

IN THE MATTER OF ARBITRATION BETWEEN

METROPOLITAN COUNCIL,
METRO TRANSIT DIVISION
(Employer)

and

DECISION
(Discharge Grievance)
BMS Case No. 11-PA-0078

AMALGAMATED TRANSIT UNION, LOCAL
1005, MINNEAPOLIS – ST. PAUL
(Union)

ARBITRATOR: Mr. Frank E. Kapsch, Jr.

DATE AND PLACE OF HEARING: The hearing took place on December 8, 2011 at the Metro Transit Operations Building located in Minneapolis MN.

RECEIPT OF POST-HEARING BRIEFS: Both Parties submitted timely briefs as of December 22, 2011.

APPEARANCES

FOR THE EMPLOYER:
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JURISDICTION

The Parties stipulated that this Arbitrator has been selected and appointed in accordance with the provisions of Article 13 of the applicable labor agreement and thereby possesses the authorities and responsibilities set forth therein to hear and resolve this dispute. The Parties further stipulated that, for purposes of this matter, they are jointly waiving their contractual right, under Article 13, to

appoint additional members to a Board of Arbitration and they agree that this Arbitrator shall be the sole determiner of this dispute.

THE ISSUE

The Parties stipulated that the Issue is; was the discharge of employee, Teri Bolduc, on June 7, 2011, just and merited pursuant to Article 5, Section 1 of the applicable Collective Bargaining Agreement? If not, what is the proper remedy?

THE EMPLOYER

The Metropolitan Council is a political subdivision of the State of Minnesota responsible for planning activities within the seven county metro area of Minneapolis and St. Paul MN. Additionally, the Council provides certain essential services to the region, including mass transit services through its Metro Transit Division (or MTD). Metro Transit maintains and operates the area's largest mass transit system consisting of buses and light rail. It operates about a dozen physical facilities and employs about 3000 people that operate and support those transit operations; including some 1500 bus and train operators, some 500 mechanics, some 550 administrative and clerical employees and about 125 employees in its Transit Police force.

THE UNION

The Union, Amalgamated Transit Union, Local No. 1005 (ATU), is an affiliated Local of the Amalgamated Transit Workers Union, AFL-CIO headquartered in Washington D.C. ATU Local 1005, with offices in Minneapolis MN, currently represents and acts as the collective bargaining representative for about 2200 employees of Metro Transit, including Bus Drivers.

COLLECTIVE BARGAINING HISTORY

The Employer, its predecessors, and Union have had a continuing and on-going collective bargaining relationship dating back decades and this relationship has been reflected in a successive series of labor agreements during that period. The most recent labor agreement was effective August 1, 2010 and is scheduled to expire July 31, 2012. The Parties agree that this agreement is applicable to this matter.

BACKGROUND

The following is a factual summary based on relevant and undisputed record testimony and evidence submitted by the Parties in the course of the hearing:

The Grievant and subject of this matter is Ms. Teri R. Bolduc. She commenced employment with the Employer, as a Bus Driver/Operator, in about July, 2001.

She was discharged by the Employer on about June 7, 2011 for excessive absenteeism/tardiness.

During her entire tenure of employment with the Employer, Ms. Bolduc worked solely as a Bus Driver and, in that capacity, was a member of the contract bargaining unit and a member of the Union. She was classified as a Part-Time Bus Driver, typically working 30 hours or less per week. In the hearing, the Parties were in agreement that her work record was good in that she had no notable vehicle accidents and no significant customer complaints during the course of her employment. The Employer, however, noted that Ms. Bolduc has had an ongoing attendance/tardiness problem for at least the past several years.

On August 13, 2005, the Employer adopted and implemented a new "*Bus Operator Attendance Policy*" (Policy). On July 29, 2005, Ms. Bolduc signed a receipt acknowledging that she had received a copy of the new policy.

The Employer's new attendance policy was essentially a derivation of the popular "point-based" attendance systems widely adopted and currently in use by many other organizations. The system is sometimes referred to as a "no fault" system in that the underlying reason for the absence is, in most instances, irrelevant and has no impact on whether or not a particular incident is chargeable per the policy.

The policy runs on a 12 month "rolling" calendar. It states that a Bus Driver will be charged an "occurrence" when they fail to report for work due to; 1) Sickness or off-duty injury, 2) Late – no work available – one minute or more late for plug-in, 3) No show or 4) any request for time off after 9:00 AM the day preceding the day requested off.

The policy notes that a "No Show", that is, a failure to show up or call in within two (2) hours of an employee's scheduled plug-in time (employee scans their badge at the garage, indicating that they are present and available for work), will be counted as two (2) "occurrences" on the third and all subsequent instances within a 12 month period.

The policy clearly states that "*An FMLA (Family Medical Leave Act) – certified absence is not considered an occurrence.*"

Employees in violation of the Attendance Policy are subject to progressive discipline:

1. *Seven (7) occurrences within a calendar year will result in a Record of Warning and a counseling session.*
2. *Ten (10) occurrences within a calendar year will result in a Final Record of Warning.*
3. *Thirteen (13) occurrences within a calendar year may result in termination.*

The policy requires that an employee receive a final warning and be afforded a hearing prior to a determination as whether to terminate/discharge and notes that mitigating circumstances may be considered.

A review of Ms. Bolduc's personal attendance record for the period February, 2009 through May, 2011 indicates the following:

- For the period 2/02/2009 to 5/26/2010:
 - There were 6 absenteeism Occurrences
 - There were 9 FMLA-certified absences (non-chargeable)
 - 6/11/2009 – Record of Warning – Absenteeism
 - 8/14/2009 – Record of Warning – Absenteeism
 - 10/9/2009 – Record of Warning – Absenteeism
 - 12/11/2009 – Record of Warning – Absenteeism

- For the period 5/27/2010 to 6/11/2011:
 - There were 13 absenteeism Occurrences
 - There was 1 FMLA-certified absence (non-chargeable)
 - 7/30/2010 – Record of Warning – Absenteeism
 - 9/17/2010 – Final Record of Warning – Absenteeism
 - 12/3/2010 – Final Record of Warning – Absenteeism
 - 12/31/2010 – Final Record of Warning – Absenteeism

When Ken Ferguson, the Assistant Transit Manager and Ms. Bolduc's immediate supervisor, met with her on 12/31/2010 to issue a Final Record of Warning; he specifically noted that she had accumulated 10 absence Occurrences since 7/30/2010 to date. He made it clear to her that three (3) more absence Occurrences before 7/30/2011 would place her in a discharge situation.

On 1/3/2011, Mr. Ferguson again met with Ms. Bolduc in a formal counseling meeting to emphasize the seriousness of her absenteeism situation. He noted that the responsibility for addressing and correcting her absenteeism problem rested solely with her. He specifically noted that Metro Transit made a number of different resources available to her, including an Employee Assistance Program to help her resolve personal difficulties that may be causing or contributing to her absenteeism situation.

Following the counseling on 1/3/2011, Ms. Bolduc incurred an absence (sick) Occurrence on 3/4/2011, another Occurrence (sick) on 4/11/2011 and another (late for work, no work available) on 4/26/2011.

When Bolduc reported late for work on 4/26/2011, that was her thirteenth (13th) Occurrence within 12 months and she was eligible for termination. However, Mr. Ferguson, in an effort to prevent her from going into discharge status, tried to find some work for her. He wasn't able to find any work for her at the Ruter Garage (her base garage), but made some phone calls and found work available at

another garage about nine miles away and sent her there. However, Ferguson and Bolduc subsequently learned that Ms. Bolduc was ineligible for the work at the other garage, because under the terms of the labor agreement, part-time bus drivers were restricted to working only out of their base garage – in this case the Ruter Garage. With no work available, Ms. Bolduc's late report absence on 4/26/2011 became an absence Occurrence.

Immediately following Ms. Bolduc's 4/26/2011 absence Occurrence, Mr. Doyne Parsons, the Ruter Garage Manager, personally reviewed Ms. Bolduc's work history. Since this was nominally her 13th Occurrence, he was faced with deciding whether to recommend to Steve McLaird, Metro Transit's Assistant Director of Garage Operations, that she be placed in discharge status. After reviewing the specifics of her Absenteeism history, Mr. Parsons decided to request permission from Mr. McLaird to remove an Occurrence that she had incurred on 7/30/2010. His request was approved.

Mr. Parsons credibly testified that after reviewing Ms. Bolduc's absenteeism record in detail, he decided that removing one of the two Occurrences from 7/30/2010 was appropriate. He noted that Ms. Bolduc was scheduled to work a split shift on that date and had previously requested that day off, but had been placed on a waiting list for approval. She was still on the waiting list on the morning of 7/30/2010. When she failed to report for work for either her morning or afternoon shifts that day, she was properly charged with one Occurrence for the morning shift and a second Occurrence for the afternoon shift. He said that it was obvious that since she was on vacation the following week and that she wanted to get a jump on her vacation by taking 7/30 off. He decided to give her a break and remove one of the two Occurrences for 7/30/2010, thereby reducing her total Occurrences, as of 4/29/2011, to Twelve (12) and removing her from discharge status.

At some point in the latter part of April, 2011 Ms. Bolduc submitted FMLA paperwork to Connie DeVolder, the Occupational Health Manager for Metro Transit. Ms. DeVolder is responsible for the administration of the Family Medical Leave Act (FMLA) with respect to Metro Transit employees. Bolduc was attempting to obtain FMLA certification for her previous absence Occurrences on March 4 and April 11, 2011. Ms. DeVolder reviewed Ms. Bolduc's request and determined that Ms. Bolduc did not have the proper medical documentation to support her retroactive request and denied her request on about 4/29/2011.

Mr. Ferguson met with Ms. Bolduc and her Union Steward on 4/29/2011 for a formal Absenteeism Counseling Meeting. In the meeting, Ferguson noted that Mr. Parsons had decided to remove one of her two Occurrences for 7/30/2010 thereby removing her from discharge status. However, he quickly noted that she still had 12 Occurrences on the record. He pointed out that one more Occurrence prior to July 30, 2011 would place her back in discharge status.

Ms. Bolduc was also informed, in the meeting, that if she was late for work again, prior to July 27, 2011, she would not be given alternative work. Since she also had two (2) "No Shows" on her current record, another "No Show" prior to July 30, 2011 would count as two (2) Occurrences.

Mr. Ferguson also pointed out that Ms. Bolduc had been routinely issued the paperwork on 3/8/2011 to seek possible FMLA certification for her absence Occurrence on 3/4/2011. She had not returned the FMLA paperwork until 4/27/2011 and on 4/29/2011 was informed that her request for FMLA certification for the 3/4/2011 Occurrence had been denied. He pointed out that although she had sought FMLA certification for both the 3/4 and the subsequent 4/11/2011 Occurrence, it did not appear that either would be certified as FMLA. He also noted that she had called Dispatch on 4/27/2011 and had requested a day of FMLA for 4/29/2011, but did not have a FMLA certification number to cover that request. Accordingly, Dispatch denied her request. He reminded her that she was personally responsible for insuring that her requests for FMLA leave were properly documented and certified.

Apparently toward the end of the counseling meeting, Mr. Ferguson spoke by phone with Mr. Parsons. Parson asked him how the meeting was going. Ferguson said that Bolduc just wasn't getting it or words to that effect. Parsons asked Ferguson to put Bolduc on the phone and he would talk to her. When Ferguson attempted to connect Ms. Bolduc with Mr. Parsons on the phone, she hung up the phone.

A copy of the Counseling record was furnished to Ms. Bolduc at the conclusion of the meeting. Noteworthy in that document is the second page where the question, "*What are the consequences if the employee continues these actions?*" appears, followed by the answer, "*Future occurrences will result in discharge.*"

After receiving the FMLA denial from Ms. DeVolder on 4/29/11, Ms. Bolduc then submitted a note, purportedly from her Urologist, Dr. Haikel, to DeVolder. The note was written on Dr. Haikel's personal Prescription form and was undated. The note stated, "*please excuse teri Bolduc for work on 3/4/11 and 4/11/11 due to kidney stone pain –*".

Ms. DeVolder subsequently advised Ms. Bolduc that the undated doctor's note failed to meet FMLA requirements and pointed out that in order to obtain FMLA certification for the 3/4 and 4/11/11 absences, the FMLA regulations required that she submit documentation to establish that she saw her physician (or other recognized medical provider) within seven (7) days of each of the absence dates. DeVolder noted that clinic notes regarding those visits would suffice.

On or about 4/27/11, Ms. Bolduc submitted FMLA paperwork to Ms. DeVolder seeking retroactive certification for her previous absences on March 4, and

April 11, 2011 as due to illness related to the kidney stone condition. She had previously applied for and had been granted an annual certification covering the recurring kidney stone condition back in about 2009, but had not renewed it when it expired. After reviewing the submitted paperwork, Ms. DeVolder, on 5/6/11, informed Bolduc by Memo that her request for a one year certification for intermittent FMLA leave was granted, effective 5/5/11 through 5/4/12.

However, the new annual FMLA certification, as issued by Ms. DeVolder on 5/6/11 had no retroactive effect on Ms. Bolduc's absence Occurrences on 3/4 and 4/11/11 and they remained on her Absenteeism record.

On 5/19/2011 Ms. Bolduc was scheduled to work a split shift with a bus run in the morning and another in the afternoon. She apparently worked the morning run routinely and then went home. She was scheduled to "plug-in" for her afternoon shift at 3:46 PM. She actually plugged in at 3:50 PM, or 4 minutes late. She was informed by Dispatch that because she was late, her work had been given to another driver. The Dispatcher told her that he would see if there was other work available for her and suggested to she wait in the Drivers Room. She went to the Drivers Room, waited about 25 minutes, but heard nothing from the Dispatcher so she went home. She was convinced that she would be terminated for being late. She made no attempt to contact Mr. Ferguson, her supervisor, or Mr. Parsons, the Garage Manager, with respect to the situation.

Ms. Bolduc was subsequently placed on administrative leave pending a management determination as to whether she should be discharged per the Absenteeism Policy, having reached thirteen (13) absence Occurrences.

Pursuant to the Absenteeism Policy, Metro Transit held a Loudermill hearing on 5/24/11 to provide Ms. Bolduc with an opportunity to offer any information to management which might mitigate a decision to discharge. Present in the meeting were Mr. Ferguson, Ms. Bolduc, Maria Hennes-Staples (Union Representative) and Doug Looyen (a management trainee - observer).

The following are some excerpts from the hearing record:

Mr. Ferguson – *Why were you late?*

Ms. Bolduc – *Bonnie (Ripple) was hanging out at the back door (the main entrance door). The agreement stated that we were not to come within 10 feet of each other. She hangs out at Dispatch also. She was next to the game, chatting with people which she never does.^{1/}*

¹ Bonnie Ripple is another Bus Driver who also works out of the Ruter Garage. Apparently Ripple and Bolduc started out as good friends, but at some point a year or so ago, their relationship deteriorated into a bitter and nasty feud. Their conflict carried into the workplace and began affecting their co-workers and management. In order to prevent the conflict from affecting the workplace, on or about 3/15/2011, management imposed an order/agreement on the two

Mr. Ferguson – *Did you understand the ramifications of being late?*

Ms. Bolduc – *Yes, I did understand the ramifications of being late meant for absenteeism.*

Mr. Ferguson – *Is there anything else you would like us to know about this violation?*

Ms. Bolduc – *I just kind of feel that this sucks that I sign an agreement to stay away from the other person (Ripple). I do what I'm supposed to do and stay away from that person. She did not sign that paper because she knew what she was going to do. It does not matter if you sign or not, no one protects you.*

Mr. Ferguson – *Did you make Dispatch aware of why you were late?*

Ms. Bolduc – *I don't recall, honestly.*

Mr. Ferguson – *Did you get a witness to what had happened?*

Ms. Bolduc – *Not to my knowledge because everyone she speaks to is on her side.*

Ms. Henne-Staples – *Teri, why didn't you use the side door to get in?*

Ms. Bolduc – *Because I would not have been able to go around fast enough without scratching (being late). After Teri lost her work, Bonnie waited in the entry way knowing that I cannot have any contact with her. She then went up to Dispatch and purposely waited to scan in, until she knew I would be late. She then gave me a shitty grin as if she had won and then walked out.*

Mr. Ferguson – *Why would you not bring this to the attention of your manager as soon as it happened? I was here until about 7 PM on 5/19/11.*

Ms. Bolduc – *When he (Dispatcher) told me to just hang out in the Drivers Room – I said this means I will be fired. I went and just sat down and cried. I waited about 25 minutes and went home.*

Mr. Ferguson – *Is this the first time that you have brought this (Ripple making her late) to management's attention?*

Ms. Bolduc – *I did not want to get harassed. I have brought this to management's attention. I feel that I was purposely set up. I am losing my job and I did not do anything wrong.*

individuals which specified that they were to stay at least 10 feet from one another and have no personal contact while in the workplace. In this instance, Ms. Bolduc is saying that she was late because Ms. Ripple was by the entrance and she (Bolduc) would be within 10 feet of Ripple if she walked in the door.

Mr. Ferguson – *Dispatch said you were on your cell phone when you came up to the window and seemed unaware of the time.*

Ms. Bolduc – *I was not on my cell phone. I did get stuck on a side street. I got here as fast as I could. I did tell them that.*

The participating parties were subsequently furnished with a copy of the Hearing Summary document.

After hearing Ms. Bolduc's statements that Ms. Ripple had somehow physically deterred Ms. Bolduc from reporting for work on time on 5/19/11; Metro Transit management checked the security camera tapes to see what they showed about Ms. Bolduc's arrival at the garage on the afternoon of 5/19/11. There were two cameras that were in a position to note Ms. Bolduc's arrival and entry into the building on 5/19/11.

1. The first camera was located outside the building with a view of the employee parking area across the street from the garage building and also the scanner and entry door to the building. I was personally able to view the tape from that camera beginning at approximately 3:35 PM on 5/19. The tape, as viewed runs continuously until approximately 3:50 PM.
 - At 3:49:19 PM Ms. Bolduc is seen walking out of the parking lot and toward the building. She is walking at a casual pace and is talking on her cell phone.
 - At 3:49:52 PM Ms. Bolduc swipes her badge on the scanner just outside the entry door. There is no hesitation as she opens and starts to walk through the door, still talking on her cell phone.
 - At 3:49:55 PM Ms. Bolduc proceeds smoothly through entry door into the building. There are no people near the door during her approach from the parking lot or during her entry into the building.
2. The second camera was located just inside the entry door. Metro Transit officials did review the tape from that camera and determined that Ms. Ripple was not inside the building anywhere near the entry door when Ms. Bolduc entered the building at 3:49:52 PM. Metro Transit was unable to provide a copy of that camera tape for viewing by this arbitrator, but the Union did not dispute the Employer's statement that Ms. Ripple was not near the entry door when Ms. Bolduc entered the building.

Simply put, the security camera tape clearly shows Ms. Bolduc as already being about 3 minutes late as she starts to walk from the parking lot to the garage building and about 4 minutes late by the time she swipes her badge on the scanner.

After viewing the tapes, management was left to conclude that Ms. Bolduc, in the hearing on 5/24, falsely accused her co-worker, Bonnie Ripple, of causing her to be late for work on 5/19. Additionally, Ms. Bolduc was less than open, candid and truthful in the hearing about the real reason(s) as to why she was late.

Fortunately, the security camera tapes prevented Metro Transit from initiating a more intensive investigation of Ms. Bolduc's false accusation against Ms. Ripple.

Following a review of all the facts and circumstances of the Absenteeism situation and after consideration of her employment record and behavior, Metro Transit management concluded that Ms. Bolduc would be discharged for violation of the Absenteeism Policy.

On June 7, 2011 Ms. Bolduc was issued a written Notice of Discharge. The Notice stated that the grounds for discharge were, "*Violation of Metropolitan Council Absenteeism Policy*".

THE GRIEVANCE

On June 13th, 2011, Ms. Bolduc filed a timely grievance in protest of her discharge. The grievance specifically states; "*Violation of Article 5, Sections 1 & 2. Remedy: Put driver back to work and make whole on a last chance agreement working with her FMLA Certs.*"

Relevant contract language;

Article 5 – Grievance Procedure

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 2. *No employee shall be suspended without pay or discharged until the employee's immediate supervisors have made a full investigation of the charges against that employee and shall have obtained the approval of the applicable department head. No discipline, excepting discharge without reinstatement, shall be administered to any employee that shall permanently impair the employee's seniority rights. When contemplating disciplinary action, Metro Transit shall not give consideration to adverse entries on an employee's disciplinary record involving incidents occurring more than thirty-six (36) months prior to the date of the incident which gives rise to the contemplated discipline. Prior to a suspension of more than two (2) days, the ATU must be notified. If a case of discipline involves suspension or discharge of an employee, and such employee is not found sufficiently at fault to warrant such suspension or discharge, the employee shall be restored to their former place in the service of Metro Transit with continuous seniority rights and shall be paid for lost time at the regular rate of pay.*

The grievance was subsequently processed in accordance with the provisions of the contractual grievance procedure, but no resolution was reached at either

Step 2 or 3. The Union subsequently requested arbitration and, ergo, here we are.

SUMMARY OF THE PARTIES' MAJOR ARGUMENTS

THE EMPLOYER:

The Employer has committed itself, via Article 5, Section 1 of the applicable labor agreement, to insuring that disciplinary action involving employees "...*shall be just and merited.*" The Employer also acknowledges that it bears the burden of proof to clearly establish that disciplinary actions, in fact, meet that standard.

The term "*just and merited*" has historically been interpreted to mean Just Cause. While the applicable labor agreement contains no specific definition of the terms "*just and merited*" or "*just cause*", there have been several definitions of the term "Just Cause" that have been recognized and generally considered by many arbitrators. Probably the most widely recognized and accepted definition is what is known as the "Seven Tests of Just Cause", as articulated by Arbitrator Carroll R. Daugherty, *Enterprise Wire Co.*, 46 LA 359 (Arb. Carroll Daugherty, 1966);

1. *Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?*
2. *Was the company's rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?*
3. *Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?*
4. *Was the company's investigation conducted fairly and objectively?*
5. *At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?*
6. *Has the company applied its rules, orders and penalties evenhandedly and without discrimination to all employees?*
7. *Was the degree of discipline administered by the company in a particular case reasonable related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?*

Some arbitrators have found Daugherty's *Seven Tests* somewhat rigid and mechanical and sometimes fail to allow consideration of all of the nuances that arise in each disciplinary discharge case. As such some arbitrators have also considered the following:

- Is employee discipline being used to fulfill one or more of these rational interests of management?

1. Rehabilitation – the objective being to cure a specific problem and restore the employee to satisfactory work.
2. Deterrence – the objective being to deter the errant employee from repeating a certain error by imposing one penalty and threatening to impose a harsher one in the future.
3. Protecting Profitability – certain employee conduct, though not prohibited by a specific rule, may still interfere with the employer's operation of the enterprise.

Toward a Theory of "Just Cause" in Employee Discipline Cases, 85 Duke Law Journal 594 (1985).

With respect to the discharge of Ms. Bolduc, regardless of which of the above tests or considerations are applied, it is clear that she was terminated for "Just Cause".

- Ms. Bolduc has been fully aware of the Bus Driver Absenteeism Policy since its implementation in 2005 and the potential consequences for violating the provisions of that Policy – up to and including discharge.
- She has been consistently counseled, in accordance with the Policy, each time her attendance record reached a disciplinary step and has been reminded of the consequences if she failed to correct the attendance problems.
- Ms. Bolduc, as a Bus Driver, has always been aware of the importance of reporting for work and reporting in a timely manner. As Mr. Parsons, the Manager for the Ruter Garage, testified, the scheduled transit routes are a "contract" that Metro Transit and its drivers have with its customers – the public. If bus operators are late on their routes, the customers are also made late for their commitments and appointments. Metro Transit derives one-third of its operating revenue from the fares paid by its customers. If customers can not depend upon Metro Transit for dependable, reliable and on-time transportation, they will choose other more dependable alternatives. Therefore, Metro Transit must insure that its operators show up for work and do so on time.
- Metro Transit, in accordance with its Absenteeism Policy, conducted a hearing on May 24, 2011 for the purpose of giving Ms. Bolduc an opportunity to fully explain her reasons for arriving late for work on May 19th and to offer any other mitigating circumstances or information to management; as it weighed potential punishment for the apparent violation. Ms. Bolduc's Union Representative was also present in that hearing. As we are now all well aware, Ms. Bolduc, in the hearing falsely accused Bonnie Ripple, a co-worker, of interfering with her ability to enter the garage building on time on May 19th. A subsequent review of the

building's security camera tapes demonstrated that Ms. Bolduc's accusations, with respect to Ms. Ripple were totally false. The video tapes also firmly established that Ms. Bolduc was clearly about 4 minutes late when she "plugged-in" or scanned her badge.

- With respect to Daugherty's Test #6, regarding discrimination, there has been no allegation that Metro Transit management discriminate against Ms. Bolduc when applying the Absenteeism Policy to her conduct. Rather, she and the Union assert that certain of her absence occurrences were not properly designated as FMLA-certified.
- Given the nature of Metro Transit's business and the clear need for its operators to show up for work and to show up on time, Ms. Bolduc's discharge is reasonably related to the fact that she incurred thirteen (13) absence occurrences in a rolling calendar year. She had previously received a Record of Warning on July 30, 2010 after the seventh occurrence. Thereafter, she had received another Record of Warning, three (3) Final Records of Warning and a formal Record of Counseling prior to her late work arrival on May 19th.
- Mr. Parsons testified that he fully considered Ms. Bolduc's complete work record and history in weighing the decision to discharge. He testified that the fact that she had a good bus driving record with respect to accidents and customer complaints that did not outweigh her responsibility to report for work, as scheduled, and also on time. He also testified that he was particularly swayed, in the decision to discharge, by Ms. Bolduc's untruthfulness regarding the reason(s) she had reported late to work on May 19th.

In applying the *Duke* tests, Ms Bolduc's discipline fulfills all three rational interests of Metro Transit.

- Rehabilitation – in this case, Ms. Bolduc was given every opportunity to correct her absenteeism behavior. The Absenteeism Policy was specifically designed to reward employees for taking corrective action in that it only penalizes for occurrences during a rolling calendar year. As such, absence occurrences outside the one-year window "drop-off" and are no longer considered for disciplinary purposes. As previously note, even with this reward system, Ms. Bolduc managed to accumulate a Record of Warning, three Final Records of Warning and a Record of Counseling for Absenteeism in the ten months prior to her discharge. Additionally it should be noted that management decided to give her a break on about April 26; when she otherwise was eligible for termination, by removing a properly documented occurrence from July 30, 2010. She was given this "break" with the clear understanding she would have no further occurrences between May 26 and July 27, 2011. She subsequently failed to meet that expectation for rehabilitation.

- Deterrence – Metro Transit’s Absenteeism Policy is an effort to deter errant operators/drivers from accumulating excessive absences from work. In this case, Ms. Bolduc was repeatedly told of the concerns regarding her absenteeism record in the numerous counselings and disciplinary actions and that the appropriate discipline steps of the Policy would be enforced. Unfortunately, none of these meetings and discussions deterred her absenteeism behavior.
- Protecting Profitability – Ms. Bolduc’s repeated absenteeism conduct was clearly prohibited by the Absenteeism Policy; which was specifically implemented to address Metro Transit’s efficiency and ability to properly serve its customers. Obviously bus drivers failing to show up for work or showing up late interferes with the efficiency of the transit operation.

Finally, the Union argues that none of the above considerations address the issue of why Ms. Bolduc’s absence occurrences on March 4 and April 11, 2011 were not excused as FMLA-certified absences. The Union argues that the FMLA policy and procedures were too complex for Ms. Bolduc to understand and to comply with. In the arbitration hearing, Ms. Bolduc testified that she suffers from a number of mental health issues; in addition to her kidney stone problem. She noted that she had just received an approved FMLA certification in May, 2011 for the mental health issues.

Connie DeVolder, the Occupational Health Manager responsible for the administration of the FMLA program at Metro Transit, testified that Ms. Bolduc has had, over the past several years, a number of approved FMLA-certifications for various health issues. One example was an FMLA designation for kidney stones that was granted to Ms. Bolduc in about April, 2009.

Obviously, Ms. Bolduc had no previous difficulties in complying with and fulfilling the appropriate FMLA requirements and regulations, until she incurred the absence occurrences for March 4 and April 11, 2011. The Union now argues that she didn’t understand Ms. DeVolder’s explicit directive that she need more specific information from the health care provider than an undated note written on a prescription form to properly document those two absences for FMLA purposes. Interestingly, Ms. Bolduc testified that she never presented or discussed the prescription note with Ms. DeVolder, that, instead, she had tried to present the note to Mr. Parsons. She said he threw it back at her and she took it home and filed it away. She doesn’t know how it eventually came into Ms. DeVolder’s hands.

Ms. Bolduc’s credibility, with respect to the FMLA situation repeatedly came into question during the hearing given that she further testified that she initially received the prescription form note the same day that she had received her FMLA paperwork on April 12, 2011 per the April 11 absence. She subsequently said that she asked for the note after repeatedly returning to the clinic to check on the status of her FMLA paperwork after being told that it had been lost. She

was unable to explain how she could have been given the note, in lieu of the completed medical documents that were allegedly lost for weeks, on the same day that she finally submitted those same documents for processing. It seems more likely that after waiting a couple of weeks and not receiving her completed FMLA forms from her doctor, she went to the clinic in May and asked for the note from her doctor's Physicians Assistant. She then submitted it, and as Ms. DeVolder testified, it was deemed insufficient to meet the FMLA requirements as it had not been received within seven (7) days of the March 4 or April 11 absences/visits. Ms. Bolduc finally alleges that she requested the prescription form note the day after her April 11 clinic visit; which, coincidentally, would now be within the seven day time frame and within the FMLA requirements.

Based upon the foregoing, the Employer respectfully requests that this Arbitrator deny this grievance in its entirety.

THE UNION:

Teri Bolduc has enjoyed some 12 years of employment with Metro Transit as a bus driver. She loved her job and was good at it. She had good safety and customer service records. For the past several years she has been suffering from recurring kidney stones. In addition, she suffers from bi-polar disorder, an anxiety disorder, obsessive-compulsive disorder, attention-deficit hyperactivity disorder and she is dyslexic. It should be noted that on about May 5, 2011 Ms. Bolduc was approved by Metro Transit for intermittent FMLA leave from May 5, 2011 to May 4, 2012 in connection with her mental health disorders.

It is Ms. Bolduc's and the Union's position that the circumstances of her discharge on June 7, 2011 failed to meet the Just Cause standard required by Article 5, Section 1 of the labor agreement.

1. The absences of March 4 and April 11, 2011 should have been certified per FMLA and thereby excused from being counted as "occurrences" under the Employer's Absenteeism Policy.

Ms. Bolduc attempted to have both the March 4 and April 11, 2011 absences certified per FMLA by Metro Transit; because both absences were caused by severe kidney stone attacks, resulting in considerable pain and thereby preventing her from reporting for work. After reviewing the information initially submitted by Ms. Bolduc, Connie DeVold, the Occupational Health Manager for Metro Transit and responsible for the administration of the FMLA program, informed her that she needed to submit documentation showing that she had consulted a physician or other health care professional within seven (7) days of each of the absences.

Ms. DeVolder testified that she had denied Ms. Bolduc's request for FMLA coverage for the dates in question because, under current FMLA

regulations, set by the U S Department of Labor, kidney stones were not considered to be a “Chronic” condition and, therefore, in order to certify those absences under FMLA, Ms. Bolduc had to provide evidence that she did consult with a health care professional within seven days of each absence. However, DeVolder also conceded that Metro Transit’s current FMLA policy statements do not put employees on notice regarding the seven day requirement to retroactively cover a non-chronic situation. She did point out that employees could locate that information online. She did acknowledge that it would have been fair if Metro Transit had advised Ms. Bolduc of the seven day requirement before, rather than after the fact.

The Arbitrator should note that Metro Transit has been well aware of Ms. Bolduc’s on-going kidney stone condition since at least 2009. On July 2, 2009 Ms. Bolduc was granted an intermittent FMLA leave certification effective June 19, 2009 through June 18, 2010 for the kidney stone condition (Employer Exhibit 31).

He Employer erred when it denied Ms. Bolduc’s request for FMLA leave on he basis that she did not see a health care provider within seven days of each of the two FMLA-related absences. The Federal FMLA regulations only require an employee to see a health care provider within seven days of an absence, if the condition is related to a single period of incapacity.

Moreover, it is simply not “just” to discharge Ms. Bolduc for failing to comply with a seven day requirement about which she had no prior notice.

Accordingly, if the Employer had properly approved Ms Bolduc’s request that the March 4 and April 11, 2011 absences be covered by FMLA, she would only have had eleven (11) absenteeism occurrences on her record when she arrived late for work on May 19th and would not have been subsequently terminated.

2. The Union is not foreclosed from challenging the earlier absenteeism occurrences.

The Union anticipates that the Employer will argue via brief that the Union is foreclosed from challenging earlier occurrences on Ms. Bolduc’s attendance record because they were not grieved at the time that each Record of Warning of Final Record of Warning was issued. However, such a conclusion would effectively nullify the contractual requirement that a discharge be just and merited; it would also be inefficient for the Union to have to grieve each and every occurrence in order to preserve the possibility that some time in the future the employee achieves a sufficient number of occurrences to warrant termination.

3. Ms. Bolduc was improperly terminated in response to two absence occurrences that were not her fault.

The labor agreement requires that an employee must be found sufficiently at fault to warrant suspension or discharge, Article 5, Section 2. Ms Bolduc was advised that she would be discharged on account of thirteen absence occurrences, two of which occurred through no fault of her own. The fact that she was out sick on March 4 and April 11, 2011 due to her kidney stone condition was not her fault.

4. Termination is not a “just” result in this case.

Pursuant to the theory articulate by Roger Abrams and Dennis Nolan in Toward a Theory of “Just Cause” in Employee Discipline Cases, (85 Duke Law Journal 594 (June, 1985), the theory of “just cause” mutually benefits Union and Employer alike:

A. Just cause exists only when an employee has failed to meet his obligations under the Fundamental Understanding of the employment relationship. The employee’s general obligation is to provide satisfactory work.

There is no dispute that Ms. Bolduc satisfied the Employer’s work requirements with respect to safety and customer service. The Employer contends, however, that her attendance was not satisfactory in that she exceeded the 12 absence occurrences that are allotted during a rolling 12 month period. *“The obligation of regular attendance is not absolute, however. Where absences are for good reason and the reason no longer exists, the likely prospect of regular attendance in the future may make discharge unreasonable.”* Id., 85 Duke Law Journal, 594, at 613.

Here, Ms. Bolduc should not have been “dinged” for the March 4 and April 11, 2011 absences because her request for intermittent FMLA leave in connection with her chronic kidney stone condition should have been approved. Had the FMLA leave been approved, she would not have received the discharge notice. Going forward, with FMLA certification properly in place, Ms. Bolduc will not suffer chargeable occurrences related to FMLA-certified absences.

B. Achievement of Legitimate Management Objectives.

An employer is entitled to impose reasonable rules relating to attendance. It is not entitled to charge employees with “occurrences” related to FMLA covered absences. Penalizing

employees for FMLA-related absences violates both the Employer's own Absenteeism Policy and the law.

C. Assurance of fairness.

The Employer's Absenteeism Policy permits 12 occurrences within a 12 month rolling period. Ms. Bolduc would not have suffered a 13th occurrence on May 19th had the Employer not wrongly denied her request for FMLA certification for her kidney stone condition absences on March 4 and April 11, 2011.

Not only did the Employer err in unilaterally deeming the kidney stone condition non-chronic, but it made no effort whatsoever to provide Ms. Bolduc with reasonable direction regarding its FMLA certification process. If anything, the Employer hindered her efforts to comply with its FMLA certification process.

On April 12, 2011, Metro Transit informed Ms. Bolduc that it was provisionally approving FMLA leave for both the March 4 and April 11, 2011 absences; provided she furnish the required health care provider documentation by May 2nd. The April 12 notice did not specifically inform her that she needed to be actually seen by a health care provider within seven (7) days of each of the absences she suffered as a result of the kidney stones.

Ms. Bolduc complied with the Employer's request for health care certification by May 2nd by submitting the health care provider's certification documentation on April 28, 2011. On April 29, 2011, the Employer denied the request and submission, having unilaterally concluded that the condition did not meet the FMLA definition of "chronic". On May 18th, 2011, more than a month after Ms. Bolduc's April 11 absence, she was informed by the Employer, for the first time, that because her kidney stone condition was not deemed to be "chronic", she would have to provide documentation showing that she had been seen by a health care provider within seven (7) days of each of the March 4 and April 11, 2011 absences. The seven (7) day requirement was not part of the Employer's FMLA policy statement nor was information that was otherwise provided to Ms. Bolduc in any of the Employer's prior notices concerning FMLA certification.

It would not be fair to discharge Ms. Bolduc under such circumstances.

The Union does not believe it would be fair for Ms. Bolduc to be terminated in response to her initial account of why she was late on

May 19th, 2011. Contrary to the Employer's belief, Ms. Bolduc did encounter Ms Ripple on May 19th when she walked into the garage building. Ms. Ripple was not standing outside the building when Ms. Bolduc arrived, she was inside the building. Coming in close contact with Ms. Ripple was upsetting to Ms. Bolduc. She didn't know what to do or how to handle the situation and that encounter was front and center in her mind when she was questioned by the Employer during the investigative hearing on May 24, 2011.

While dishonesty should not be condoned, discharge is not appropriate given the circumstances. During the arbitration hearing, Ms. Bolduc conceded that she knew she was already tardy on May 19th before she saw Ms. Ripple and she forthrightly admitted that she didn't know why she accused Ms. Ripple of causing her to be tardy; when, in fact, Ms. Ripple had absolutely nothing to do with her arriving late for work. Because of the avoidance/no contact order, encounters with Ms. Ripple were a prevalent and persistent concern for Ms. Bolduc and that is the likely reason she focused on it as the cause of her tardy. In any event, given her otherwise 12 year good history with Metro Transit and in consideration of her current mental health challenges, discharge is too harsh a response to Ms. Bolduc's account of the events giving rise to her being late for work on May 19th.

Based upon the foregoing, the Union respectfully requests that the Arbitrator sustain this grievance, reinstate Ms. Bolduc to her former position and make her whole in all respects.

ANALYSIS, DISCUSSION AND FINDINGS

As an Arbitrator, I am keenly aware that discharge cases are among the most important situations that I am called upon to determine. Discharge decisions have significant psychological, economic and legal effects on all parties involved.

This labor agreement conditions Discipline/Discharge upon being "...*just and merited*". The Parties have advised this Arbitrator to treat those terms as synonymous with the more commonly used term, "*Just Cause*" and like most labor agreements, this one contains no other statements, standards or definitions as to what constitutes "*just cause*".

Despite of the absence of a definition of "just cause" within the labor agreement itself, one would expect that - given the myriad of discharge cases that labor arbitrators have had to deal with over the course of many decades - the labor arbitrators themselves would have certainly reached a clear consensus as to the meaning of those terms. Wrong! The situation was aptly explained by a

seasoned, veteran labor arbitrator who observed that neither he nor his esteemed colleagues have ever been able to reach agreement on an universally accepted definition of the term “just cause”, but he noted that he and every other labor arbitrator could readily recognize the presence or absence of “just cause” in any particular case.

Of course, I am very familiar with Arbitrator Carroll Daugherty’s “*The Seven Tests of Just Cause*” as set forth in the Employer’s Arguments above.

I, personally, find Daugherty’s “Test” to be a useful tool in organizing and analyzing the facts and evidence that come to the fore in discipline cases. However, like many arbitrators, I find that it is rigid and overly mechanical in its application as a true test of “just cause”; in that it fails to recognize and allow for the weighing of the myriad of factors and nuances that are involved in a typical discipline situation.

An alternative view of the “just cause” situation was set forth by Roger I. Abrams and Dennis R. Nolan in “*Toward a Theory of ‘Just Cause’ in Employee Discipline Cases*”, 85 Duke Law Journal 594 (1985). The authors begin by setting forth what they refer to as “The Fundamental Understanding” in the employment relationship:

A potential employer is willing to part with his money only for something he values more highly, the time and satisfactory work of the employee. The potential employee will part with his time and work only for something he values more, the money offered by the employer.

The Fundamental Understanding can be and is modified by collective bargaining agreements and the congruent interests of unions and employers. From the point of view of employees, collective agreements can correct what they perceive to be the major flaw of the Fundamental Understanding – the insecurity of the employment relationship. Thus, the main addition to the Fundamental Understanding that unions seek in collective bargaining agreements is job security through limitations on the employer’s power to discipline and discharge employees. Therefore, the basic Fundamental Understanding is modified by a particular collective bargaining agreement, as follows:

Employees will provide ‘satisfactory’ work, in return for which the employer will pay the agreed wages and benefits, and will continue the employment relationship unless there is just cause to terminate it.

This modification of the Fundamental Understanding obviously limits the employer’s power to discipline and discharge pursuant to the common law concept of “Employment at Will”, which essentially permits the employer to discipline or discharge employees for any reason or for no reason whatsoever.

Under the modified Fundamental Understanding employee discipline should only be used to fulfill one or more of management's rational interests; 1) rehabilitation – the objective being to cure a specific problem and restore the employee to "satisfactory" work, 2) deterrence – the objective being to deter the errant employee from repeating a certain error by imposing one penalty and threatening to impose a harsher one in the future and 3) protection of profitability – certain employee conduct, though perhaps not prohibited by a specific rule, may still interfere with the employer's operation of the enterprise. This category is something of a catch-all and many of the situations falling within its confines involve off-duty conduct by employees.

Like management, unions also have certain interests and expectations with respect to discipline and discharge of employees. A rational union acknowledges that an employee's failure to meet his or her obligations works to the detriment of other employees as well as the employer. In the short run, an unsatisfactory employee simply makes the jobs of co-workers more difficult. In the long run, continued tolerance of substandard work performance by an employee will endanger the employer's competitive position, and that, in turn, will threaten the wages and even the jobs of the rest of the workforce. Therefore, the economic welfare of the workers, the union and management is interdependent.

The primary interest of the union and the employees in disciplinary matters is fairness. First, they seek fairness in disciplinary procedures; that is employees must have actual or constructive notice as to their work obligations. Secondly, they seek fairness in the administration of discipline. Disciplinary measures must be based on facts; management must ascertain what actually happened before it imposes discipline and must give the employee an opportunity to explain his or her view of the situation and must allow union representation during the investigation if the employee so requests. Thirdly, discipline should be imposed in gradually increasing degrees, with the exception of certain "capital offenses" and, finally, proof by management that just cause exists for the discipline.

The foregoing concerns for procedural fairness in discipline situations might be termed "Industrial Due Process".

The employee is also entitled to "Industrial Equal Protection" which requires like treatment of like cases. But, related, is the requirement that an employee is entitled to individualized treatment. Distinctive facts in the employee's record or regarding the discipline must be given appropriate weight.

Like Daugherty's "Tests", the Abrams & Nolan theoretical construct for Just Cause serves as a useful analytical tool for organizing, assessing, evaluating and considering the numerous facts and pieces of evidence involved in a typical discipline or discharge situation.

Applying these tools to the instant matter and based on the record evidence, testimony and briefs:

No arbitrator expects that s/he is going to obtain a totally true, complete and accurate picture of what exactly transpired in a discharge situation, based upon a day or two of testimony and evidentiary presentations. Accordingly, I need to focus on the core elements of the situation and Issue.

Since the violations attributable to Ms. Bolduc's discharge are related to her attendance record, obviously, the focus of attention is the Employer's *Bus Operator Absenteeism Policy*. I have carefully reviewed and examined the provisions concerning the administration of Discipline and have assessed them against the analytical constructs articulated by Daugherty and Abrams and Nolan. I am fully satisfied that the Employer's actions in this situation fulfilled all the contractual and procedural requirements and the standards outlined in the noted constructs. I also note that neither Ms. Bolduc nor the Union raised any questions or issues to allege that she was not afforded full "due process" in this situation. Accordingly I find that the Employer did fulfill the required proper and logical procedures in carrying out the disciplinary process with respect to Ms. Bolduc.

Having found that the Employer's disciplinary action and process meets the standards of both the contract and the generally accepted principles for establishing "just cause"; let's turn to the Union's arguments and position in this matter.

First let us look at what the Union is not questioning or challenging;

- That Ms. Bolduc has been fully aware of and familiar with the content and provisions of the Employer's *Bus Operator Absenteeism Policy* at all times material herein.
- That Ms. Bolduc has had an ongoing absenteeism problem for at least the past 2-3 years.
- That she had received a significant number of Warnings, Final Warnings and counselings over the course of the past 2-3 years in accordance with the progressive discipline provisions of the Employer's *Bus Operator Absenteeism Policy*, due to excessive absenteeism.
- That Ms. Bolduc was well aware that, if she accrued thirteen (13) absence occurrences within a rolling 12 month year, it was virtually certain that she would be discharged, as have other employees.
- That Ms. Bolduc was treated in a disparate manner in this situation as compared to other employees who have acquired thirteen (13) "occurrences" under the Absenteeism Policy.

- That given her absenteeism history, Ms. Bolduc was disciplined in proper accordance with the progressive discipline provisions of the Employer's Absenteeism Policy.
- That Ms. Bolduc falsely accused Ms. Ripple of causing her to report late for work on May 19, 2011; in the course of the investigative hearing conducted by the Employer on May 24, 2011.

If the Union essentially acknowledges the foregoing, what is the thrust of its argument alleging that this discharge does not meet the Just Cause standard? Simply put, the Union contends that on May 19, 2011, when Ms Bolduc showed up late for work, contrary to the Employer's position that was not her thirteenth (13) absence occurrence within the rolling 12 month period. Instead, it is the Union's position that the May 19 occurrence was her Eleventh (11th) occurrence.

As outlined in its arguments, it is the Union's position and contention that Ms. Bolduc's absences on March 4, 2011 and April 11, 2011 should have reasonably been "excused" as FMLA-certified absences. Accordingly, if those two absences had, in fact, been timely excused as FMLA-certified absences, Ms. Bolduc would only have had eleven (11) occurrences on her record on May 19th, 2011 and would not have been eligible for discharge yet.

After reviewing the Union's brief and the record testimony and evidence, I find the Union's argument worthy of further review and consideration.

1. The Union argues that Metro Transit was historically aware, back to at least 2009, that Ms. Bolduc suffered from an ongoing, intermittent kidney stone condition wherein her body produced kidney stones at an unusually high rate over time. As a result of that condition, Ms. Bolduc was subject to periodic, painful and incapacitating attacks.

Based upon the medical documentation available in the record, I find that this Union assertion is true.

2. The Union argues that due to a misinterpretation of the FMLA regulations, Ms. Devold erroneously denied Ms. Bolduc's request for retroactive FMLA certification of the March 4 and April 11, 2011 absences because kidney stones were not regarded as a "chronic" condition under FMLA regulations. Additionally, the Union contends that Ms. Bolduc was unaware that she had to document visits to a health care provider within seven (7) days of an absence to obtain retroactive FMLA certification for that absence.

After reviewing the record testimony and evidence with respect to this Union contention; I find that it is without merit. I base that finding on the following:

- The Family Medical Leave Act (FMLA) is a program and policy created by a Federal statute. The rules and regulations governing the operation and administration of the program, as it relates to employers and employees, are established by the U.S. Department of Labor (DOL). Therefore, the applicable labor agreement is totally silent on the subject of FMLA and since this arbitrator's authority under Article 13 is restricted to the scope of the labor agreement, I find that I have no power or authority to evaluate the FMLA program. I do find that based on the record evidence and testimony, it appears that Metro Transit, at all times material herein, is making all reasonable efforts to comply with current FMLA rules, regulations and protocols, as established by DOL.
- Ms. Bolduc had, back in 2009, applied for and was granted FMLA certification for intermittent absences for kidney stone attacks and treatments for periods ranging from weeks to months. To qualify to those approvals, she provided satisfactory documentation from her health care providers to show that these attacks and treatments would be ongoing for some period into the future. These approvals each had specific expiration dates; which required her to obtain new documentation from her health care providers to justify renewal of the approvals.
- With such an approval in place, Ms. Bolduc was not necessarily required to visit a health care provider each time she experienced an incapacitating attack; because the FMLA approval recognized that she could deal with some of the attacks with prescribed medications and rest – until the attack passed.
- For whatever reason, Ms. Bolduc did not receive renewed FMLA certification for intermittent absences due to her kidney stone condition after about September, 2009.
- With respect to the March 4 and April 11, 2011 absences, Ms. Bolduc did not apply for FMLA certification for those absences until at least mid-April. Ms. DeVolder responded by pointing out that in the absence of a FMLA certification for intermittent approval of the kidney stone condition covering those dates, such as those she had received back in 2009, Ms. Bolduc would have to furnish documentation from a health care provider clearly indicating that she had been examined and/or treated for the kidney stone condition within seven (7) days of each of the respective absences and that absent such documentation, those two absences could not otherwise be retroactively certified under FMLA.
- There was really no issue with respect to the term “chronic”. The kidney stone condition, with the appropriate health care provider documentation, had been and would have been FMLA-certified, as an intermittent condition, if Ms. Bolduc had complied with the proper procedures, as she obviously had back in 2009.

It is clear to me that Ms. Bolduc, based upon her prior experience with the FMLA certification process and procedure, was aware or reasonably should have been aware, that the only way she could receive retroactive FMLA certification for the March 4 and April 11, 2011 absences was to provide relevant documentation from her health care provider(s) clearly showing the they had personally examined and/or treated her for the alleged kidney stone attacks, within seven (7) days of each of the absences. I would presume that the seven day requirement by DOL is intended to be a reasonable check on possible fraudulent or spurious claims for FMLA leave by employees.

It is also clear that Ms. Bolduc attempted to otherwise cover her inability to document the required health care provider visits by furnishing the undated prescription note and the completed forms from Physician Assistant Reiss, dated April 27, 2011. Those attempts were properly denied by Ms. DeVolder as failing to meet the FMLA requirements.

FMLA involves both the employer and the employee. Each is responsible for carrying out their respective responsibilities to insure that the program operates properly and fulfills its purpose. If an employee, such as Ms. Bolduc, has a question or problem with respect to the program there are resources readily available to him or her to assist in quickly resolving an issue, but it is the employee's responsibility to ask for such assistance.

In view of my specific findings, as above, I find that Ms. Bolduc's absences on March 4 and April 11, 2011 did not qualify for FMLA certification, due to lack of the required timely medical documentation and, therefore, were not "excused" absences per the Employer's *Bus Operator Absenteeism Policy*. Accordingly, the Employer was properly entitled to count those two (2) absences as "occurrences" under the policy in reaching its discharge decision.

Having reviewed the record testimony and evidence several times, I am left with the distinct impression that had Ms. Bolduc behaved differently on May 19 and May 24, she might well have avoided a discharge determination by the Employer. With the loss of personal credibility, so goes trust.

CONCLUSION

In view of my analysis, discussion and findings above, I conclude that the Employer did have "just cause" to discharge employee Teri R. Bolduc on June 7, 2011 and that the discharge was in full conformance with the provisions of the applicable labor agreement and the Absenteeism Policy.

DECISION

Having concluded that the Employer did not violate the applicable labor agreement, as alleged by the Union in its Grievance of June 13, 2011, that grievance is hereby denied and dismissed. Concurrently, the Employer's discharge decision with respect to Teri R. Bolduc is hereby sustained.

Dated at Minneapolis, Minnesota, this 23rd day of January, 2012.

Frank E. Kapsch, Jr.
Arbitrator

Note: I shall retain jurisdiction in this matter for a period of fourteen (14) calendar days from the issuance of this Decision to address any questions or problems related thereto.