragulla and his supervisor, Ted Stone, Director of Bus Maintenance thought initially that Grievant was on his cell phone for most if not all of the 34 minutes. They asked Grievant for his cell phone records which Grievant did not produce. They asked Grievant to account for the 34 minutes when he should have been working. Grievant did not account for this time either during the investigation or at the grievance hearing. On the evening of the arbitration hearing Grievant's cell phone records were finally produced. They established that Grievant was on the phone for some 10 minutes of the 34 in question.

It was concluded that Grievant should be disciplined for his conduct. Ted Stone determined that Grievant should be disciplined for violation of Rule 2, intentionally spoiling of work product or restricting work output and impose a 3 day suspension. Stone justified charging Grievant with a violation of Rule 2 rather than 31 as previously grievant maintained the work flow, he was moving his bus through the service line, while here he stopped work, there was no work flowing. The only other employee disciplined for violation of Rule 2 was of an employee whose grievance was pending at the time of this hearing.

By way of defense during the investigation of his conduct, Grievant indicated that some workers jumped ahead to get buses to move down the line and that the line was not particularly busy at that time of night. He justified his cell phone usage by indicating that he was trying to call relatives to find details and time of the funeral service of a distant cousin and that this was the only time he had to make such calls. He indicated that he didn't understand that his supervisor might grant permission to make such a call if asked.

This grievance was filed on October 30, 2008 challenging the discipline under Rule 2 as unjust. The Grievant sought to have the discipline removed from his record and to be made whole.

POSITIONS OF THE PARTIES

The **Employer** contends that the discipline imposed was clearly justified. Grievant had been properly informed that his productivity was unsatisfactory and had been previously disciplined for the same. Nevertheless, Grievant chose on October 22 to simply stop working for more than one-half hour in the middle of his shift. While Grievant had previously been disciplined under Rule 31, he now was being disciplined under a rule intended for more serious violations, even though a violation of Rule 31 would result in the same penalty here, a 3 day suspension. Grievant not only failed to improve his conduct following the earlier written reprimand on June 30, 2008, but his misbehavior escalated. The discipline under rule 2 was reasonable and justified and intended to cause an

immediate correction in Grievant's misconduct when lesser discipline had proven ineffective. The arbitrator should not disturb or second guess KCATA's exercise of its managerial discretion where it falls within the range of reasonable responses to the facts at hand. The grievance should be denied in its entirety.

The Union contends that in order for the Employer to prevail here that it must establish that Grievant violated Rule 2. This is the rule upon which the Employer based its discipline and the rule on which it placed its bet. The Employer should not be allowed to switch horses once the race has begun. The Employer failed to establish that Grievant intended to restrict output in violation of Rule 2. The fact that Grievant may have been on his cell phone for a brief period of time does not justify a three-day suspension under rule 2. In fact Grievant was suspended not because he was on his cell phone but because he could not explain to Ted Stone's satisfaction what he had been doing during the alleged gap. In fact the video tape does not show a 34 minute gap at all but merely a few minutes of time during which Grievant is shown talking on his cell phone. There is no set time for an employee to start one bus at the refueling station to proceed through the service line and wash and then to bring up another bus to repeat the process. Testimony established that some workers jump the line and ambush buses. There is an ebb and flow to the bus service line in terms of buses coming off the street. No prior employee has been disciplined under Rule 2 with the exception of an employee whose arbitration hearing was held May 8, 2009. In preparation for this hearing the Union requested the names of all employees previously disciplined under Rule 2. The Employer mistakenly understood the Union was only interested in employees charged during the previous 5 years. During the May 8th hearing an employee testified that he and some other employees had been charged for violation of Rule 2 for having engaged in a wildcat strike in the 1970's. Grievant's suspension was based on the Employer's acknowledged assumption that he was on his cell phone for 34 minutes and not working. This assumption was incorrect and insufficient to impose the discipline. Clear and convincing evidence is required to support this discipline. There is no evidence that Grievant intentionally restricted output. Being on the cell phone for a period of time does not prove he intentionally restricted output. Grievant's testimony reasonably supports a conclusion that he did not intend to restrict output by making the calls when he did. Whatever Grievant did on October 22nd, he did not violate Rule 2, a rule with far more serious consequences than Rule 31. Intentional spoiling of work is more akin to an act of sabotage or work stoppage. Rule 31 includes the language *productivity and workmanship falling below standard*. Stone's charging Grievant with having violated Rule 2 was an attempt to manipulate the rules and steps of progressive discipline that should not be condoned.

While the Employer will argue that even under Rule 31 Grievant would have been subject to a three day suspension and therefore the grievance should be denied and the suspension upheld, the employer should not be allowed to benefit from such a manipulation of this process. To maintain its integrity, the grievance should be sustained and Grievant made whole for any loss of pay or benefits as the result of the suspension.

DISCUSSION

Considering the facts in a light most favorable to Grievant, I conclude that he initiated calls and talked repeatedly on his cell phone on the evening of October 22, 2008 for a period of at least

10 minutes during work time. The calls could not be characterized as urgent. A period of some 34 minutes elapsed during which Grievant, without explanation, performed no documented work. Other service workers during this period moved over 20 buses through the service line averaging at least 1-2 buses each. Grievant had previously received a written reprimand for violation of Rule 31 for talking on his cell phone during work and failing to clean his bus. He was on notice that talking on his cell phone during work and failing to perform his duties was misconduct which could subject him to discipline. He had already been disciplined for similar conduct which discipline was not challenged.

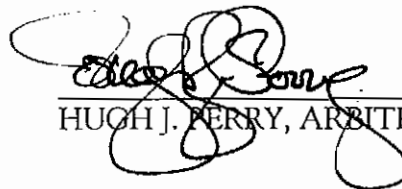
I conclude that Grievant was properly subject to discipline for his actions of October 22nd. The real issue is whether he violated Rule 2 or Rule 31 and if Rule 31 should the grievance be denied because the employer pled the wrong rule when imposing the discipline. Both rules have similar language *intentionally restricting output* (Rule 2) and *deliberately restricting output* (Rule 31). Rule 2 speaks of *intentionally spoiling work product*. Rule 31 addresses *productivity and workmanship below standard*. Rule 2 appears aimed at more serious behavior. It calls initially for more serious discipline and less progression. Rule 31 was used to discipline Grievant for his June misconduct. The October 22nd conduct is similar, although arguably more serious. Grievant used his cell phone and didn't do his work. A violation of Rule 31 would have been the appropriate basis for the imposition of discipline.

Having found Rule 31 to be the more appropriate rule upon which to base this discipline, I don't find that the Employer's citing of Rule 2 rather than Rule 31 mandates the sustaining of this grievance. The imposition of discipline and the filing of grievances is not an exact art in pleading or procedure. Of paramount importance is the requirement that prior to being disciplined employees be placed on notice that certain conduct in the workplace is unacceptable and could lead to appropriate penalties. Grievant here had such notice based upon his previous written reprimand and upon the Employer's written and oral communications prohibiting casual cell phone use during work. The three day suspension was appropriate under Rule 31. Any further violation of this Rule by Grievant could lead to a five day suspension and then discharge. Based upon this discussion, the following award is entered.

AWARD

Based upon the above discussion, it is concluded that the Grievance should be and is hereby denied.

Signed this 20th day of October, 2009.



HUGH J. PERRY, ARBITRATOR