

FACTS

The Employer operates the public transit system in the metropolitan area that includes Minneapolis and St. Paul, Minnesota. The Union (sometimes, the "ATU") is the collective bargaining representative of most of the non-supervisory employees of the Employer, including those working in the classification, Bus Operator, (sometimes, "Operator" or "Driver," as the parties refer to the classification).

The grievant was hired by the Employer on February 5, 2001. Since then, she has worked as a Driver until she was discharged on May 21, 2010. She reported to the Employer's South Garage, driving busses garaged and maintained there. The notice of discharge alleges, as grounds for her discharge, "Violation of Bus Operator Absenteeism Policy" and "Overall Record." On May 27, 2010, the Union grieved the discharge, alleging that it violated Article 5, Section 1, of the parties' labor agreement, which requires that discipline be "just and merited."

The Employer adopted its Bus Operator Absenteeism Policy (the "Policy") on August 13, 2005, to be effective on that date. The grievant received a copy of the Policy on August 1, 2005, just before it became effective. Relevant parts of the Policy are set out below:

I. Purpose. . . . This policy establishes the procedure and guidelines under which progressive discipline will be administered.

II. Transition. All operators will start with a clean absenteeism record as of the effective date of the policy. Only occurrences after that date will be counted. Any absenteeism records prior to that date will only be used as supporting documentation should discipline be merited at a later date.

III. Monitoring of Absence Record. [Supervisors are to monitor the absence record of each employee and "review each Employee Work History every time an entry is made."]

IV. Definition of Absence.

- A. For purposes of administering this policy, the following occurrences will be monitored and charged against the operator's record on a no-fault basis (reason for an occurrence will not be considered relevant):
1. Sickness/off-duty injury.
 2. Late - no work available - one minute or more late for plug in time.
 3. No show.
 4. Any request off after 9:00 a.m. the day preceding the requested day.
No show - Failure to show up or call-in for work within two hours after an employee's scheduled plug in time. The third no show, and every no show thereafter, within a rolling calendar year will count as two occurrences.
- B. An occurrence is defined as part of a workday or a single workday, or consecutive workdays missed. An FMLA [Family Medical Leave Act] certified absence is not considered an occurrence. . .

V. The Steps of Progressive Discipline.

- A. Managers must always administer discipline in a progressive and timely manner (up to five (5) working days). This means (a) that operators must have an adequate oral and written warning that their attendance is not satisfactory before any discipline, such as suspension or termination, is administered; (b) operators shall be given adequate opportunity to improve their attendance; (c) additional discipline will be administered when attendance does not improve; and (d) an operator shall be given a formal warning and hearing before being terminated.
- B. The steps of progressive discipline are as follows:
- Seven (7) occurrences in a rolling calendar year will result in a Record of Warning and a counseling session.
 - Ten (10) occurrences in a rolling calendar year will result in a Final Record of Warning.
 - Thirteen (13) occurrences in a rolling calendar year may result in termination. . .
- C. In assessing discipline, greater or lesser severity may be applied, based upon the circumstances of a particular case.
- D. In preparing materials for letters and hearings, the absenteeism record of the previous thirty-six (36) months may be referenced. . .

VI. Administering Discretionary Discipline.

- A. When assessing discipline, the supervisor should take whatever actions are necessary, consistent with progressive discipline, to resolve the operator's attendance problem.
- B. The supervisor should consider the following factors in determining whether the operator should be disciplined, suspended or terminated.
 - 1. Expectation of improvement.
 - 2. The operator's past record.
 - 3. The operator's performance in other areas.
 - 4. Mitigating circumstances, such as emergencies, or personal problems.
 - 5. The cause of excessive missed work.
 - 6. Other relevant considerations.

. . . .

The evidence explains that "plug in time" is the time just before the start of a driving shift, when a Driver is expected to report for work in order to make preparations for departure from the garage. The evidence also shows that, if a Driver reports for work late, thus causing the Employer to assign another Driver to the bus route the late Driver was to drive, the late Driver will be charged with an occurrence under the Policy. If, however, the late Driver is then assigned to another bus and thus works a shift that day, the late Driver is not charged with an occurrence. This practice is summarized under Subparagraph IV(A)(2) of the Policy, which defines an "Absence," to include "Late - no work available - one minute or more late for plug in time."

The Employer presented in evidence its summary record of the "absences" charged against the grievant under the Policy since June 2, 2007. Below, I summarize that evidence, showing the date and the reason for the charged absence, as given in the Employer's summary:

<u>Date</u>	<u>Reason</u>
06-19-2007 to 06-28-2007	Sick
11-27-2007	Request Off (chargeable)
12-04-2007	Request Off (chargeable)
12-12-2007	Request Off (chargeable)
02-18-2008	Sick
04-05-2008 to 04-07-2008	Sick
07-09-2008 to 07-11-2008	Sick
09-20-2008 to 09-22-2008	Sick
11-03-2008	Sick
11-18-2008 to 11-21-2008	Sick
12-28-2008	Late for Work
01-05-2009	Sick
07-29-2009	Request Off (chargeable)
09-08-2009	Sick
09-19-2009 to 09-20-2009	Sick
<u>09-21-2008</u>	<u>Record of Warning</u> <u>Absenteeism</u>
10-03-2009	Sick
10-14-2009 to 10-20-2009	Sick
10-31-2009	Late for Work
<u>10-31-2009</u>	<u>Final Record of Warning</u> <u>Absenteeism</u>
11-10-2009	Request Off (chargeable)
<u>11-10-2009</u>	<u>Final Record of Warning</u> <u>Absenteeism</u>
11-18-2009 to 12-04-2009	Sick
01-13-2010	Request Off (chargeable)
02-03-2010	Sick
<u>02-03-2010</u>	<u>Final Record of Warning</u> <u>Absenteeism</u>
02-09-2010 to 02-13-2010	Sick
03-07-2010	Request Off (chargeable)
05-16-2010	Late for Work

In this summary, I have underlined the warnings issued to the grievant, and I note that, as provided in the Policy, a "Record of Warning" indicates the accumulation of seven charged occurrences within the preceding twelve months and a "Final Record of Warning" indicates the accumulation of ten charged

occurrences within the preceding twelve months. This summary does not show that, on December 17, 2007, the grievant was previously discharged for having accumulated thirteen occurrences within the preceding twelve months (not all of which are shown in the summary above), but that in the course of grievance processing she was reinstated to employment on January 25, 2008.

Relevant parts of Article 5 of the parties' labor agreement are set out below:

Section 1. Metro Transit reserves to itself, and this Agreement shall not be construed as in any way interfering with or limiting, its right to discipline its employees, but Metro Transit agrees that such discipline shall be just and merited.

Section 3. Any dispute or controversy, between Metro Transit and an employee covered by this Agreement, or between Metro Transit and the ATU, regarding the application, interpretation or enforcement of any of the provisions of this Agreement, shall constitute a grievance.

Section 4. A grievance as defined herein may be presented for settlement by the aggrieved employee, the ATU or both. The ATU must begin acting for such member within seven (7) days after the ATU or its members have knowledge of the facts giving rise to said grievance, in the following manner:

1st Step. Take up such grievance with the appropriate Metro Transit management representative in writing, who will answer within five (5) days in writing. First step grievances will be held at the employee's current work location. If no mutually satisfactory adjustment can be reached, then

2nd Step. Within seven (7) days the ATU shall notify the applicable department head, who will answer same in writing within seven (7) days after hearing the grievance. Discharge answers will be given in writing within five (5) days. If no mutually satisfactory adjustment can be reached, then

3rd Step. Within seven (7) days the ATU shall notify the General Manager of Metro Transit or his appointee

who will answer in writing within seven (7) days after hearing same. Discharge answers will be given in writing within five (5) days. If no adjustment satisfactory to the ATU is reached within seven (7) days thereafter or within such additional time as may be mutually agreed upon, then the dispute may be submitted to a board of arbitration in accordance with Article 13 hereof . . .

Failure to comply with procedures and time limits above outlined shall be deemed an abandonment or settlement of the grievance and shall terminate the matter. . . .

DECISION

The Union's primary argument is that four of the thirteen occurrences charged against the grievant during the twelve months before her discharge should not have been charged against her, and the Employer argues that all of the thirteen occurrences were properly charged. I discuss and rule upon those arguments below.

In addition, the Employer makes the following argument. Neither the grievant nor the Union has previously grieved any of the four occurrences now challenged by the Union, nor have they grieved the warnings that resulted from the charging of those occurrences. Therefore, the Employer argues that the Union is precluded from challenging those four occurrences in this proceeding -- by the time limits established in Article 5 of the labor agreement, which require that, to initiate a grievance, the Union "must begin acting for such member within seven (7) days after the ATU or its members have knowledge of the facts giving rise to said grievance." The Employer argues that under Article 5 "failure to comply with procedures and time limits above outlined shall be deemed an abandonment or settlement of the grievance and shall terminate the matter."

The Union makes the following response. First, the Union argues that because the Employer did not notify the Union that it intended to make this argument until it first raised the issue at the hearing, the Employer should be considered as having waived the issue. Second, the Union argues that the ruling the Employer seeks -- to require that any absence charged as an occurrence must be grieved at the time the occurrence is charged -- would result in substantial inefficiencies, because the Union would be forced by such a ruling to bring a grievance every time an occurrence is charged against any employee, thus to protect against the possibility that an employee charged with an occurrence might be discharged in the future. Third, the Union notes that the labor agreement requires that the discharge of an employee must be "just and merited" -- a requirement that the discharge be based on just cause -- and the Union argues that this requirement of the labor agreement would be nullified if the Union were not permitted in a discharge grievance to challenge the underlying events that are alleged by the Employer to be the cause for the discharge.

For the following reasons, I rule that the Union is not foreclosed from challenging occurrences upon which the Employer now bases the grievant's discharge, even though those occurrences were not grieved at the time they were first entered in the grievant's record. The scope of a grievance challenging a discharge based upon accumulation of thirteen occurrences of absence must include the right to challenge any of those occurrences. A ruling otherwise would be the substantial equiv-

alent of a denial of the right to challenge any underlying past event that may be alleged as a basis for discharge -- for example, an allegation that the discharged employee has a record of past performance errors or, for a second example, an allegation that the employee has a record of past misconduct toward co-employees.

I regard the recording of an occurrence under the Policy as similar to the recording of such a deficiency in performance (as in the first example) or the recording of such misconduct toward co-employees (as in the second example). The allegation of such events should remain open to challenge in a discharge proceeding, even though the past recording of those events in the employee's record was not grieved.

As the Union points out, for pragmatic reasons, it would be burdensome to both the Union and to the Employer to foreclose later challenge to any charged occurrence if not grieved when charged -- because such a requirement would lead to the initiation of many grievances, not yet made consequential by subsequent discipline. Accordingly, I rule that the Union may challenge the four occurrences that it argues should not have been charged.

I note that, by this ruling, I do not intend that the previous discipline against the grievant, i.e., the records of warning and the final records of warning, should also be re-opened to challenge. As the Employer argues, failure to grieve such previous discipline within the time limits established by Article 5 forecloses a later challenge to those

disciplines. When, however, the Employer initiates new discipline, as it has done, that discipline and the events upon which it is based are matters that must be open to challenge in order to preserve the right to determine whether the discharge was "just and merited."

The Union makes the following arguments that four of the thirteen occurrences upon which the discharge was based should not have been charged. First, the grievant was charged with an occurrence for being absent from October 14, 2009, through October 20, 2009. She testified that she had flu during that time with a high fever, a cough and congestion. The Union presented in evidence a memorandum sent to all Drivers on September 16, 2009, by Christy A. Bailly, Acting Director of Bus Operations, in which Bailly described preparations for "the next wave of H1N1 influenza," as recommended by the Minnesota Department of Health and endorsed in Bailly's memorandum. Among those recommendations was the following:

Stay home from work, and errands when you are sick with a fever over 100 and have a significant cough and congestion. Don't go back to work or school until fever free (without medication) for 24 hours!

The Union argues that the grievant should not have been charged with an occurrence for this absence because she was obeying the instructions received in Bailly's memorandum. The Employer argues that this absence, like any other absence for illness, is a chargeable occurrence under the Policy and that, though the grievant was given what the Employer refers to as a "packet" to be used to apply for FMLA leave and could have

applied for it, she did not do so. To this argument, the Union responds that, because Bailly's memorandum did not state that, if an employee stays home with flu symptoms in compliance with the memorandum's directive, the employee must apply for FMLA leave to avoid a chargeable occurrence. The Union argues, therefore, that the grievant should not be charged with an occurrence for the absence that began October 14, 2009.

Second. The grievant was charged with an occurrence for being absent on November 10, 2009, when she took her fifteen year old daughter, who suffers from asthma, to a physician to be tested and treated after an asthma attack that day. This absence was for one day only and for that reason would not qualify for FMLA leave unless it did so under the "intermittent leave" provisions of the FMLA. The grievant received the FMLA packet from the Employer, but did not apply for such leave.

The Union notes that Minnesota Statutes, Section 181.940, et seq., requires that an employer "not retaliate against an employee" for using personal sick leave benefits for "such reasonable periods as the employee's attendance with [a sick or injured child under the age of 18] may be necessary." The Union argues that the charging of an occurrence for the absence of November 10, 2009, and the subsequent use of that occurrence as part of the basis for the grievant's discharge was an act of retaliation against the grievant for her use of sick leave to attend to the medical care of her daughter. The Employer responds that the statute was not intended to include the use of discipline under a no-fault attendance policy as a prohibited

retaliation, especially when the employee-parent can use FMLA leave to avoid any adverse consequence to possible discipline.

Third. The grievant was charged with an occurrence for being absent from February 9, 2010, through February 13, 2010, because of symptoms possibly related to heart disease. The grievant testified that she began to experience chest pains on February 9, 2010, and first sought medical attention for those symptoms on February 12, 2010. She called in to the Employer's dispatcher to report her illness on February 9, 2010, and she did not report to work on that day and on subsequent work days until she returned to work after February 23, 2010. The grievant was, at first, charged with one occurrence for being absent from February 9 through February 23, consistent with the Policy's treatment of a continuing absence on consecutive work days as one occurrence. During grievance processing, the Employer, in response to the Union's request to permit the grievant to provide FMLA documentation retroactively to cover this occurrence, allowed the Union to obtain such documentation from the physician the grievant had consulted, with the understanding that the Employer would allow it to be used retroactively to the extent that it established the right to FMLA leave for that occurrence. The physician's documentation, as subsequently obtained and supplied to the Employer, certified that the grievant was ill from February 12, 2010, the date the physician first saw the grievant, through February 23, 2010. Because this certification did not cover the first days of the grievant's absence from work, February 9 through February 11,

the Employer still charged the grievant with an occurrence covering those days. Accordingly, this process of retroactive FMLA certification did not result in the deletion of an occurrence.

The Union argues that the Employer should have noted that the physician's certificate did not extend back to the time the grievant first called in sick, on February 9, and that the Employer should have interpreted the certificate as applying from the first onset of symptoms. The Employer argues that, even though it was under no obligation to allow retroactive FMLA documentation, it did so, and that it was correct in interpreting that documentation as it was written.

Fourth. The grievant was charged with an occurrence for being absent on March 7, 2010. The circumstances that led to that absence were the following. The grievant's sister, has a twenty-one year old son who was shot on February 28, 2010, paralyzing him below the waist. The grievant was absent from work from February 28, 2010, through March 2, 2010, as she stayed with her sister at the hospital where the grievant's nephew was being cared for. James P. Perron, Assistant Manager of the South Garage, decided not to charge the grievant with an occurrence for her absences on those days -- in his discretion, treating them as caused by an emergency excused in accord with Section VI(B)(4) of the Policy. The grievant testified that, on March 7, 2010, her sister called her and said the grievant's nephew was being taken to the intensive care unit of the hospital to remove fluid from his lungs. The grievant testified

that her sister was very distraught and that she wanted the grievant with her at the hospital during the procedure. The grievant informed the dispatcher that she would not be reporting to work. Perron testified that he did not excuse the absence of March 7, 2010.

During his testimony, Perron conceded that, except for her problems with attendance, the grievant has a good record of performance, the record shows that she has no prior discipline except for problems related to attendance. As noted above, the grievant was previously discharged for violation of the Policy, but was reinstated during grievance processing.

The Employer argues that the grievant's overall record of poor attendance justifies her discharge, irrespective of issues concerning the charging of particular occurrences under the Policy.

I make the following rulings. As noted above, Minnesota Statutes, Section 181.940, et seq., requires that an employer "not retaliate against an employee" for using personal sick leave benefits for "such reasonable periods as the employee's attendance with [a sick or injured child under the age of 18] may be necessary." The Union makes a plausible argument that charging an occurrence for the grievant's absence on November 10, 2009, when she took her daughter to a physician to be tested and treated for asthma, falls within that prohibition -- notwithstanding that the grievant might have succeeded in applying for intermittent FMLA leave to excuse that occurrence. In the absence of a court's contrary interpretation, I so interpret the

statute, and accordingly, I rule that the occurrence charged for the absence of November 10, 2009, should be removed from the grievant's record.

Nevertheless, though this removal will allow the grievant to avoid the discharge that would result from a record of thirteen occurrences within twelve months, the grievant's overall record justifies substantial discipline in what should be a final effort to correct her chronic poor attendance. The award below best fits the circumstances of this case.

The award reinstates the grievant to her position as a Driver, thus providing her with an opportunity to show that, as she testified, she values her job and now fully understands the Employer's need to have the regular attendance of its Drivers. The award does not provide the grievant with back pay because she, as the primary cause of her loss, should not be rewarded for that loss with compensation unearned by work.

The award directs the Employer to treat the grievant's discipline as a long-term suspension without pay. I recognize that, because the grievant has not worked as a Driver since the date of her discharge on May 21, 2010, a literal application of the Policy would reinstate her to work on the date of this award with only one occurrence on her record during the preceding twelve month period -- the occurrence of May 16, 2010. Because the grievant may not be motivated by such a result to correct her poor attendance, the award reinstates her with some of the occurrences restored that were on her record at the time of the discharge -- enough to encourage a prompt effort to reform, yet

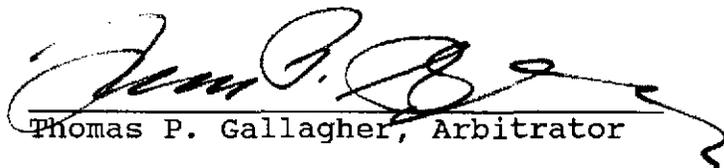
retain some of the flexibility that a no-fault attendance policy must have.

AWARD

The grievance is sustained in part. The Employer shall reinstate the grievant to her position as a Driver without loss of seniority, but without back pay, and shall adjust her discipline record to show that the time since her discharge has been a suspension without pay.

Upon the grievant's reinstatement, her attendance record shall be adjusted to show eight occurrences, including the one charged on May 16, 2010. Because that occurrence will almost immediately be more than twelve months old and thus eliminated from the grievant's record, she will, in effect, begin her reinstated employment with only seven retained occurrences on her record. The Employer shall eliminate one of those seven retained occurrences on June 15, 2011, as if it were twelve months old, and the Employer shall so eliminate from the grievant's record another of the retained occurrences on the fifteenth day of each succeeding month, i.e., one on July 15, on August 15, on September 15, on October 15, on November 15 and on December 15 of 2011.

May 9, 2011


Thomas P. Gallagher, Arbitrator