**Federal Mediation and Conciliation Service**
**Case No. ----------**

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| **In the Matter of Arbitration between:** | **Grievant: MA** |
| | **Grievance: ----------** |
| **Union** | |
| **and** | **Hearing: Dec. 17, 2019** |
| | **Brief exchange: Jan. 27, 2020** |
| **Metro** | **Award date: Feb. 3, 2020** |

## Opinion and Award

### I. Facts

The Metro Regional Transit Authority ("Metro") is a public employer providing public transportation services to residents of the City a. Metro employs over 300 employees in both full-time and part-time positions, including Bus Operators who are represented, for the purpose of collective bargaining, by the Union. Metro and the Union have negotiated a collective bargaining agreement (CBA) to govern their relationship. Joint Ex. 1.

Metro hired Ms. MA as a Special Service Operator on June 22, 2012. Before that she served as a school bus driver for approximately ten years. Tr. 251 (MA).

At several points in Ms. MA's employment with Metro, she raised safety concerns concerning poor back support in some of Metro's buses. In March 2017, Ms. MA submitted a "First Report of Injury," a form used by employees when they are injured on the job. The Union Ex. 6. In it, Ms. MA informed Metro that she had suffered a back injury because her assigned bus had "no lumbar support." *Id*. She simultaneously submitted an "Incident Report," raising safety concerns with the lumbar support in certain Metro buses. Union Ex. 1. According to the testimony of Ms. MA and others at the arbitration hearing (and not disputed by Metro), the lack of back support or a malfunctioning bus seat can create a safety risk if the seat or its lumbar support cannot be positioned such that a short driver's feet can rest flat on the pedals. Tr. 261 (MA); Tr. 121 (McC). A driver cannot compensate for a malfunctioning seat merely by sitting forward in the seat, because if the bus were to move suddenly, the seat belt would automatically retract and pull driver against the back of the seat, leaving the driver unable to control foot pedals such as gas and brake. *Id*. at 262. In Ms. MA's March 2017 Incident Report, she stated that she had raised this issue directly with Metro's Safety Director, but that she never heard back. *Id*. at 264-65; the Union Ex. 1. Consistent with this 2017 report, in a July 2019 Incident Report, Ms. MA again reported that the seat in a bus to which she had been assigned

had defective lumbar support that she could not cure with a pillow, and that the seat could not be moved properly. Metro Ex. 7, pp. 102-03. She further reported that she had discussed the issue with Metro's Safety Director and "received no report back but told not to hold her breath." *Id*. at 102.

In October 2016, Metro issued a revised edition of the Operator Handbook. Metro Ex. 1. The provisions of this Handbook were neither bargained-for nor grieved. *See generally* Metro's brief at 6. This Handbook contains the following provision on mobile phone use:

> The use of a personal cell phone and/or any personal electronic device is:
>
> 1. limited to the end of the line or layover.
>
> 2. strictly prohibited while the vehicle is moving, including while waiting at stop lights, etc.
>
> Violation of this policy will result in disciplinary action, up to and including termination of employment. * * *

On November 9, 2017, Ms. MA confronted a passenger who attempted to ride her bus using an expired bus pass. The passenger subsequently filed a customer service complaint against Ms. MA over the incident. In the course of investigating that complaint, someone from Metro (it is unclear who, because the relevant documents use the passive voice) reviewed the video footage of the incident and apparently noted that Ms. MA was wearing wired earbuds around her neck. This resulted in Metro imposing a five-day suspension on Ms. MA, three days for wearing the earbuds and two for her argument with the customer over the invalid bus pass. The letter explaining the discipline, dated November 30, 2017 from then-Chief Dispatcher McC to Ms. MA, states:

> During the verbal altercation on November 9, 2017, you were observed **wearing** a Bluetooth Device while driving a METRO vehicle. As you know, **using** a cell phone or **wearing** a **Bluetooth** while operating a METRO vehicle is strictly prohibited.

Metro Ex. 3 at 51 (emphasis added).

Ms. MA testified that she was wearing wired earbuds around her neck like a necklace while driving her bus, and only placed them in her ears when she was on break. Tr. at 256-57 (MA). This is consistent with Ms. McC's description of what had occurred – that Ms. MA was wearing wired earbuds around her neck – and with the disciplinary letter's description of Ms MA "wearing" (as opposed to "using") the earbuds. Tr. 129 (McC); Metro Ex. 3 at 51. Moreover, though the disciplinary letter states that "wearing" a Bluetooth is prohibited, and Ms. McC justified the discipline by stating that "the policy is that you can't wear it [an electronic device] while on duty", neither is supported by the language in the October 2016 edition of the

Operator Handbook. The Handbook provision quoted above prohibits only the "use" of – not "wearing" – a personal electronic device. Moreover, the Policy does not specify whether a Bluetooth device unconnected to a personal electronic device is prohibited by the policy, and it prohibits using personal electronic devices only when driving, not (as McC described the policy) any time the worker is on duty. Metro Ex. 1.

Metro apparently never held a pre-disciplinary hearing to give Ms. MA a chance to tell her side of the story and for the Union to raise any objections. Tr. 128-29 (McC's testimony that she could not recall whether a pre-disciplinary hearing was held and that she had no documents establishing that such a hearing was held). Article 6, Section 1 requires that a pre-disciplinary meeting be held before Metro imposes any discipline involving a suspension or termination. This interpretation of Article 6, Section 1 is reinforced by Ms. McC's testimony that "the policy is I have to meet with the Union representatives before any disciplinary action. That's part of the contract." Tr. 138 (McC). The Union did not grieve.

On approximately May 25, 2018, Metro received a "verifiable customer complaint" against Ms. MA for poor customer service. Tr. 64-65 (McC). No details on the underlying conduct giving rise to this discipline were presented at the arbitration hearing by either party. Metro initially imposed a five-day suspension plus a broad last-chance agreement. Tr. 66 (McC). This initial discipline was memorialized in a letter dated June 6, 2018, from McC, then Director of Operations, to Ms. MA. Metro Ex. 4 at 60. This document states in pertinent part:

> …. Your actions were extremely disturbing, unprofessional and warranted severe discipline; however, your Union Representatives negotiated a five (5) day suspension and a Last Chance Agreement. The discharge will not be eligible for the grievance and arbitration procedures.
>
> …. If you receive ANY future verifiable complaints of poor customer service, which includes but is not limited to: failing to transport passengers, fare discrepancies, refusing to drive the coach assigned to you or subordination to anyone in a supervisory capacity at METRO for the remainder of your employment you will be discharged.

The Union grieved this discipline. Metro Ex. 4 at 61. That grievance was resolved when Metro and the Union negotiated a new disciplinary letter, dated August 22, 2018. Metro Ex. 4 at 65. Both parties characterize this disciplinary letter as a Settlement Agreement. See, e.g., Metro Brief at 10. The August 22 Settlement Agreement differed from the June 6 last-chance agreement in the following respects relevant to the current grievance:

1. In the new disciplinary letter, Ms. MA agreed to serve a thirty-day suspension, rather than the 5-day suspension in the original letter. In return, the Union successfully negotiated for the following language that significantly restricted the scope of the original agreement:
2. The phrase "Last Chance Agreement" was removed.

3. The sentence "The discharge will not be eligible for the grievance and arbitration procedures." was removed.
4. The duration of the letter was changed from "for the remainder of your employment" to "two years from the date of the event giving rise to the grievance".
5. The language "…you will be discharged" [for verifiable customer complaints) was retained. However, in the new letter, the word "will" no longer is underlined, italicized, and boldface, and there is an additional sentence in a preceding paragraph stating: "Mistreatment of customers shall be just cause for disciplinary action up to and including discharge."

On October 19, 2018, Metro adopted a new Cell Phone Policy. Metro Ex. 2 at 46. This new policy provides, in pertinent part, that:

> Distracted driving is the leading cause of accidents on U.S. Highways. It is evident by the number of verifiable complaints that METRO receives that some Operators continue to ignore the Cell Phone Policy.
>
> As you know, using a cell phone while driving a METRO vehicle is strictly prohibited. Doing so jeopardizes your safety, the safety of your passengers, and the safety of the general public.
>
> Any Operators observed using any electrical/battery operated devices such as a cell phone, blue tooth, notebook, computer, pager, Apple Watch, Kindle, iPod, iPad, MP3 player or camera or while sitting behind the wheel of the bus or while driving a [Metro] vehicle will be disciplined as follows:
>
> 1st violation: Three (3) day suspension.
> 2nd violation: Fifteen (15) day suspension.
> 3rd violation: TERMINATION OF YOUR EMPLOYMENT
>
> Please be advised that you are not permitted to use said items while boarding passengers, while stopped at traffic control devices, while at line ups or anytime that you should be rendering customer service.

*Id*. RS, President of the Union Local, testified that this new policy was not bargained-for, Tr. 229-20 (RS), a point which Metro has conceded. *Id*. (dialogue of attorneys).

On April 1, 2019, MA arrived at work, mistakenly inspected and boarded the wrong bus, and started driving her route. Tr. 258-59 (MA). NS, her immediate supervisor, apparently assumed she had not appeared for work (he did not testify at the arbitration hearing). Tr. 134 (McC). Mr. NS could have used Metro's AVAIL tracking system to ascertain whether Ms. MA was driving a bus and, if so, which bus she was driving and where that bus currently was located. *See generally* Tr. at 231-33 (RS). However, instead Mr. NS phoned and texted Ms. MA's mobile number to ask about her whereabouts. Tr. 258-60 (MA); Tr. 169 (S). Ms. MA voice-

texted (i.e., dictated a text into her phone's microphone) back to inform him of her status and location. Tr. 258-59 (MA). Ms. MA testified that she felt obligated to do so because she was responding to her supervisor, and she felt she was between a rock (the need to immediately respond to her supervisor) and a hard place (Metro's prohibition on mobile phone use while operating a vehicle). *Id*. at 259. She testified that she chose what she considered the lesser of two evils, but never explained why she did not use her bus radio (an approved method of communicating while driving – see Tr. 147 (McC)) instead of her mobile phone. *Id*. The Union did not grieve this discipline.

The issue giving rise to this grievance occurred on June 28, 2019. Ms. MA was driving her usual route. She was on a two-lane road in a construction zone; the lanes were narrow. Tr. at 276 (MA). A "box truck" sideswiped her bus and knocked off her driver's-side mirror. Tr. 18 (MW); Tr. 276 (MA). Ms. MA immediately called her immediate supervisor, Road Supervisor MW. Tr. 18 (MW); Tr. 276 (MA). She told him the bus was drivable, that because of the construction there was nowhere nearby to pull over, and that she would drive the bus back to the transit center. Tr. 18 (MW); Tr. 276-77 (MA). Mr. MW advised Ms. MA he would have a "chaser" bus waiting to "trade-up" when she arrived at the Transit Center. Tr. 18-20 (MW).

When Ms. MA arrived at the transit center, WC, the Metro employee responsible for trading out buses, brought out another bus for her to drive. Tr. 277 (MA). Ms. MA sat in the driver's seat and then told Mr. WC that a malfunctioning seat made the bus unsafe for her to drive. Ms. MA exited the bus, and a few minutes later Mr. MW arrived. Tr. 20-21 (MW). Mr. MW asked Ms. MA "what's wrong", and four times she told him that bus was not safe for her to drive because the seat would not go far enough forward, and the lumbar support did not keep her far enough forward, for her feet to adequately reach the foot pedals safely. *Id*.; Tr. 278 (MA). She then sat in the seat and showed him what she believed was wrong with the seat. Tr. 111 (McC). He responded first by saying that the seat issue was a comfort issue and not a safety issue, *id*. at 21, 25, and then by saying he would get her another bus later that evening, but that she needed to drive the current bus for now. *Id*. at 33. When Ms. MA insisted the bus was not safe for her to drive, Mr. MW told Ms. MA to let him know "if [she's] refusing to take [the bus] out… and [he'll] call [JS] and [McC] and let them know that you're refusing to take the bus out." Tr. 22 (MW); Tr. 278 (MA). Ms. MA apparently took this as a threat to fire her, a reasonable assumption since "refusing to drive the coach assigned to you" is expressly listed in the August 22, 2018 disciplinary letter as a basis for future discharge. Metro Ex. 4 at 65.

Ms. MA then boarded the bus and prepared to drive off. She was visibly exasperated, as demonstrated by the difficulty she had and frustration she expressed in attempting to put on her seat belt. Metro Ex. 11; Tr. 75 (McC). Ms. MA let loose a string of profanity within easy hearing distance of several passengers. Tr. 281 (MA). She explained in her testimony that this was out of character for her and that she regretted it. *Id*. Although several customers and one off-duty Metro employee presumably heard the profanity, none filed a customer complaint. Tr. 214-15 (D); Tr. 283 (MA). When Ms. MA drove off, she was approximately ten minutes behind schedule. Tr. 26 (MW).

Before driving off in the bus, Ms. MA placed her lunch box behind the small of her back to provide support. Tr. 284 (MA). While she was driving the bus out of the transit center parking lot, one of her passengers stood up, got Ms. MA's water bottle that had been left out of reach, and handed it to Ms. MA. Metro Ex. 11; Tr. 282 (MA). While the customer was standing, Ms. MA told her: "I want you to uh. I am going to stop down here. Take my picture with this stupid lunch bag behind me. Because I need that." Metro Ex. 11. As the bus slowed down near the end of the parking lot, Ms. MA handed the passenger her phone. Tr. 282-83 (MA). Ms. MA stopped the bus. The passenger took a photo and handed the phone back to Ms. MA. Ms. MA thanked her, then said: "This is going to go to the Safety Director. We'll see if anything happens." Metro Ex. 11; Tr. 285 (MA); Tr. 125 (McC).

Mr. MW subsequently reported the incident to Ms. McC. Ms. McC then scheduled a pre-disciplinary hearing. That hearing was held on July 19, 2019. At that meeting Ms. McC showed the video of the June 28, 2019 and invited Ms. MA to explain herself. Tr. 78-79, 96-97 (McC). Ms. MA tried to explain that her objection to the trade-out bus was based on the health and safety issues presented by that particular bus's malfunctioning seat and poor lumbar support. Tr. 97 (McC); Tr. 286-87 (MA). Ms. McC, however, cut Ms. MA off and attempted to re-direct Ms. Adkns's explanation toward what Ms. McC considered the pertinent issues of cell phone use and poor customer service. Tr. 97-98, 142 (McC). Ms. MA then became frustrated and upset and had to leave the room. *Id*. at 98. When Ms. MA returned, Ms. McC asked Ms. MA if she had anything else to say. *Id*. Ms. MA, still upset, declined to comment further, apparently believing Ms. McC wanted to talk about only cell phone use and customer service and believing she could not tell her side of the story without explaining that her objections to the bus had been motivated by health and safety concerns. Tr. 287 (MA).

At a July 23, 2019 meeting, attended by Ms. McC, Ms. MA, and a Union representative, Ms. McC told Ms. MA that her employment would be terminated effective that day because Ms. MA's conduct on June 28, 2019 violated the August 22, 2018 Settlement Agreement (i.e., customer service) and constituted the third violation of the Metro Cell Phone Policy. Tr. 101 (McC).

## II. Issue

Whether Metro had just cause to discharge Ms. MA and, if not, what should the remedy be?

## III. Relevant CBA Provisions

> Article 6 – Discharge and Disciplinary Layoff
>
> Section 1. The Company may discharge or invoke a disciplinary layoff against an employee for just cause. Provided, however, the Company will consult with the

union prior to any discipline involving time off. Any employee claiming unjust layoff or discharge may appeal such disciplinary layoff or discharge through the grievance procedure (Step 1 being dispensed with) set forth in the preceding Article 5, provided said employee has caused a written grievance to be presented to the Company no later than five (5) working days after the time of such disciplinary layoff or discharge, failing which, the disciplinary layoff or discharge shall be final and binding upon the union, its members and the employee involved. * * *

Article 18 – Management Rights

Section 1. Except as herein expressly qualified, the Company retains the exclusive right to manage its business, operation, and affairs and to direct the working force. Prominent among such unqualified rights, although by no means a wholly inclusive list thereof, are the following: to hire and maintain order and efficiency; to discharge for proper cause; to discipline; to adopt and enforce working rules; to determine the general method of operating its business; to establish customer service and public relations policies; to determine the business hours and location of its establishments and operations under this Agreement; to effectively direct its employees; to establish the number of shifts; to relieve employees from duty for lack of work and other legitimate reasons; to fix the standard of work; the assignment and transfer of personnel and working hours thereof; to determine the necessity for overtime work; and to improve efficiency.

Section 2. Failure of the Company to exercise rights herein reserved to it or exercising them in a particular way shall not be deemed a waiver of said rights or of the Company's right to exercise said rights in some other manner not in conflict with the terms of this Agreement.

Article 19 – Miscellaneous

* * *

Section 2. The Union agrees that the Company _____to make and enforce such rules and regulations as it deems necessary to ensure the safe and orderly performance of its operations; provided, however, that such rules and regulations shall be promulgated after consultation with the Union and shall not abridge the employee's rights under this Agreement.

## IV. Arguments and Analysis

Metro has provided two independent bases for terminating the employment of Ms. MA: (1) the third violation of the three-strikes and-you're out Metro Cell Phone Policy, and (2)

violation of the August 22, 2018 Settlement Agreement (i.e., customer service). Tr. 101 (McC). Each of these will be addressed in turn.

**A. Cell Phone Use**

> Metro argues that Ms. MA violated its Cell Phone Policy on June 28, 2019 by
>
> using her cell phone, in contravention to the policy, while seated behind the wheel of a moving Metro vehicle. Specifically, Ms. MA is holding her cell phone while driving the bus and hands it to a passenger to take her photograph. Ms. MA testified that Bus 1712 was "[s]lightly in motion," when she handed her cell phone to the passenger.

Metro's brief at 22. I agree. Metro's Cell Phone Policy, Metro Ex. 2, forbids bus drivers from "using any electrical/battery operated devices such as a cell phone…. [Y]ou are not permitted to use said items while boarding passengers, while stopped at traffic control devices, while at line ups or anytime that you should be rendering customer service." I find that taking a phone out of one's pocket, handing it to a passenger, and asking that passenger to take one's photograph – all while the bus was moving – constitutes "using" the phone within the meaning of the Policy. The Union's argument that the bus was stopped at the time the customer took the photograph does not change the analysis. The explicit purpose of the Policy is to combat "distracted driving." *Id*. Here, Ms. MA took the phone out of her pocket, glanced back at the passenger, and handed her phone to the passenger – all while the bus was moving. This is precisely the kind of distracted driving that the Policy was intended to prevent. Even if the bus had been stopped the entire time, Ms. MA still would have violated the Policy, because the Policy explicitly states that it applies "anytime that you should be rendering customer service." *Id*. Ms. MA implicitly acknowledged the violation when she admitted – appropriately – that if she could do it over, she would have "wait[ed] until her shift was over and ask[ed] another Metro employee to take the photograph." Tr. 286 (MA).

Metro argues that because its Cell Phone Policy is a three-strikes-and-you're-out policy, and because this is Ms. MA's third strike, Ms. MA's discharge is automatic. Metro further argues that because neither prior cell-phone incident was grieved, those instances of discipline must be accepted at face value as strikes #1 and #2.

I agree, but only up to a point. Metro is correct that cell-phone incident #1 and #2 cannot be re-opened on the merits, and the discipline imposed on those incidents cannot be second-guessed by this Arbitrator. However, Metro has explicitly cited those incidents as forming the basis for its argument that it had just cause to discharge Ms. MA for what it characterizes as strike #3. As such, the Arbitrator has full authority to consider whether those two prior incidents constitute strikes under Metro's Cell Phone Policy.

I find they do not.

The first incident was the November 9, 2017 incident for wearing earbuds. I find that it was inappropriate for Metro to count this incident as prior discipline for any purpose, and most certainly as "strike 1" of its Cell Phone Policy. First, as described above, Ms. MA's wearing of earbuds as a necklace (i.e., not in her ears) does not fall within the prohibition of the cell phone policy in effect at the time of the incident, for three reasons. First, that policy forbade "using" certain electronic devices, Metro. Ex. 1 – not "wearing" them, and the disciplinary letter to Ms. MA explaining her discipline mis-cites the policy as forbidding the "wearing" of such devices. Metro Ex. 3 at 51. Second, the policy in effect at the time did not specify whether a Bluetooth device unconnected to a personal electronic device is prohibited by the policy. Metro. Ex. 1. Third, the policy in effect at the time prohibited using personal electronic devices only when driving, Metro Ex. 1, not (as inaccurately described in the disciplinary letter, Metro Ex. 3 at 51) any time the worker was on duty. In fact, the policy expressly *permitted* Metro bus drivers to have personal electronic devices on their person so they could use them at "the end of the line or layover." *Id*.

The second reason I find it was inappropriate for Metro to count this incident as prior discipline is that Metro cannot demonstrate that it complied with the pre-disciplinary hearing requirement of Article 6, Section 1. Tr. 128-29 (McC's testimony that she could not recall whether a pre-disciplinary hearing was held and that she had no documents establishing that such a hearing was held). The Union's failure to grieve this discipline may well be explained by the fact that it apparently did not receive the prior notice and hearing to which it was contractually entitled.

The third reason I find it was inappropriate for Metro to count this incident as prior discipline for purposes of the three-strikes rule is that Metro has failed to demonstrate that the three-strikes rule existed at the time of the incident. Though Metro's October 2018 Cell Phone Policy contains a "three-strikes-and-you're-out" rule, its October 2016 Policy – the one in effect at the time of this November 2017 incident – does not. I find that it would be inappropriate to call "strike 1" on Ms. MA at a time when she could not have known that the third strike would result in her discharge.

Ms. MA's second strike, according to Metro, was the April 1, 2019 incident in which Ms. MA drove off in the wrong bus, and Nick NS – her immediate supervisor – assumed she had not arrived for work and phoned and texted Ms. MA's mobile number to ask about her whereabouts. Tr. 258-60 (MA); Tr. 169 (S). Ms. MA responded by voice-texting back to inform him of her status and location. Tr. 258-59 (MA). the Union presented uncontested testimony that Mr. NS could have used Metro's AVAIL tracking system to ascertain whether Ms. MA was driving a bus and, if so, which bus and where she was driving. *See generally* Tr. at 231-33 (RS). Because Mr. NS called and texted Ms. MA's mobile number instead, I find it was reasonable for her to respond to him in the same medium in which he had communicated to her. It might have been preferable for her to have used her radio, but under the circumstances – where Mr. NS initiated the conversation by mobile phone, Ms. MA believed she would be in trouble for taking out the wrong bus, and Ms. MA felt obligated to respond to Mr. NS immediately – I find that

her split-second decision to respond to Mr. NS on her mobile phone was understandable and should not be used as a prior incident of discipline.

The Union argues that the three-strike provision in Metro's unbargained-for Cell Phone Policy is inconsistent with the just cause provision of the CBA. I find it unnecessary to reach that issue because I have concluded that the incident being grieved constitutes "strike 1" of the Policy rather than "strike 3".

**B. Customer Service**

Metro's second justification for discharging Ms. MA is poor customer service. Metro points to the 2018 Settlement Agreement, which provided in pertinent part:

> …. If you receive ANY future verifiable complaints of poor customer service, which includes but is not limited to: failing to transport passengers, fare discrepancies, refusing to drive the coach assigned to you or subordination to anyone in a supervisory capacity at METRO for the remainder of your employment you will be discharged.

Metro argues it had just cause to discharge Ms. MA because she violated this Agreement on June 28, 2019 when she displayed poor service toward customers by "ignoring them, failing to take their fares, ranting about Metro, admonishing them, using vulgar language in front of them, and causing them to be late to their destinations." Metro brief at 22.

The Union raises three counter-arguments. First, the Union argues that Ms. MA never received a meaningful pre-disciplinary hearing on this discipline because Metro cut her off every time she wanted to talk about safety issues. Metro replies that even if Ms. McC initially cut Ms. MA off when Ms. MA tried to raise safety issues, "Ms. MA admitted that Mr. H gave her the opportunity to speak at the pre-disciplinary meeting, and Ms. D also gave her an opportunity to explain herself at the Step III hearing. Ms. MA testified, 'I didn't have much to say but I said what I felt I needed to.' (Tr. 296-297.)." The Union responds that by that time Ms. MA was too distraught to explain herself.

Though I believe Ms. McC could have handled the situation better by giving Ms. MA an open-ended, uninterrupted opportunity to explain her side of the story at the beginning of the meeting, I find that the July 19, 2019 meeting sufficed to satisfy the pre-disciplinary meeting requirement of Article 6, Section 1 of the CBA. Though all parties acknowledge that Ms. McC initially cut Ms. MA off when Ms. MA tried to explain herself, all parties likewise acknowledge that eventually Ms. MA was given an uninterrupted opportunity to do so. Even if at that point Ms. MA was distraught, there is nothing in the record indicating that anything impeded the Union from speaking on her behalf. Thus, though the meeting was not ideal, I find it was minimally sufficient.

The Union's second argument against Metro's customer-service argument for discharge is that Ms. MA's conduct under the circumstances was understandable because, already on edge as a result of the accident an hour earlier, she was further frustrated that neither Mr. WC nor Mr. MW would acknowledge the safety concerns she was trying to raise regarding her newly assigned bus. Metro counters that the level of lumbar support in a seat is not a safety issue; "[i]t's a comfort issue." Tr. 25 (MW). Metro's brief explains:

> Further, Mr. MW indicated that bus operators are permitted to provide their own lumber support, such as a pillow or cushion, "anything that will assist them" in being comfortable. (Tr. 25-26.) Ms. D also testified that "[t]he seat was operable. It had been used by other operators, the operator that brought the vehicle to [Ms. MA]." There was no malfunction or safety factor with the seat itself." (Tr. 192.) Notably, no other bus operator reported any mechanical issues with Bus 1712 that day. (Tr. 27.)

Metro's brief at 11 fn. 11.

I find that both sides have valid arguments on this issue. The Union correctly characterizes the back support / seat functioning issue as a safety concern. The Union proffered testimony from both Ms. MA and Mr. RS that inadequate lumbar support or a malfunctioning seat could cause Ms. MA to be unable to reach the pedals with her feat, jeopardizing the safety of Ms. MA and her passengers. Tr. 261 (MA); Tr. 224-26 (RS). Ms. McC agreed that if a bus driver was unable to reach the pedals without sitting forward in her seat, that would present a safety issue. Tr. 121 (McC). Metro counters that the bus to which Ms. MA was re-assigned on June 28, 2019 was never found to be "unsafe". But Metro concedes that the bus was not sent to the mechanic's bay to be checked for the concerns Ms. MA raised (instead, Mr. WC and Mr. MW instructed Ms. MA to drive it), and that Mssrs. WC and MW, who checked over the bus when Ms. MA complained, are significantly taller than Ms. MA and thus the bus might be safe to them but not to Ms. MA. See, e.g., Tr. 113 (McC). Thus, I find that Ms. MA properly raised a safety issue.

However, I also find that even though Ms. MA raised a valid safety concern, and was no doubt frazzled by her earlier accident and frustrated by Mssrs. WC and MW's lack of concern for the safety issue she was attempting to raise, she nonetheless was out of line when she cursed in front of her passengers and otherwise took out her frustration on them. I thus find that Metro had *some* cause to discipline Ms. MA for her conduct toward customers on June 28, 2019. However, I also find that such discipline should be tempered by both the fact that Ms. MA's conduct occurred in the context of having been involved in a traffic accident less than an hour earlier, and by the fact that Ms. MA's conduct occurred in the context of her trying to raise a safety issue. Metro did not take these into account when imposing discipline – Ms. McC testified explicitly that she did not consider the safety issue as relevant. See, e.g., Tr. 97-98, 142 (McC).

The Union's third argument against Metro's customer-service argument for discharge is that the August 22, 2018 Settlement Agreement provides for discharge only if there is a "valid customer complaint", and a "valid customer complaint" requires that a complaint be reported by a "customer" – i.e., a passenger. Here, although several customers and one off-duty Metro employee were on board Ms. MA's trade-out bus on June 28, 2019, none filed a customer complaint about the incident. Tr. 214-15 (D); Tr. 283 (MA). Metro does not argue that any customer filed a complaint about the incident.

Metro counters that supervisors can make a "verifiable complaint" (Metro brief at 20, 22), that the Settlement Agreement language does not limit customer complaints to those submitted by passengers (Tr. 70-71 (McC); Tr. 201-202 (D)), and that Mr. MW made such a complaint based on the June 28, 2019 incident. Metro's argument is buttressed by some of the language in the Settlement Agreement itself, which defines "poor customer service" as including "failing to transport passengers, fare discrepancies, refusing to drive the coach assigned to your or insubordination towards anyone in a supervisory capacity at METRO." Metro brief at 10, quoting Metro Ex. 4 at 65. Most of the items in this definition would normally seem to arise outside the presence of passengers, lending credibility to Metro's argument that "poor customer service" includes conduct such as insubordination toward a supervisor.

However, this both stretches the concept of "customer service" and is inconsistent with the distinction that Metro appears to have drawn in the past between a verifiable customer service complaint (made by a customer) and a "verifiable report" (made by a supervisor or other employee). For example, Metro's October 19, 2018 Cell Phone Policy (Metro Ex. 2 at 46) uses the phrase "valid complaints from concerned passengers" to refer to *customer* complaints. By contrast, in a July 14, 2016 disciplinary letter (Metro Ex. 3, p. 48), Metro uses the phrase "any verifiable report" to refer to a complaint from a supervisor. Though it is possible Metro may be using these phrases interchangeably, the weight of the documents indicates that when Metro uses a phrase like "customer complaint" it is referring to complaints filed by customers, and when it uses a phrase like "verified complaint" it is referring to complaints filed by supervisors, Metro employees, and others (possibly including customers). This is consistent with a plain-language reading of the phrase "valid customer complaint" in the August 22, 2018 Settlement Agreement, which is that a "valid customer complaint" is a complaint reported by a customer that has been substantiated by a subsequent Metro investigation.

For this reason, I find that although Metro had cause to discipline Ms. MA for poor customer service on June 28, 2019 (discipline that should have been, but was not, tempered by the circumstances under which the conduct occurred), that poor customer service did not violate the June 28, 2019 Settlement Agreement, and thus did not provide Metro with just cause for discharging Ms. MA.

## VI. Disposition

For the reasons described above, I find that Ms. MA violated the Metro Cell Phone Policy on June 28, 2019 when, while driving her bus, she handed her mobile phone to a passenger and asked that passenger to photograph her. However, I also find that neither the November 9, 2017 incident (involving ear buds) nor the April 1, 2019 incident (returning a text to Ms. MA's supervisor) can be counted as prior "strikes" under the three-strikes provision of that Policy. Metro therefore did not have just cause to discharge Ms. MA for this violation, but may impose discipline consistent with a strike-one violation of the Policy. Consistent with the discipline Metro has previously imposed for a strike-1 violation of its Cell Phone Policy, I find that the discipline it may impose on Ms. MA for this violation should not exceed three days.

Likewise, I find that Ms. MA exhibited poor customer service on June 28, 2019 when she, among other things, cursed in the presence of her passengers. However, I also find that that that poor customer service did not violate the June 28, 2019 Settlement Agreement because it did not result in a customer complaint. Metro therefore did not have just cause to discharge Ms. MA for this violation, but may impose such discipline as it would have imposed absent that Settlement Agreement, tempered by the extenuating circumstances Ms. MA was under at the time (having been involved in an accident less than an hour before, and frustration and her supervisor not taking seriously her raising of a safety concern). Consistent with the discipline Metro has previously imposed for a poor customer service, and taking into account the extenuating circumstances, I find that the discipline it may impose on Ms. MA for this violation should not exceed two days.

For these reasons, I I sustain the Grievance, and find the appropriate remedy is for Metro to reinstate Ms. MA and make her whole for the wages, benefits, and seniority she would have earned had she not been discharged, less the discipline Metro was entitled to impose as described in the two paragraphs above. I retain jurisdiction for the limited purpose of resolving any disputes the parties may have about applying or interpreting this Award.

**Richard A. Bales, Arbitrator**

**January 3, 2020**
**Date**