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In the Matter of Arbitration

between

Niagara Frontier Transit Metro System

and

Amalgamated Transit Union, Local 1342

* * * * *

Opinion

and

Award

This arbitration was heard on November 1, 2018, at the Company's offices in Buffalo, New York. The undersigned was appointed to arbitrate the controversy from a panel maintained by the parties. Upon completion of the hearing, the record was closed.

APPEARANCES

For the Employer:

Wayne Gradl, Counsel
Louis R. Giardina, Manager of Labor Relations
Chris Antholzner, Operations Manager

For the Union:

Jules Smith, Attorney
Jeff Richardson, President

THE ISSUE

Did the Union unreasonably withhold its approval of the Company's proposal to change its rules on Use of Mobile Devices? If so, what shall the remedy be?

BACKGROUND

Section 19-1 of the Collective Bargaining Agreement (CBA) between the parties reads in relevant part as follows:

It is understood and agreed that the Company shall always be privileged from time to time to revise, supplement and otherwise change its rules, provided same are not in conflict with any specific provision of this Agreement, and if in conflict or inconsistent with any such specific provision, such revised, supplemental, or changed rules or regulations shall be subject to the approval of the Union, which approval the Union agrees not to unreasonably withhold.

In 2000 the Company promulgated a set of rules titled Performance Improvement Guidelines (hereafter "Guidelines"), which contained a system of progressive discipline for various behavioral violations. The system set forth seven categories of offenses, each with a stated number of disciplinary "steps." One of the categories was "four-step regular discipline," which included the violation, "operating or displaying personal entertainment or communications equipment, except during lunch." The four steps, for successive violations during a 12-month period, were final warning, one-day suspension, 2-day suspension, and termination.

On January 30, 2018, the Company sent the Union a letter with the subject heading, "Texting or Manipulation of a Communication Device While Operating a Vehicle [Modifying Performance Improvement Guidelines]." It requested the Union's approval of a proposal to change this violation to a two-step infraction, under which the violator would receive a 15-day suspension for a first offense and termination for a second offense within three years. The Union declined to approve the request, and the Company filed the instant grievance under Section 19-1, claiming that the Union's withholding of approval was unreasonable.

POSITION OF THE COMPANY

The Company contends its proposal is reasonable and the Union's withholding of approval of it unreasonable. The use of portable communication devices while driving is

both dangerous and illegal, and it exposes the Company to significant liability. It is also unnecessary and unprofessional. Under the current Guidelines, the disciplinary scale for violations of the rule against the use of such devices does not adequately reflect the seriousness of the offense, not does it provide an effective deterrent to the behavior.

The Company notes that New York law prohibits the use of both mobile telephones and portable electronic devices while operating a commercial motor vehicle. It points to video news coverage of an operator who was apparently texting on his cell phone while operating a bus on a city highway, and it presents evidence of a lengthy list of infractions by drivers over the past two years, pointing up the ineffectiveness of the current penalties. It calls attention to a "No Texting Rule" promulgated by the Federal Motor Carrier Safety Administration, violations of which can result in driver disqualification. And it refers me to Arbitrator's Schmidt's decision sustaining the discharge of a driver for a preventable accident that resulted in liability damages to the Company of more than one million dollars.

For all of the foregoing reasons, the Company urges that its grievance against the Union's withholding of approval be granted and the requested rule change approved.

POSITION OF THE UNION

The Union stresses that it does not condone the use of a mobile device while operating a vehicle, but it contends that the Company's revised rule is unreasonable. The proposed new rule does not contain a transition provision that would permit all operators to become familiar with it as it is implemented. The clear purpose of the rule is not to punish but to achieve voluntary compliance, as in fact the Company needs operators and terminating the operators it has will not improve service to the public.

The Union further argues that an appropriate and reasonable rule would include a transition period of six months while the Company educates its operators on the new rule. Following that six-month period there should be a three-step process, with a five-day suspension for the first offense, a ten-day suspension with final warning for a second offense, and termination for a third offense, all within a 12-month period. Also, when the new rule is implemented all existing violations on operators' records should be removed. Moreover, after the parties have had six months of experience under the new rule, subsequent violations should remain on an employee's record for 24 months instead of 12 months.

FINDINGS AND OPINION

After careful consideration of the evidence and argument offered by both sides in this dispute, I find that the Company's grievance has merit and should be sustained. The Company's request to change the rule is reasonable, and the Union's withholding of approval is not reasonable.

I reach this conclusion largely for the reasons advanced by the Company. The risks involved in distractions to vehicle operators, and especially operators of large commercial vehicles, are too obvious to require belaboring. These risks – which are borne by passengers, other members of the public, the drivers themselves, and the Company – represent significant exposure in terms of both harm to person and property and financial liability. And the Company is persuasive in contending that the current schedule of penalties, under which an operator can commit three violations every year and receive no more than a two-day suspension, is an inadequate deterrent to such dangerous and

illegal behavior. Although the Union's counterproposal is clearly an improvement over the *status quo*, I find that it still does not adequately reflect the gravity of this offense.

Finally, the Union is reasonable to suggest that a new rule should include a period of implementation during which operators are educated on its content and purpose, although the proposed six months is excessive. It is also reasonable that existing violations be removed from operators' records so that all can enter the new regime with a clean slate.

AWARD

The Union unreasonably withheld its approval of the Company's proposal to change its rules on Use of Mobile Devices. The revised rule shall take effect no earlier than 60 days after it is posted. During this period the Company will provide education to operators on the content and purpose of the revision. Upon the effective date of the new two-step rule, all existing violations under the previous four-step rule will be removed from operators' records.

I, Howard G. Foster, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

November 5, 2018
(dated)

Howard G. Foster
(signature)