



The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 09-45-A

July 23, 2009

Investigation by the Department of Public Utilities on its own Motion commencing a rulemaking pursuant to 220 C.M.R. §§ 2.00 et seq: revising 220 C.M.R. § 151.00 and 220 C.M.R. § 155.00.

ORDER ADOPTING FINAL REGULATIONS

I. INTRODUCTION

On May 18, 2009, pursuant to G.L. c. 30A, § 2, the Department of Public Utilities (“Department”) issued an Order commencing a rulemaking and adopting emergency regulations prohibiting the possession or use of a cellular telephone or other electronic devices by the operator of a bus, train or streetcar of the Massachusetts Bay Transportation Authority (“MBTA”). Order Adopting Emergency Regulations, D.P.U 09-45. On June 12, 2009, the Department published notice of the emergency rulemaking in the Massachusetts Registrar. On June 30, 2009, the Department held a public hearing to receive comments on the emergency regulations. The following participants testified at the public hearing: Daniel Grabauskas, general manager of the MBTA; Stephan MacDougall, president and business manager of the Boston Carmen’s Union, Local 589 (“Carmen’s Union”); Gary J. Pires, president and business manager of Local 1037 (“Local 1037”); and Richard M. O’Flaherty, president and business agent of Local 1547 (“Local 1547”). On July 7, 2009, the MBTA submitted an Addendum to its comments at the public hearing (“MBTA Addendum”). Teamsters Local 25 (“Local 25”) filed comments July 1, 2009 (“Local 25 Comments”).¹ On July 14, 2009, the MBTA submitted written comments in response to the comments submitted by Local 25.

II. RELEVANT STATUTES AND REGULATIONS

Pursuant to G.L. c. 161A, § 3(i), the Department exercises jurisdiction over the safety of equipment and operations of the MBTA. In addition, the Department serves as the MBTA’s

¹ The Department accepted Local 25’s comments although they were late-filed and the Department offered participants the opportunity to respond.

designated state oversight agency pursuant to 49 C.F.R. Part 659, which is administered by the United States Department of Transportation Federal Transit Administration. As the designated state safety oversight agency, the Department is responsible for establishing standards for rail safety and security practices and procedures to be used by the MBTA. 49 C.F.R. 659.13.

Pursuant to our authority as established by 49 C.F.R. Part 659 and G.L. c. 161A, § 3(i), the Department has promulgated the following regulation, Rail Fixed Guideway System: System Safety/Security Program Standard, 220 C.M.R. § 151.00 et seq. Pursuant to G.L. c. 159A, § 9, the Department issues motor bus driver certificates, and has promulgated the following regulation, Operation of Motor Vehicles for the Carriage of Passengers for Hire Under A Certificate of Public Convenience and Necessity, Charter License, Special Service or School Service Permit, 220 C.M.R. § 155.00 et seq.

III. COMMENTS

A. General

1. MBTA

The MBTA urges the Department to make the emergency regulations permanent (Tr. at 4). The MBTA stated that its original policy banning the use of cellular phones, but not the possession of cellular phones, was not sufficient to prevent all employees from using cellular phones or texting while operating a transit vehicle (Tr. at 6). The MBTA explained that, on May 8, 2009, an MBTA Green Line trolley rear-ended another trolley between the Park Street and Government Center stations (Tr. at 4-5). According to the MBTA, the trolley operator admitted to texting on his cellular phone immediately before the accident (Tr. at 5). The

MBTA notes that this accident was the most serious incident of a bus or train operator using a cellular phone while engaged in the safety-critical duty of transporting MBTA customers and that the incident resulted in approximately 50 injuries and over \$10 million in damages to MBTA vehicles and equipment (Tr. at 5).

As a result of the trolley collision on May 8, 2009, the MBTA enacted Operations Special Order # 09-56 ("Special Order") on cellular phones and other electronic devices (Tr. at 6). The Special Order forbids operators from possessing or using a cellular phone or other electronic devices while on duty on his or her bus or train (Tr. at 6). The MBTA asserts that the Special Order is necessary to ensure the safety of the MBTA's passengers and its employees (Tr. at 7).

The MBTA stated that it did not consider a less restrictive policy, such as providing a lock box device on-board each vehicle (Addendum at 2). The MBTA notes that recent video footage captured MBTA employees using their cellular phones despite the complete ban on possessing these devices (Addendum at 2). As such, the MBTA argues that a lock box device would not be an effective deterrent to keep MBTA employees from using cellular phones while on duty (Addendum at 2).

The MBTA recognizes the importance of MBTA employees being able to reach and be reached in the event of an emergency (Tr. at 7). The MBTA stated that, beginning in 2006, it has provided an emergency hotline number for operators' families to call in case of an emergency (Tr. at 8). The MBTA explained that the emergency hotline number is located at the MBTA's operations control center, which is staffed 24 hours a day, 365 days a year (Tr. at

8). In addition, the MBTA is in the process of installing 42 new phone lines at key locations that will allow MBTA employees to make telephone calls to family members while on break (Tr. at 10). These phone lines will be installed by the end of July 2009 (Tr. at 14).

According to the MBTA, there are emergency communication systems present on buses and trains in case of an emergency (Tr. at 9). The MBTA stated that it performs daily radio checks on its two-way radios to ensure that all communication systems are working properly (Tr. at 9). The MBTA also updated its on-board bus communication systems by installing three primary methods to indicate an emergency (Addendum at 1). First, the bus operator would activate the emergency/vandal lights and external destination signs (Addendum at 1). Second, the bus operator would communicate via voice radio communication with the dispatcher and would indicate if the emergency was a priority, overt, or covert (Addendum at 1). Third, the bus operator would communicate via data communication with the dispatcher (Addendum at 1). The MBTA stated that a bus operator can follow-up after sending an overt voice message to the dispatcher with a data communication indicating the type of emergency that is going on: vehicle fire; unruly passenger; injury or illness; and other emergency (Addendum at 2).

2. Boston Carmen's Union, Local 589

The Carmen's Union supports a ban on the use of cellular phones or other electronic devices and on prohibiting operators from carrying cellular phones or other electronic devices on their person while operating a passenger transit vehicle (Tr. at 17). It further stated that

such a policy is necessary to ensure the safe travel of MBTA customers and its employees and to prevent MBTA employees from inattention of critical safety duties (Tr. at 17).

The Carmen's Union asserts, however, that it does not support the MBTA's Special Order or the Department's emergency regulations prohibiting MBTA employees from possessing cellular phones or other electronic devices (Tr. at 17). Instead, the Carmen's Union argues that there is a less restrictive option available (Tr. at 23). Specifically, the Carmen's Union suggests that the MBTA modify its fleet of vehicles by installing a lock box device, which would allow MBTA employees to keep their cellular phones or other electronic devices nearby and, at the same time, would prevent them from using their cellular phones or other electronic devices while operating a transit vehicle (Tr. at 23-24). The Carmen's Union argues that the MBTA failed to consider less restrictive options, like installing a lock box device, before implementing the Special Order prohibiting the possession of a cellular phone or other electronic device (Tr. at 22).

The Carmen's Union also argues that the MBTA's Special Order is unreasonable because it punishes MBTA employees by denying them reasonable access to their families upon completion of their official duty (Tr. at 25). Moreover, some MBTA employees are required to take unpaid multi-hour breaks at remote locations (Tr. at 18-26). Under Department regulations, such MBTA employees will not be able to have access to their cellular phones while on break. Thus, an MBTA employee may be effectively prevented from using his or her cellular telephone for twelve or more hours (Tr. at 20). In addition, the Carmen's Union argues that no policy will prevent some MBTA employees from conducting themselves

in an inappropriate manner, noting that there have been three violations of the MBTA's Special Order since its enactment (Tr. at 24-25). The Carmen's Union concludes that it is the Department's task to balance the issue of operational safety of the system with critical quality-of-life issues affecting the MBTA's employees (Tr. at 17).

3. Local 1037

Local 1037, a union representing employees of a regional transit authority, located in New Bedford, Massachusetts, expressed concern regarding how permanent regulations would affect other transit authorities in the Commonwealth (Tr. at 31). Local 1037 stated that its radio communication systems are not reliable because they are older and the geographic area it operates in is not always conducive for radio communication (Tr. at 31). Local 1037 stated that as a result, its members rely on their cellular phones in order to communicate with management about various system problems, including breakdowns, accidents, and to relay emergencies (Tr. at 31-32). Local 1037 stated that a policy prohibiting use of cellular phones while on duty is sufficient (Tr. at 32).

4. Local 1547

Local 1547, a union representing employees of a regional transit authority, located in Brockton, Massachusetts and North Attleboro, Massachusetts supports banning cellular phones while driving and favors the use of a lock box device (Tr. at 40). Local 1547, however, opposes a total ban on possessing a cellular phone while on duty (Tr. at 40).

Local 1547 does not support prohibiting the possession of cellular phones while on duty because cellular phone use is an operational need (Tr. at 37). Local 1547 asserts that its

drivers have no radio communication in certain geographic areas (Tr. at 37). As such, Local 1547 asserts that its drivers rely on cellular phones to communicate with managers and supervisors (Tr. at 37). Specifically, Local 1547's drivers use cellular phones to communicate if there is an accident, a detour, or if people are hurt (Tr. at 39).

B. Applicability of Department Regulations to MBTA Contractors

1. Teamsters Local 25

Local 25 stated that it represents employees of Joint Venture of TTI/YCN, LLC ("Joint Venture"), Kiessling Transit, Inc. ("Kiessling"), and Veterans Transportation Service ("Veterans"), all MBTA contractors for the MBTA's "The Ride" passenger service program.

Local 25 stated that the MBTA informed Joint Venture, Kiessling, and Veterans that they must comply with the Department's emergency regulations (Local 25 Comments at 1). Local 25 argues that the emergency regulations apply only to bus, train and streetcar operators employed by the MBTA (Local 25 Comments at 3). Local 25 asserts that the Department's emergency regulations do not apply to Joint Venture, Kiessling, or Veterans because their drivers are operating automobiles and vans to transport passengers, not a bus, train, or streetcar (Local 25 Comments 2-3). Local 25 further argues that its operators are employed by Joint Ventures, Kiessling, and Veterans, which are private companies, and not by the MBTA (Local 25 Comments at 3).

2. MBTA

The MBTA stated that the Joint Ventures, Kiessling, and Veterans agreed in their contracts with the MBTA to operate pursuant to the same policies and procedures that govern

the MBTA bus and subway operations and operators (MBTA Comments at 1). As such, the MBTA communicated to Joint Ventures, Kiessling, and Veterans that they must comply with the Special Order (MBTA Comments at 1). The MBTA asserts that it has not asked Joint Ventures, Kiessling, and Veterans to submit to the Department's emergency regulations (MBTA Comments at 2). Rather, the MBTA asserts that it exercised its contractual right to direct Joint Ventures, Kiessling, and Veterans to develop and implement a workplace policy that comports with the MBTA's Special Order (MBTA Comments at 2).

IV. ANALYSIS AND FINDINGS

A. General

The purpose of this rulemaking is to address the public health and safety risks associated with the use of electronic devices by operators of public transit vehicles. D.P.U. 09-45, at 2 (May 18, 2009). In our role as the designated state oversight agency pursuant to 49 C.F.R. Part 659 and in light of our statutory obligation to protect the public under G.L. c. 161A, § 3(i), the Department adopted emergency regulations which expire on August 18, 2009, unless the Department promulgates final regulations. In this Order, the Department adopts as final the emergency regulations that became effective on May 18, 2009 because of the important public safety concerns, with minor changes.

The Department appreciates the thoughtful comments of Local 1037 and Local 1547 and acknowledges their concerns. We note, however, 220 C.M.R. § 151.13 and 220 C.M.R. § 155.02(13) apply only to MBTA employees. These regulations do not apply to employees of other regional transit authorities in the Commonwealth of Massachusetts.

The Carmen's Union opposes the Department's emergency regulations because they prohibit MBTA employees from possessing cellular telephones or other electronic devices (Tr. at 17). The Carmen's Union suggests that the Department consider a less restrictive policy, such as modifying rail transit vehicles by installing a lock box device (Tr. at 23-24). The Carmen's Union argues that a less restrictive regulation would not penalize MBTA employees and would still provide for the safety of the MBTA's customers and its employees.

The MBTA contends that its original policy prohibiting the use of cellular phones while on duty did not prevent the trolley accident on May 8, 2009 (Tr. at 6). The MBTA also argues that a less restrictive policy, such as providing a lock box device, was rejected as an ineffective deterrent to keep MBTA employees from using cellular phones while on duty since there have been at least two violations despite the complete ban on possessing cellular phones (Addendum at 2). The MBTA asserts that the Special Order and emergency regulations are necessary to ensure the safety of the MBTA's passengers and its employees (Tr. at 7).

The MBTA stated that it recognizes the importance of its employees being accessible in the event of an emergency and has attempted to address that concern by providing an emergency hotline number and installing 42 new phone lines at key locations for its employees (Tr. at 8; Tr. at 10). In addition, the MBTA has addressed the concerns of Local 1037 and Local 1547 regarding the possibility that radio communication may fail. The MBTA indicated that it has updated its communication system on-board a bus with three primary methods of communication if an emergency occurs (Addendum at 1).

The Department recognizes that our regulations prohibiting both the use and possession of cellular telephones and other electronic devices may have the unavoidable consequence of making personal communications for MBTA employees more burdensome. The Department's jurisdiction, however, pursuant to 49 C.F.R. Part 659 and G.L. c. 161A, § 3(i), relates to the oversight of the MBTA's safety of equipment, operations, and procedures. The Department does not have the authority to address employee and labor relations matters that may exist between the MBTA and the Carmen's Union. We encourage the MBTA to continue to work closely with the Carmen's Union to explore ways to mitigate the impact on employees' ability to communicate with family members in emergencies. The Department agrees with the MBTA, however, that the emergency regulations should be made permanent to ensure the safety of the MBTA's passengers and its employees (Tr. at 7). As such, the Department adopts the changes to 220 C.M.R. § 151.13 and 220 C.M.R. § 155.02(13) as final, and also makes minor modifications to 220 C.M.R. § 151.00 and 220 C.M.R. § 155.00 as discussed below.

The Department's regulation at 220 C.M.R. § 151.00 includes a new section prohibiting the operator of a rail transit vehicle from possessing or using a cellular telephone or other electronic device while operating an MBTA rail transit vehicle. After further consideration, the Department has revised 220 C.M.R. § 151.13 as follows:

151.13 Attention to Duty.

(a) Definitions.

Operator means a Transportation Authority Motorperson, Yard Motorperson, Train Attendant and Streetcar Motorperson, whether working as a Pilot or Trailer, who is on duty and on his or her train or streetcar.

Electronic Device means wireless or portable electronic handheld equipment that may be hands-free or not. This includes, but is not limited to, cellular phones, smartphones, two-way pagers, portable internet devices, MP3 players, iPods, Bluetooth devices or any headphones or earbuds of any type, and any other portable electronic devices.

(b) Use or Possession of Electronic Device While on Duty. An Operator is prohibited from using or having in his or her possession an Electronic Device while the Operator is on duty and on his or her train, which includes streetcars. The Electronic Device cannot be anywhere on the Operator's person or property, such as pocketbook or other belongings. The Electronic Device cannot be on the vehicle he or she is operating or in any part of a train consist. The Operator cannot give the Electronic Device to another person on the train or streetcar to hold, whether or not that person is a Transportation Authority employee.

The Operator is prohibited from any use of any Electronic Device while on duty, including, but not limited to, telephoning, checking the time, texting, playing games, reading, e-mailing, or listening to music.

The Department has deleted the word "Other" from the definition of Other Electronic Devices in the initial proposed provision in subsection (a). In addition, the Department has deleted the phrase "cellular telephone or other," wherever it appears, from the initial proposed provision in subsection (b). The Department also replaced the word "It" with "Electronic Device" in the third sentence of subsection (b). The Department made these revisions because cellular telephone is included in the definition of electronic devices.

The Department also adopts revisions to 220 C.M.R. § 151.00 correcting typographical errors and adopts revisions to 220 C.M.R. § 151.00 updating the language to reflect the following changes: (1) the Department deleted the Department of Telecommunications and Energy and replaced it with the Department of Public Utilities, wherever it appears; (2) the Department deleted D.T.E. and replaced it with D.P.U., wherever it appears; and (3) the

Department added the word “Oversight” to read Transportation Oversight Division, wherever it appears.

The Department’s regulation 220 C.M.R. § 155.00 includes an amended section prohibiting the driver of an MBTA bus from possessing or using a cellular telephone or other electronic devices, other than a company-installed radio for official use, while on duty. After further consideration, the Department has revised 220 C.M.R. § 155.02(13) as follows:

(13) Attention to Duty.

(a) Generally. No driver of a motor bus shall collect fares, make change, receive or discharge passengers while such bus is in motion: nor shall they have a lighted cigarette, lighted cigar, or lighted pipe in their possession while any passenger is being carried therein, nor drink any intoxicating beverage, nor take any drug or medication which would adversely affect their driving ability. A carrier may prohibit smoking by passengers and erect signs to that effect. If smoking is allowed, a section of the bus shall be designated for that purpose and proper signs shall be erected. A driver shall not use personal or citizen band radios other than company-installed radios which are limited to company or official use.

(b) Use of Electronic Device by Massachusetts Bay Transportation Authority Operators.

1. Purpose and Scope. 220 CMR 155.02(13) (b) is applicable to motor bus drivers employed by the Massachusetts Bay Transportation Authority (Transportation Authority).

2. Definitions.

Operator means a Transportation Authority Bus Operator who is on duty and on his or her bus.

Electronic Device means wireless or portable electronic handheld equipment that may be hands-free or not. This includes, but is not limited to, cellular telephones, smartphones, two-way pagers, portable internet devices, MP3 players, iPods, Bluetooth devices or any headphones or earbuds of any type, and any other portable electronic devices.

3. Use or Possession of Electronic Device While on Duty. An Operator is prohibited from using or having in his or her possession an Electronic Device while the Operator is on duty and on his or her motor bus. The Electronic Device cannot be anywhere on the Operator’s person or property, such as pocketbook or other belongings. The Electronic

Device cannot be on the vehicle he or she is operating. The Operator cannot give the Electronic Device to another person on the motor bus, whether or not that person is a Transportation Authority employee.

The Operator is prohibited from any use of any Electronic Device while on duty, including, but not limited to, telephoning, checking the time, texting, playing games, reading, e-mailing, or listening to music.

The Department has deleted the word “Other” from the initial proposed provision in subsection (b)(2). The Department has also deleted the phrase “cellular telephone or other” from the initial proposed provision in subsection (b)(3). The Department also replaced the word “It” with “Electronic Device” in the third sentence of subsection (b)(3). The Department made these revisions because cellular telephone is included in the definition of electronic devices.

The Department also adopts revisions to 220 C.M.R. § 155.00 adding the word “Oversight” to read Transportation Oversight Division, wherever it appears.

B. Applicability of Department Regulations to MBTA Contractors

The MBTA has explained that it does not assert that the Department’s regulations are applicable to its contractors. Rather, it seeks only to enforce an existing agreement with the contractors to comply with MBTA policies and practices, including its Special Order # 09-56. Therefore, the Department need not address the applicability of its regulation to MBTA contractors.

C. Conclusion

The Department finds that the regulations designated at 220 C.M.R. § 151.00 et seq. and 220 C.M.R. § 155.00 et seq. and attached to this Order as Appendix A and Appendix B are reasonably necessary to ensure public safety, and we adopt those as final regulations.

V. ORDER

Accordingly, after notice, hearing, and consideration, it is

ORDERED: That the Department of Public Utilities regulations at 220 C.M.R. § 151.00 and 220 C.M.R. § 155.00 are hereby amended.

By Order of the Department,

/s/

Paul J. Hibbard, Chairman

/s/

Tim Woolf, Commissioner

/s/

Jolette A. Westbrook, Commissioner