

**IN RE ARBITRATION BETWEEN:**

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**METROPOLITAN COUNCIL TRANSIT OPERATIONS, (MCTO)**

**and**

**AMALGAMATED TRANSIT UNION (ATU), Local 1005**

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**DECISION AND AWARD OF ARBITRATOR**

**BMS CASE # 08-PA-0900**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**June 30, 2008**

IN RE ARBITRATION BETWEEN:

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MCTO,

and

DECISION AND AWARD OF ARBITRATOR  
BMS CASE # 08-PA-0900  
Stefanie Brown Grievance

ATU, #1005.

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**APPEARANCES:**

**FOR THE EMPLOYER:**

Anthony Edwards, Attorney for the Employer  
Sam Jacobs, Director of Bus Transportation  
Mark Johnson, Mgr. of Bus Operations, Heywood  
Marcia Keown, Labor Relations Specialist

**FOR THE UNION:**

Roger Jensen, Attorney for the Union  
Stefanie Brown, grievant  
Sheila Miller  
Russell Dixon, Exec. Brd. at Heywood Garage  
Michelle Sommers, President of Union

**PRELIMINARY STATEMENT**

A hearing in the above matter was held on June 9, 2008 at the Law Offices of Parker Rosen in Minneapolis, MN. The parties presented oral and documentary evidence at that time. The parties waived Post Hearing Briefs.

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement dated August 1, 2005 through July 31, 2008. Article 5 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Bureau of Mediation Services. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

**ISSUES PRESENTED**

Was there just cause for the termination of the grievant? If not what shall the remedy be?

**PARTIES' POSITIONS**

**EMPLOYER'S POSITION**

The MCTO took the position that there was just cause for the termination of the grievant. In support of this position, the MCTO made the following contentions:

1. The MCTO asserted that the grievant was subject to a last chance agreement, LCA, dated 11-08-06, and that she violated the terms of that agreement. The basis for the original disciplinary action was related to a note she left threatening co-workers at the Heywood Garage. Further, the grievant had a long history of attendance problems that occurred well prior to her pregnancy with her latest child that all parties acknowledged was difficult for the grievant and her baby. Based on these incidents the grievant and her Union and the Employer agreed to the terms of the LCA in this case. It is not appropriate to now reconsider the underlying basis for the LCA.

2. The terms of the LCA are clear and provide in relevant part as follows:

Metro Transit is willing to allow Ms. Brown a last chance opportunity to continue as an employee with Metro Transit so long as she agrees to and complies with the all of the following conditions:

1. This agreement will remain in force and effect in Ms. Brown's employment file for thirty-six (36) months following the date of the agreement.
2. Ms. Brown agrees that within a rolling calendar year, effective November 8, 2006, she:
  - Cannot exceed five (5)\* occurrence of absenteeism (late occurrences will count as one whether it be excused or not excused)

\*This excludes her current pregnancy during the period identified in her FMLA certification for pre-natal care and maternity leave.
3. Ms. Brown cannot participate in any action whether it be physical, verbal or written that would be in violation of the Metropolitan Council's violation [sic – violence] in the workplace policy as this will be just cause for her immediate discharge from employment.
4. Failure of Ms. Brown to comply with any term(s) of this Agreement shall result in her immediate termination. Such termination will be deemed just and merited as interpreted in Article 5, Section 1 of the Labor agreement between the parties.
5. This Agreement shall not operate to restrict Metro transit's authority to terminate Employee for any reason not mentioned in this Agreement, if that reason would have been proper reason for Employee's termination in the absence of this Agreement.
6. Metro Transit may or may not invoke immediate disqualification or discharge as provided for in this Agreement as its sole discretion for future violations. If the employer decides to punish future violation with a less severe penalty other than immediate discharge, such a decision by the employer shall not in any way diminish its right to impose immediate discharge for any subsequent violation or violations.

7. In the event Ms. Brown is discharged pursuant to this Agreement, she may file a grievance only to challenge whether her conduct constituted a violation of any employer rules and regulations as stipulated in this agreement. Ms. Brown specifically agrees that she may not challenge the propriety of the discharge in any stage of the grievance procedure.
8. If Ms. Brown's grievance is submitted to arbitration, the jurisdiction of the arbitrator is limited to determining whether Ms. Brown was in violation of this agreement. All parties agree that the arbitrator shall not have jurisdiction to modify the discharge penalty in the event such a violation is found.

3. The MCTO argued that Ms. Brown in fact was in violation of the agreement due to her chronic absenteeism for many months. The MCTO pointed to Joint Exhibits 7 and 8 and asserted that these document clearly show that the grievant was well beyond her 5 allowable absences in a rolling calendar year.

4. The MCTO further asserted that it has been more than fair with Ms. Brown over the course of this matter. They specifically excluded any absences related to her pregnancy as contained in the FMLA certification. They further allowed her to take a leave of absence in early 2007 and to "take as much time as she needed" to deal with her newborn son and the various health problems he had due to his premature birth. None of those days and absences was even counted. It was not until her return after that leave in the spring of 2007 that any days began to be counted.

5. Pursuant to the absenteeism policy, days on which employees do not appear for work is counted as an occurrence. Moreover, if there are multiple days related to the same illness or reason for absence they too are counted as one occurrence.

6. The one exception was that for certain types of absences, in the event someone is late for work but is still assigned work, that is not counted as an unexcused absence under the general absenteeism policy. Here though pursuant to the provisions of the LCA, such late appearances were to be counted and everyone clearly knew that.

7. The MCTO pointed to the documents at Joint 7 and 8 and argued that there were well over 5 absences between April of 2007 and the end of 2007; the grievant never even made it a rolling calendar year. There were in fact as many as 11 such absences.

8. The MCTO countered the Union's claim that some of these absences were due to a work related injury, that had been initially denied by the employer, but arguing that even if those days are excluded, the grievant is still well over the 5 allowable days.

9. Moreover, the grievant's supervisor specifically warned her in September of 2007 that she was already in a terminable position due to her many absences from work and that one more would result in her discharge. See joint exhibit 10, Memo dated September 13, in which Hugh Hudson, the grievant's immediate supervisor specifically advised the grievant that she was informed that "no further occurrences of absenteeism would be allowed as you had exceed the number of occurrences stipulated in your last chance agreement." The grievant apparently responded that she understood she had exceeded the number of occurrences allowable and understood that the next occurrence would result in her termination. The MCTO noted that as of September 13, 2007 she already had 9 occurrences.

10. When she missed several days of work between December 4 and 6, 2007, the MCTO had no alternative but to terminate her pursuant to the clear terms of the LCA.

11. The MCTO countered the Union's claim that there was a separate agreement reached at the Step 1 meeting to reinstate her if she brought in a doctor's note for September 6 and September 10, 2007. First, no such documentation was even brought in until several months after these dates. Second, they do not reference any treatment rendered on that date nor was there any indication from the doctor as to why the grievant could not work those days. Third, the notes on the call-in sheet indicated that when the grievant called in on those days in September she did not reference her shoulder injury but rather indicated that she was out due to some illness with her child, (which the MCTO also noted was not covered by FMLA at that point since the grievant did not have sufficient hours then to qualify for FMLA).

12. Finally, the Judge in the Workers Compensation trial, See joint exhibit 11, specifically found that there was no documentation that the employee was taken off work by her treating doctor on September 6 and 10, 2007. Moreover, as noted above, even if those dates are taken out of the calculation, the grievant is still well over the 5 allowed absences and would still be in a termination situation.

13. The MCTO denied that there was any “side deal” to reinstate her if she brought that note in. There was a statement that if she brought such a note in it “would be beneficial to her” but there was no promise implicit or otherwise to reinstate her even if she did. At best, it was a commitment to consider some other remedy but no promise to do anything beyond that.

14. The essence of the MCTO’s case is thus that the LCA could not be clearer and specifically limits the arbitrator’s jurisdiction to deciding whether there was a violation of the specific terms of the LCA. If so, the arbitrator must sustain the discharge. Here it was clear that the grievant was in violation of the terms of the LCA as of December 2007 even if all of the potential days she claimed were due to the work injury are taken out of the calculation. Given the limited jurisdiction the arbitrator must sustain the discharge on this record.

The MCTO seeks an award denying the grievance in its entirety and upholding the discharge.

## **UNION’S POSITION**

The Union took the position that there was no just cause for the grievant’s termination. In support of this position the Union made the following contentions:

1. The Union argued that the grievant is a long-term employee with the bus company and has been a very loyal and hard working and dedicated employee for many years. In fact she has something of a family history with the MCTO since her mother currently works there as well as several relatives and the grievant’s own daughter. She should not simply be cast aside due to the technical terms of a LCA that probably should not have been in place to begin with.

2. The Union acknowledged that the grievant was subject to the LCA but argued that the underlying reasons for it were very weak. The grievant left a note for her co-workers that was meant as a joke and was frankly taken as a joke when they realized who it was from. There was never any threat nor any real danger to anyone at any time.

3. Moreover, there was some confusion about the meaning of the term “rolling calendar year” and the grievant did not clearly understand that this would be calculated differently. A “calendar year” is from January 1<sup>st</sup> to December 31<sup>st</sup> yet the rolling year was calculated on a rolling fiscal year.

4. The Union further argued that many of the absences were in fact due to a work related injury the grievant sustained to her shoulder, which related to driving her bus. The injury was initially denied by the employer, which thereby caused many of the absences to be counted toward the occurrences in the LCA that should not have been. Pursuant to the Findings and order of Judge Penny Johnson of the Office of Administrative hearings, the determination by the Workers Compensation Court is now that the injury was in fact work related and that the grievant’s absences due to her shoulder injury should not be counted as violations of the LCA.

5. The Union also asserted most strenuously that after the grievant was fired a grievance contesting that was filed and a Step 1 grievance meeting held. At that meeting Mr. Mark Johnson, the grievant’s manager met with the grievant and Union representative. He made a specific statement at that meeting in response to the allegation that the September 6 and 10 absences were work related and therefore not to be counted as violations of the LCA.

6. The grievant denied that she ever said that these days were related to her son’s illness. The Union argued that the dispatchers get busy and do not always write things down accurately or get distracted and write things down later. Virtually everyone at Heywood knew of the grievant’s predicament and her son’s health issues and assumed that when she called in “sick” it was due to her son since she had done so quite often for that very reason. This however was due to the shoulder injury and not to her son and the Union claimed that these days should not have been counted.

7. The Union asserted that it is important to keep in mind that at that time the injury was still being denied and therefore the employer was counting those dates as occurrences pursuant to the LCA. Mr. Johnson stated that if the grievant could bring in something from her doctor indicating that those days were due to a work related shoulder injury it would “be beneficial to her.”

8. The Union argued that this statement could only mean one thing in that context and at that time – that if she brought in a statement from her doctor indicating that she needed to be off work due to the work injury she would be reinstated. The Union argued that there is nothing else the words “it would be beneficial to you” could possibly mean at that point. She had already been fired and a statement such as that made in that context could only mean that she would be reinstated. There was nothing else to be offered to her at that point.

9. The grievant then did bring a note from her doctor, Dr. Kasmurski at Park Nicollet Medical Center, dated 12/14/07 that unequivocally stated that “Ms. Brown was unable to work 9/6/07 & 9/10/07 as she was under my care for a significant shoulder injury & was unable to perform her job duties.” This was brought in within a day or so of the Step 1 meeting.

10. Further, the Union argued that this statement essentially trumps the LCA because it was made after the decision to terminate her and in a Step grievance meeting designed for the very specific purpose of trying to find possible resolution of grievances. The Union argued that the MCTO then reneged on Mr. Johnson’s commitment to reinstate her once the doctor’s note was brought it.

11. The essence of the Union’s case is thus that while there may be technically a violation of the LCA here, many of the days should not be counted now that the workers compensation system has agreed with the employee that this is a work related injury. Moreover, the MCTO should be required to live up to its commitment made through the manager to reinstate her if she brought in a doctor’s excuse for certain days in September.

The Union seeks an award sustaining the grievance and reinstating the grievant with all lost back pay and accrued benefits as the result of the termination in this matter.

## MEMORANDUM AND DISCUSSION

Initially it must be noted that the arbitrator's jurisdiction is greatly limited in this case per the terms of the LCA. As noted above, the question is strictly limited to whether there was in fact a violation of the LCA. Once that is determined the result becomes what the legal profession calls a directed verdict – if there is no violation, the grievant is to be reinstated with appropriate back pay benefits. If there is such a violation the grievance must be denied and the discharge sustained. There is no authority for a middle ground result here.

The Union argued that the underlying reason for the imposition of the LCA was without cause and that the “threatening note” left by the grievant should never have been viewed as a threat. It was meant as a joke and the affected dispatchers knew that once they realized who had written it. The Union claimed that the affected employees chuckled and threw the note away and that it was some other employee who came along and raised a huge issue over it.

Here though none of that can be considered. Whether the LCA was called for or not is not before the arbitrator here. The simple fact is that the grievant and the Union and the MCTO signed it and the terms were quite clear.

The Union further raised an issue that there was confusion about the meaning of the term “rolling calendar year” and that this term cannot be strictly applied since the grievant may not have fully understood what that meant, especially given the Draconian consequences of a violation here. The evidence did not support this allegation. The term could perhaps have been better phrased since a rolling year and a calendar year may mean different things, however, on this record it was shown that the parties knew what this meant. Even the grievant acknowledged that she understood that her absences would be calculated on a rolling year basis and that the MCTO would keep track of it in that way. She further understood that more than 5 could result in her termination.

No argument could even be made here that the prior leniency shown by the MCTO toward the grievant could be held as some sort of precedent. The terms of the LCA at paragraph 6 could not be clearer – the employer had the discretion to determine if a violation of the LCA would result in immediate termination at any point but that this decision would not diminish its right to impose immediate discharge for subsequent violations. Thus the fact that the grievant was allowed to accumulate more than 5 absences does not by the clear terms of the LCA diminish the right of the MCTO to impose discharge for any future violations.

Moreover, it was clear on this record that the grievant and her manager met to discuss her absences in September 2007 and that she was placed on very clear notice that any further absences would result in her termination. Those occurred in early December and in fact involved 3 full days.

The Union raised some issue that there may not have been 5 absences however the record did not bear that out and in fact supported the employer's claim that she had well over 5 occurrences during the period from March 2007 to December 2007. See Joint exhibit 7 & 8. The record showed that the dates in February that the grievant was gone were not counted even though they may not have strictly fit into the asterisked exception set forth in the LCA for her FMLA leave. Further, her leave of absence taken during the months of March and April were also not counted.

A review of the days missed reveals that even if one does delete the days found to have been related to a work injury, the grievant simply had more than 5 occurrences. The record supported the employer's claim that she had as many as 11 such days. Under the best of circumstances she had 9 such days. She was further warned not to have any further days and acknowledged that in September 13, 2007 and in fact missed 3 more days, counted as only one occurrence by the way, in December 2007, resulting in the termination at issue here.

Taking the evidence as a whole and even in the light most favorable to the grievant, it is clear that she was in violation of the terms of the LCA and could have been terminated much earlier than she was. As noted above though, the fact that she was not did not provide any grounds to argue that she should not have been once there was a further violation.

There was considerable dispute about September 6 and September 10, 2007. The Employer argued that the grievant called in sick and claimed that the days were related to her son's health problems. The grievant denied this and claimed they were due to her shoulder injury. The Union claimed that the dispatcher's notes, while admissible, were not subject to cross-examination and could well have been inaccurate. There was some support for the notion that the dispatchers may have assumed something that was not accurate or that they filled in the paperwork later and again simply assumed that the grievant's son was the cause of her absence since it had been so often before. On this record those dates do not really matter – the grievant was already above the limit even if those days are taken out of the calculation. That dispute thus becomes moot under the limited terms and jurisdiction of the LCA.

The real essence of the Union's claim is based on the statements made during the Step 1 grievance meeting. It was clear that a grievance over the termination was filed and that the parties met to discuss it. It was further clear that Mr. Johnson made what can only be termed an ill-advised statement at that meeting regarding September 6 and 10, 2007. Initially, it is not even clear if the arbitrator has the jurisdiction to reach that question given the limited nature of authority conferred by the terms of the LCA. Even if there is, the record does not adequately support the Union's claim that reinstatement must occur based on the statements made at the Step 1 grievance meeting.

Frankly, the Union did a masterful job using this incident to make this case a great deal closer than it otherwise would have been. The Union argued that the statement “it will be beneficial to you” or words to that effect were tantamount to an offer of reinstatement if she brought in a doctor’s note. There was no question that Mr. Johnson made this statement at the Step 1 grievance meeting and it was quite understandable that the Union seized upon this as a possible way to get the grievant reinstated. After all, there had been many instances in the past where this manager had accommodated the grievant's medical and family needs and had been quite lenient with her. It is also quite understandable that the Union would be puzzled when, after having brought a doctor’s slip that clearly indicated that the September dates were due to the shoulder injury, the employer would not agree to reinstatement.

The question here is whether that statement resulted in an override of the clear terms of the LCA or whether it clearly conveyed a mutual intent to reinstate the grievant upon certain stated conditions. Mr. Johnson indicated that once he got the doctor’s note he found that it was not sufficient to convince him that the grievant really was out due to her shoulder injury. This was due to the fact that it was several months after the fact and did not indicate that there was any actual treatment done on those dates. In fact, the record shows that there was not but that the grievant may have been having shoulder pain and symptoms such that she could not go to work and drive a bus on those days.

It is always difficult if not impossible to get into people’s heads to determine what they really meant when they say things like this. On this record, taken as a whole, the statement meant at best that Mr. Johnson would consider other options. It was clear that there was no express promise made nor any statement that reinstatement would occur. There was further no promise to pull back the action taken based in the LCA or to diminish or amend its terms in any way. Finally, there was no promise implicit or otherwise that the doctor’s note alone would be enough. Mr. Johnson never said what would be sufficient to change his mind. More to the point, it was his decision to make. As noted above, leniency rested with the employer in this case under the terms of the LCA.

Thus while the Union was certainly justified in latching onto this statement it cannot be said on this record that there was a firm commitment to reinstate the grievant even though that is what the Union may have thought.

Having found that there was a violation, and here there clearly was, the rest of the equation is established by the LCA itself.

Accordingly, the grievance must be denied and the discharge sustained.

## **AWARD**

The grievance is DENIED.

Dated: June 30, 2008

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Jeffrey W. Jacobs, arbitrator

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