

IN THE MATTER OF THE GRIEVANCE ARBITRATION BETWEEN

**KANSAS CITY AREA
TRANSIT AUTHORITY**

and

**LOCAL 1287
AMALGAMATED TRANSIT UNION**

**ARBITRATION
OPINION AND AWARD**

Ruth M. Weatherly J.D., MBA
Neutral Member of the
Arbitration Board
Issued: June 16, 2010

Re: Ralls Discharge

ATU Member: William Wilson
KCATA Member: Fern Kohler

FMCS #01303-A

Appearances

*For Kansas City Area
Transit Authority:*
Michael F. Delaney, Atty.
Spencer Fane Britt &
Browne
Suite 700 40 Corp. Woods
9401 Indian Creek Pkwy
Overland Park, Kansas 66210

*For Local 1287 Amalgamated
Transit Union:*
Scott A. Raisher, Atty.
Jolley Walsh Hurley Raisher &
Aubrey
204 W. Linwood Blvd.
Kansas City, Missouri 64111

mdelaney@spencerfane.com

scorail@hotmail.com

Background and Brief Summary of Facts

KCATA provides bi-state mass transit service to the general public through a fleet of approximately 300 buses. ATU Local 1287 represents about 700 of the Authority's bargained-for employees. The parties are signatories to a labor agreement ("Agreement") executed on March 19, 2008 and expiring on December 31, 2010, submitted as Joint Exhibit 1.¹

¹ Employer's Exhibits 1 through 21 were accepted into the record; ATU introduced Exhibits 22 and 23, also accepted.

Ms. Vickie Ralls², a bus operator for KCATA, was employed for about three years prior to her discharge on August 12, 2009. The discharge was grieved; and, appealed to arbitration on August 29, 2009.

KCATA prohibits use of cell phones and other electronic devices by its drivers while driving. Bulletin No. 43-01 (August 8, 2001)³ states:

"Bus Operators, who are observed using cell phones while driving, will be subject to the following disciplinary measures: First offense - one-day suspension; Second offense - three-day suspension; and Third offense - discharge."

The Employer had previously "promulgated, posted and distributed to operators a number of Bulletins concerning cell phone usage."⁴

Ms. Ralls' discharge was based upon the Employer's claim that she had violated the cell phone prohibition three times within a twelve month period. Those incidents were on February 19,⁵ March 4,⁶ and August 10, 2009.⁷

Jurisdiction

The hearing was held on April 5, 2010 at the Breen Building (Forest Ave. & E. 18th Street) in Kansas City. The hearing began at about 9:00 a.m. and adjourned shortly after 3:00 p.m. the same day.

The parties agreed that witness sequestration was not required. The following witnesses were sworn and gave testimony:

For Kansas City Area
Transit Authority⁸
Gaylord Salisbury
Manager of Safety and
Instruction

For Local 1287, Amalgamated
Transit Union⁹
Vickie L. Ralls
Grievant

² Ms. Ralls' first name is not consistently spelled in the parties' materials. I use the spelling consistent with her signature on Exhibit. 12.

³ Exhibit 3

⁴ ATU Brief at p. 3, citing Exhibits 4-7, Bulletins dated 1996, 1999, 2000, and 2001

⁵ Exhibit 12

⁶ Exhibit 13

⁷ Exhibit 15

⁸ Hereinafter "KCATA" or "Employer"

⁹ Hereinafter "ATU" or "Union"

Tommie Hill	Ronald Love
Manager of Road	Executive Board Member
Supervision	William Wilson
Tom Morgan	President, ATU Local 1287
Superintendent of	
Transportation	

Also in attendance were:

Bob Kohler, KCATA Director of Transportation
Shawn Ford, Attorney¹⁰

The parties pursuant to their practice audio-recorded the hearing, and provided the undersigned with a CD of the recording. Neither party sought any other means of making a record, or the subpoena of any witnesses. Both parties had the opportunity to fully present testimony and evidence in support of their cases, and to cross-examine the witnesses.

The parties agreed at hearing that this matter is arbitrable, and not affected by any procedural questions. Both parties filed closing briefs by mail. The undersigned received the briefs and the matter was deemed fully submitted on May 14, 2010.

The Issue

The parties' statements of the issue varied slightly.¹¹ However, the essence of the issue is clear. It is:

Whether, under all the facts and circumstances was the discharge of Grievant Vickie Ralls for just cause; if not, what shall be the appropriate remedy?

Relevant Provisions of the Labor Agreement

Section 1.12. Management - Discipline

(a) The Union recognizes that the management of the

¹⁰ Attorney Ford, from the Spencer Fane firm, signed the post-hearing brief for KCATA

¹¹ ATU Local 1287 brief includes the language "under all the facts and circumstances" while KCATA does not. It would be inappropriate to assess whether there is just cause for a discharge *without* considering all the facts and circumstances.

business, including the right to direct the working forces, to prescribe, effectuate and change service and work schedules . . . to relieve employees from duty because of lack of available work or for other legitimate reasons, . . . is vested exclusively in the Authority; subject, however, to the seniority rules and grievance procedure hereinafter set forth as concerns any employee to whom this Agreement is applicable and who may be relieved from duty or transferred or whose qualifications may be questioned.

(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; . . .

(c) The Union covenants that its members shall render faithful service in their respective positions and will cooperate with the management in the efficient operation of the business . . .

(e) Warning slips may remain in an employee's file but shall not be considered after twelve (12) months for the purpose of progressive discipline, but may be considered in reviewing the employee's record only for determining whether moderation of discipline is warranted.

Section 1.13. Grievances

Any employee to whom this Agreement is applicable and who claims to be aggrieved by any action of the Authority or its officials, whether occasioned by discharge, suspension or other discipline . . . may proceed in accordance with the following grievance procedure . . .

1. The Employee, or his accredited Union representative shall personally and informally present the alleged grievance . . . within seven (7) days after same has come to his attention, otherwise it shall not be considered; . . .

4. If the Director's decision is not satisfactory, then the dispute may be referred to arbitration by the Union delivering a notice of intent to arbitrate

The matter may be submitted to regular or expedited arbitration. Expedited arbitration must be by mutual consent.

. . .

7. When a case is submitted to an Arbitration Board, the Authority and the employee involved (or his representative) shall jointly present a statement in writing of the specific issue or issues to be decided, based on the record . . . and the Arbitration Board shall confine its decision to the issue or issues so presented; and no such Arbitration Board shall be authorized to deal with wages, hours of service or working condition controversies of a general nature, but shall be limited to considering and acting upon individual grievances as hereinbefore provided.

. . .

Summary of Positions of the Parties

KCATA

The Employer, under its contractual authority, promulgated a Manual of Instruction, Operating Rules, and Discipline Code. Section 5.8 of that Code, as extended by the language of Policy Bulletins, prohibits use of "cellular phones, scanners, or any other electronic device not authorized by the Authority."¹² On February 19, 2009 Authority Supervisor Crumpton observed the Grievant as she "pulled up on her inbound trip. . . with an earpiece in her ear."¹³ For this violation, Vickie Ralls' discipline was a one-day suspension, which was not grieved. However, at the hearing herein, Ms. Ralls testified to a newly-developed explanation, that Mr. Crumpton did not observe her either operating her bus, or with an earpiece in her ear. She testified that she had in her possession an iPod on February 19, 2009, and that the earplugs were on her shoulder when Mr. Crumpton saw her.

The March 4, 2009 violation, essentially undisputed by Ms. Ralls, was discovered through examination (arising from a passenger incident) of the video from her bus on-board camera. Ms. Ralls declined union representation at the subsequent March 16 disciplinary meeting, which resulted in a three-day suspension, the third day of which was waived.

On August 10, 2009, Vickie Ralls again violated the cell phone prohibition policy. On that day, Ms. Ralls worked a split shift. During her off-duty break from 10:10 a.m. to 12:35 p.m., she spoke with her son, who suffers from a type of high-risk leukemia in remission, but which requires

¹² Exhibit 4

¹³ Exhibit 12

ongoing treatment and medications. The son identified a discrepancy in a medication he had been prescribed; due to the risks associated with incorrect medicines, Ms. Ralls called both her son's doctor and the pharmacy, leaving messages for both. While Grievant could have made arrangements through the KCATA dispatcher to take the phone call and message for her, or otherwise arranged to handle the contact without doing so while behind the wheel of her bus, she did not; instead, she returned to work with her cell phone. Later, her cell phone did ring. She answered it, and spoke for several minutes while operating her bus. The call was not from the doctor or the pharmacist, but rather from a parole officer inquiring about a family member. Grievant subsequently pulled over to call the family member to provide contact information. KCATA discovered this August 10, 2009 violation in a review of on-board camera video tapes, examined due to a report that Grievant had failed to acknowledge a dispatcher's message, and that she had left her route and taken an unauthorized break at a relative's house.

While the Union presentation of its case contemplates that the facts of the first (February 19, 2009) cell phone violation can and should be reconsidered in the context of this discharge proceeding, in fact, such is inappropriate. The Agreement, at Section 1.13(1) specifically limits to seven days the time period within which anyone "aggrieved by any action of the Authority" may file a grievance. The Union does not have an extra-contractual right to wait until the employee's discharge to assert her innocence as to a prior infraction, and discipline.

KCATA clearly had just cause to discharge Vickie Ralls, in view of her repeated and flagrant violation of the policy prohibiting use of cell phones and electronic devices while operating a bus. This policy is essential to the safe operation of the Employer's fleet. The grievance must be denied in its entirety.

ATU Local 1287

The Grievant did not dispute that she violated the cell phone prohibition on March 4, 2009 (the second incident.) As to the August 10, 2009 (third) incident, which led to Ms. Ralls' discharge, the circumstances must be considered. Ms. Ralls worked a split shift that day, assigned to a Metroflex "demand response" vehicle with no set route; the

drivers have some degree of flexibility with regard to breaks, restroom stops and time off the bus. Ms. Ralls' work time that day was 6:25 a.m. to 10:10 a.m. and 12:35 p.m. to 6:45 p.m. She had taken a call from her son following her morning assignment, with questions about medication he had received. In view of her son's illness and the importance of the correct medications, she placed calls to both the pharmacy and the physician, hoping that she would hear from them during her layover. As was documented on the bus on-board video, Ms. Ralls did receive and answered a call while operating the bus. It was not from the doctor or the pharmacy, but rather from a probation office representative, seeking information about Ms. Ralls' relative. For about a minute, Ms. Ralls spoke on the phone, via the speakerphone mode. After stopping the bus, she made a call to her relative.

The first alleged cell phone violation was on February 19, 2009. KCATA disciplined Ms. Ralls after Supervisor Crumpton, according to the employer, observed Grievant as she "pulled up on her inbound trip" . . . with an ear piece in her ear" which Grievant "quickly pulled . . . out."¹⁴ Ms. Ralls was entitled to union representation during the resulting disciplinary meeting with Tommie Hill on February 24, 2009; she declined representation, signed the disciplinary form and served the one-day suspension. Ms. Ralls had no effective opportunity to tell her side of the February 19, 2009 incident until the arbitration hearing. She testified that when she saw Mr. Crumpton on February 19 in a KCATA vehicle at the Indian Springs location, she called him to her bus in order to ask him to answer questions raised by a passenger on her bus. When Mr. Crumpton approached the driver-side window of the stopped bus, he told Ms. Ralls to see Tommie Hill the next working day, due to her "earphones." Ms. Ralls explained at the arbitration hearing she had earplugs to an iPod, which were not in her ears, but rather draped over her shoulder.

During the Step III hearing leading to this arbitration proceeding, Mr. Tom Morgan stated the decision to discharge Ms. Ralls was based upon three violations of the "cell phone" prohibition. In considering the discharge, Mr. Morgan chose to revisit the facts of the February 19, 2009 incident, and contacted Mr. Crumpton in doing so. He set out in his Step III decision what he learned from that

¹⁴ Exhibit 12

contact. The arbitration hearing was the first practical opportunity the Union had to address what Mr. Crumpton allegedly said. Mr. Morgan reopened consideration of the facts of February 19 incident; it is within the discretion of the arbitrator in this proceeding to also consider those facts.

Analysis and Findings

Much evidence presented at the hearing focused on the hazards of distracted driving, and most specifically, on the dangers associated with use of cell phones while behind the wheel. It's clear that none of us ought to use a cell phone while driving. Yet, drivers in states where cell phone use has been regulated fail to follow "hands free" requirements, and this arbitration proceeding shows that even the threat of negative job consequences does not prevent drivers' forbidden cell phone use.¹⁵ The ability to be available electronically has somehow "morphed" into a perceived need to be reachable, to have instantaneous communication, and to an expectation that others will also be available at all times. As referenced by Counsel for ATU Local 1287¹⁶, we may unfortunately be succumbing to various systems, allowing those systems to override our individual conscious knowledge of choices that are right or wrong (e.g., dangerous) in given situations. Nevertheless, rules are rules, and violations of rules must have consequences. In the application herein, the consequences must depend upon a finding that just cause and its attendant elements are the foundation for the determination that a violation has occurred.

1) The "just cause" requirement

The Agreement between the parties requires that discipline be founded upon just cause. "Just cause" is a central concept "permeating discipline and discharge arbitration", even in the absence of specific contract language.¹⁷

¹⁵ At the risk of venturing into an area in which my opinion is neither sought nor required, I will pose a question. Is the disciplinary system associated with cell phone use by drivers effective? Exhibit 20 indicates that over a 15 month period, operators violated the rule over 6 times each month. As suggested by Member Kohler in her May 21, 2010 letter, the work rule prohibiting the use of personal electronic devices is, appropriately, all about safety. Any one of the incidents for which operators were issued warning slips between January 2009 and March 2010 could have resulted in a collision, injury, or a loss of life.

¹⁶ Union's Post-Hearing Brief p. 3

¹⁷ *Discipline and Discharge in Arbitration*, Brand, ed. p. 29

While just cause is not an easily defined concept, one measurement is "what an arbitrator thinks is fair."¹⁸ It is incumbent upon an arbitrator to determine whether the employee involved is guilty of wrongdoing, and also to make certain the interests of the employee are protected by making "reasonably sure" the "causes for the discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge."¹⁹

2) The necessity for due process

"Due process is an integral part of just cause, requiring employers to treat employees fairly during the disciplinary process."²⁰ Due process is inherent to the consideration and determination of employee discipline; the requirement for due process benefits the employer and the employee. "The employer who provides procedural due process is much less likely to be confronted later with an order of reinstatement and back pay."²¹ Industrial due process requires that the employer conduct a reasonable inquiry or investigation regarding the actions for which an employee is to be disciplined. "Procedural fairness" requires a full and fair investigation of the circumstances of an employee's alleged conduct.²²

3) Consideration of the February 19, 2009 incident

The parties are at odds with regard to whether Ms. Ralls violated the cell phone policy on February 19, 2009, the first of the three violations on which her discharge was based. Further, ATU Local 1287 submits that it is appropriate in the course of this proceeding to consider Ms. Ralls' testimony at hearing, in which she denies that she had an "earpiece" or a "Bluetooth" device in her ear on February 19, 2009. KCATA urges rejection of consideration herein of the underlying facts of that incident, in that no grievance was filed regarding the discipline rendered to Ms. Ralls for that alleged violation. According to the Employer, since the Agreement requires that an aggrieved employee file a grievance within seven days of a disciplinary action, if at all, the Union is precluded from

¹⁸ *Discipline and Discharge in Arbitration*, Brand, ed. p. 29, p. 31

¹⁹ Riley Stoker Corp., 7 LA 764, (Platt, 1947) as quoted in *Discipline and Discharge in Arbitration*, Brand, ed., p. 31

²⁰ *Discipline and Discharge in Arbitration*, Brand, ed. p. 35

²¹ Gilman Paper Co., 61 LA 416 (Murphy, 1973) as quoted in *Discipline and Discharge in Arbitration*, Brand, ed. p. 35

²² *How Arbitration Works*, 6th ed., Elkouri & Elkouri, Ruben, ed., p. 969

now challenging the facts underlying Ms. Ralls' first suspension.

However, KCATA itself elected to reconsider the February 19, 2009 incident as a part of its response to the August 12, 2009 grievance filed on Ms. Ralls' behalf. If KCATA saw fit to revisit the facts of the February 19 incident some six months later, it is not appropriate to preclude Ms. Ralls' presentation of her version of the February 19, 2009 occurrence during the proceedings directly related to the reason that KCATA reviewed the incident, that is, the discharge decision.

According to Mr. Morgan's third-step grievance response letter, "Ms. Ralls stated that the 1st cell phone violation was while she was using an I-pod and that she had actually summoned the supervisor to her bus. Management stated that a follow-up interview would be conducted with Bernard Crumpton, the responding supervisor."²³ The results of that follow-up²⁴ do not indicate how the interview was conducted. The summary does not reveal whether Mr. Crumpton's recollection of an incident exactly six months earlier may have been prompted, or whether or to what extent he was informed of or asked to respond to Ms. Ralls' version of the incident.

Mr. Morgan's summary of Ms. Ralls' explanation of the first incident in his August 25, 2009 letter is *comparable* to her hearing testimony. Ms. Ralls explained at the time, and in her hearing testimony that she had an iPod with earphones.²⁵ The two versions of what happened of what happened on February 19, 2009 are otherwise significantly at odds, and at least on these points:

- * the location of Mr. Crumpton's vehicle, and its distance from Ms. Ralls' bus
- * whether Mr. Crumpton used the term "Bluetooth" specifically or generically
- * whether or not Ms. Ralls motioned Mr. Crumpton to the bus to speak to a passenger

The discrepancy between Ms. Ralls' version and Mr. Crumpton's is so profound that it reasonably should have been a signal or a trigger for a more thorough

²³ Page 3 of August 25, 2009 letter to Mr. Wilson, part of Exhibit 2.

²⁴ Page 4, August 25 letter, Exhibit 2

²⁵ Notably, possession of an electronic device is not a rule violation; testimony of Mr. Salisbury.

investigation, either at the time of the incident, or as a part of the August 19, 2009 review.

In the cell phone use "three strikes" system, particularly in view of the statistics concerning KCATA operators' violation of the rules,²⁶ it must be assumed that any violation may be the first of three that will lead to a discharge, or that a second violation may be followed by a third, also resulting in discharge. Thus, while videotape evidence not disputed by an employee would require little, if any, additional investigation to meet due process standards, a fair, thorough, due process investigation is called for when the facts are so in dispute that the two versions have essentially nothing in common.

4) The Grievant's personal situation

This decision is not based upon or affected by the reason that Grievant had for answering a call on her cell phone while the bus was moving. While her need to attend to her son's medical situation is understandable, she had other options for handling that important phone call, without violating her employer's reasonable and appropriate work rule. Further, while Counsel for ATU Local 1287 makes a reasoned argument that consideration should be given to Ms. Ralls' status as a single mother of five children, that is also not a basis for this decision.

5) The remedy

"Arbitrators almost uniformly award a make whole remedy where there is no just cause for a discharge. They may also award a make whole remedy where the Employer fails to provide procedural due process even where there *might be* just cause for discharge or discipline."²⁷

"When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies."²⁸

²⁶ Exhibit 20

²⁷ *Discipline and Discharge in Arbitration*, Brand, ed., p 370 (emphasis mine)

²⁸ *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597 (1960) as quoted in *How Arbitration Works*, 6th Ed., beginning at p. 1188

It's clear that Ms. Ralls violated KCATA's work rules on March 4 and August 10, 2009. Those incidents should not be erased from her record and this decision does not do so. As it applies to Ms. Ralls, the twelve month period for application of the cell phone prohibition policy, and Section 1.12(e) of the Agreement should begin on March 4, 2009 and include 1) the period from March 4 until August 10, 2009 and 2) the period beginning with the date of Ms. Ralls' reinstatement as if there was no "break" between the two periods. Ms. Ralls' record is to reflect that she has two "strikes" under the cell phone prohibition policy.

Decision and Award

There was not just cause for the discharge of the Grievant. The grievance is sustained. Ms. Vickie Ralls shall be reinstated to the position she held as of August 10, 2009. She shall be made whole for loss of pay, subject to adjustments for her earnings from other employment she received from August 12, 2009 until the date of this award. Her benefits and seniority shall be adjusted accordingly, and her disciplinary record adjusted as described above. The undersigned maintains jurisdiction for purposes of implementation of the award for a period of thirty days, or until the parties are mutually satisfied that implementation has been achieved.

Respectfully submitted,



Ruth M. Weatherly J.D., MBA
Neutral Member of the
Arbitration Board

dated: 6/16/2010

Concur: _____

Dissent: _____

dated: _____

dated: _____

CERTIFICATION of MAILING

I hereby certify that on the 17th day of June, 2010,
I served a copy of the foregoing Opinion and Award on
the following parties, by mailing to each, by USPS mail
with appropriate postage prepaid.



Ruth M. Weatherly

Michael Delaney, Atty.
Spencer Fane Britt &
Browne
Suite 700 40 Corp. Woods
9401 Indian Creek Pkwy
Overland Park, Kansas 66210

Scott A. Raisher, Atty.
Jolley Walsh Hurley Raisher &
Aubrey
204 W. Linwood Blvd.
Kansas City, Missouri 64111

Fern Kohler
Deputy General Manager
KCATA
1350 E. 17th St.
Kansas City, Missouri 64108

William Wilson
President
ATU Local 1287
6320 Manchester Ave.
Suite 46
Kansas City, Missouri 64133