

THE MATTER OF ARBITRATION BETWEEN

Metropolitan Council)	BMS Case No. 13-PA-0845
)	
“Employer”)	Issue: Disciplinary Arbitration
)	
and)	Hearing Date: 09-9-2013
)	
)	Brief Submission Date: 09-20-2013
)	
Amalgamated Transit Union Local 1005)	Award Date: 11-19-2013
Local # 55)	
)	
“Union”)	Anthony R. Orman,
)	Arbitrator

JURISDICTION

The hearing in this matter was held on September 9, 2013, in Minneapolis, Minnesota. The parties appeared through their designated representatives. Both parties were afforded a full and fair opportunity to present their case. Exhibits were introduced into the record. The parties agreed to the issue and that it was properly before the Arbitrator. The parties submitted their statement of the issues and final positions. Post-hearing briefs were submitted on or before September 20, 2013, and thereafter the matter was taken under advisement.

APPEARANCES

For the Union:

Timothy J. Louris Attorney

Mark Lawson Recording Secretary/Asst. Business Agent

XXXX XXXX Grievant

For the Employer:

Sidnee Woods Attorney

Marie Padden Labor Relations Specialist

Ellen Jackson Operations Manager Nicollet Garage

Steve McLaird Assistant Director

Lisa Johnson Manager, Street Operations

Christy Bailly Director, Bus Operations

I. BACKGROUND AND FACTS

1. On February 12th, XXXXX XXXXX, here in after referred to as the Grievant, was placed under arrest while at work. (Ex. 6)
2. Following the Grievant's arrest the Grievant was released on bail February 15th with the stipulation that he have, "No unsupervised contact with children" and he stay away from a specific address. (Ex. 4.1 and 4.2")
3. On February 18th the Grievant called work and stated he would be unable to return to work due to personal matters. The Grievant was informed he had been placed on "Held Off" (unpaid leave) status. He was to come to work for a meeting with supervisory staff at 10:00 A.M. on February 19th. (Ex. 8)
4. Tuesday, February 19, the Grievant met with Ellen Jackson, Nicollet Garage Manager and Greer Gentry, Assistant Transportation Manager. The Grievant informed his supervisors of his conditions of bail. His next

court date would be March 14th. The Grievant was informed by his supervisors he would be, “continued under a “Held Off” status until this matter reached resolution.” (Ex. 7 and 8)

5. On February 26th, an investigative hearing (Ex. 11) was held by the Employer. The Grievant, Ms. Jackson, Mr. Gentry, Metro Transit’s Labor Relations Consultant and an ATU representative were present. The Grievant was given a Tennessee advisory (Ex. 10.1) and a Garrity warning (Ex. 10.2). No questions were asked regarding the facts or circumstances of his criminal charges.
6. In a letter dated March 1, 2013 the Grievant was informed, “Metro Transit intends to terminate your employment....” The reasons given by the Employer were the Grievant’s inability to, “ensure the safe boarding and transporting of riders” and “answer questions, anticipate, and mediate rider issues”. (Ex. 12) The Employer stated, “These duties anticipate that you may, in your role as a bus operator, have repeated unsupervised contact with children. Your bail conditions have rendered you unable to fulfill those duties.”
7. On March 4th a Loudermill hearing (Ex. 13) was held. During the hearing the Grievant stated he was attempting to get the restrictions of bail changed to allow him the ability to work and requested “Restrictive duty” or a leave of absence until the issues concerning the charges against him were resolved. The Employer’s representative responded, “At this time I cannot grant your request, but we will consider, and review everything

prior to making a decision.” The Union presented Arbitration Case No. 100809-5897-3/FMCS Case No.09-56328 (Ex. 23) as evidence of industry standards and the past practice of the Employer when a previous employee under similar circumstances was not terminated until he was found guilty (Ex. 22). The Union’s position was the Grievant should be allowed to prove his innocence and not be fired. The Employer stated that because they do school runs the Grievant would not be able to fulfill the duties of a bus driver due to his bail conditions. Further the Employer stated, “(The Metropolitan Council has policies and procedures in place we must follow.”

8. On March 11th the Grievant was given a notice of discharge which he acknowledged with his signature. (Ex. 14)
9. On March 11th the Union filed a grievance. The grievance requested, “Immediate re-instate grievant to bus operator position and make whole for all lost wages/benefits.” (Ex. 16)
10. On March 14th the Grievant returned to court. His bail restrictions were revised to state, “No contact with children under 18 except if operating Metro Transit bus equipped with GPS and video monitoring and fares on bus.” (Ex. 5.1)
11. On March 14th Mark Lawson, here in after referred to as Steward and Ellen Jackson, Nicollet Operation Manager, corresponded by e-mail concerning the Grievant’s change in bail conditions.

12. On March 22nd a first step grievance meeting was held. Those present were the Grievant, Steward, Cliff Bolden, ATU, Marcia Padden, Labor Relations, Greer Gentry, and Ellen Jackson. According to notes by Ellen Jackson, the Union requested the Grievant be put to work immediately because the Court had amended his bail restrictions to allow him to carry out the duties for which he had been dismissed. The possibility of a leave of absence was also discussed. The Employer Representatives rejected the Union's requests for the reasons the Court had not removed the restrictions concerning children under the age of eighteen during the Grievant's non work hours, his attorney appeared to misrepresent the Employer's abilities concerning the video monitoring available on the buses and the Employer had no duty to grant a leave of absence. (Ex. 16) The Arbitrator notes Ex. 16 is a rendering by Ellen Jackson and accepted it as factual only to establish who was at the meeting and the general positions of the parties. Further testimony in the hearing confirmed the positions of the parties.
13. On March 29th the Employer informed the Union the grievance had been denied. (Ex. 16)
14. On April 15th a second step grievance hearing was held. Present were the Grievant, Steward, Ellen Jackson, Marcia Padden and Steve McLaird, Assistant Director. The positions of the parties as reflected in a memo by Steve McLaird remained the same. There is no reference to the issue of leave of absence. (Ex. 17) The Arbitrator notes Ex. 17 is a rendering by

Steve McLaird and accepted it as factual only to establish who was at the meeting and the general positions of the parties. Further testimony in the hearing confirmed the positions of the parties.

15. On April 18th the Employer informed the Union the grievance had been denied. (Ex. 17)

16. On May 28th the issue was sent to the Arbitrator.

II. THE ISSUE

The issue as agreed to by the parties in the hearing is, “Was the dismissal of the Grievant “just and merited” pursuant to the collective bargaining agreement and, if not what is the proper remedy?”

III. RELEVANT CONTRACT PROVISIONS AND GOVERNING RULES

ARTICLE 1, Section 2: NONDISCRIMINATION

Metro Transit and the ATU agree that they shall not discriminate against any individual with respect to hiring, promotion, discharge, compensation and other terms, condition and privileges of employment, nor unlawfully deprive any individual of employment opportunities because of such individual’s race, color, religion, sex , sexual orientation, national origin, age or disability. Accordingly, Metro Transit employees shall perform their duties and responsibilities in a non-discriminatory manner, consistent with this Article and the law. It is understood that nothing in the agreement prohibits an employee from the lawful and timely pursuit of any remedy allowed by law.

ARTICLE 5, Section 1: GRIEVANCE PRODCEDURE

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.

ARTICLE 5, Section 2: GRIEVANCE PRODCEDURE

(In part) No employee shall be suspended without pay or discharged until the employee’s immediate superiors have made a full investigation of the charges

against that employee and shall have obtained the approval of the applicable department head.

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 then be restored to their former place in the service of Metro Transit with continuous seniority right and shall be paid for lost time at the regular rate of pay.

ARTICLE 5, Section 5: GRIEVANCE PROCEDURE

When an employee's grievance is sustained in whole, all negative narratives relate to the incident shall be removed from all records.

ARTICLE 11, Sub (e): WORK RULES AND PRACTICES

Work rules and/or practices are subject to the Grievance Procedure.

ARTICLE 13, Paragraph 2: ARBITRATION PROCEDURES

In making such submission the issue to be arbitrated shall be clearly set forth in writing. The arbitrator's decision shall be final, binding and conclusive and shall be rendered within thirty (30) days from the date the arbitration hearing is completed.

ARTICLE 15: LEAVES OF ABSENCE

(In part) All employees covered by this Agreement may be granted reasonable leaves of absence not exceeding ninety (90) days during any calendar year, and at the discretion of Metro Transit, except that longer leaves of absence may be granted in the event of sickness or disability.

99 ATTENDANCE

All employees are expected to be available for scheduled work assignments. Operators have been issued and are expected to follow the Metro Transit Absenteeism policy. Any employee who is absent without leave (AWOL) for 48 or more hours may be determined to have abandoned his/her position and may be discharged.

If you are unable to report to work due to illness, emergency or other reason, you should notify dispatch as soon as possible. Failure to show up and/or call in for work within two (2) hours after your scheduled plug-in time will be recorded as a no show.

111 ARREST OF EMPLOYEE

If for any reason you are arrested while on duty, you must report the matter immediately to the TCC by radio or by calling 000-000-0000. If the alleged offense occurred while you were on duty and is a gross misdemeanor or felony, you may be suspended or placed on administrative leave, pending completion of an investigation by the authorities. An employee convicted of a gross misdemeanor or felony occurring either on or off duty may be subject to disciplinary action up to and including dismissal.

IV. EMPLOYER'S POSITION

The Grievant was properly terminated for being unable to perform the essential functions of his position. He was granted restrictive bail conditions by the court that prevented his ability to work. After his discharge, his attorney presented incomplete and misleading information to the Court, indicating that Metro Transit's bus system had video "monitoring" and "surveillance" capabilities, which led to a modification of those bail conditions. Metro Transit management determined neither its video system nor its personnel could properly "monitor" Mr. XXXXX as stated in the judge's modification.

V. UNION'S POSITION

The Employer's stated justification for termination is that the Grievant was, "[u]nable to perform essential functions of job[.]" (Ex. 14 (Discharge Notice).) Accordingly, the Employer must demonstrate that discharge under these particular circumstances was "just and merited." The Employer cannot meet that burden because it has violated long-standing and important arbitral principles of alleged off-duty misconduct, as well as its own Bus Operator Rule Book & Guide. Furthermore, at least one other employee charged with the exact same crime, and who also apparently worked in the presence of children, was allowed to continue working and

collecting a paycheck until the date of his conviction. Discharge of the Grievant was wholly inappropriate and unnecessary in this case, and therefore not “just and merited” under the contract.

VI. DISCUSSION

The Arbitrator has read all the documents and listened to the sworn testimony live and recorded in this case. Because of the heinous crime the Grievant has been charged with he sees the dilemma the Employer faces putting the Grievant back to work. As Ms. Jackson and Mr. McLaird testified they did not want to assume the risk of the Grievant acting inappropriately while he was at work with the bail restrictions he had in place. Neither would the Arbitrator. But the Arbitrator is bound to act on facts and is constrained by the collective bargaining agreement and work rules. Based on the facts and rules he will make his decision.

The Employer, through its Attorney, has taken the position, “It is well settled that in cases involving discipline, the employer bears the burden of proof. The parties’ CBA states that discipline must be “just and merited.” This has been interpreted to mean “just cause.” In determining whether discipline was for “just cause,” arbitrators will not normally substitute their judgment for that of the employer’s if the employer can prove that it acted reasonably and consistently.” The Arbitrator agrees.

To resolve a “just cause” grievance Arbitrators has long used the seven elements of just cause.

Notice: “Did the Employer give to the employee forewarning or foreknowledge of the possible or probable consequence of the employee’s disciplinary conduct?”

Reasonable Rule or Order: “Was the Employer’s rules or managerial order reasonably related to (a) the orderly, efficient, or safe operation of the Employer’s business, and (b) the performance that the Employer might properly expect of the employee?”

Investigation: “Did the Employer, before administering the discipline, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?”

Fair Investigation: “Was the Employer’s investigation conducted fairly and objectively?”

Proof: “At the investigation, did the ‘judge’ obtain substantial evidence or proof that the employee was guilty as charged?”

Equal Treatment: “Has the Employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?”

Penalty: “Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee’s proven offense, and (b) the record of the employee in his service with the Employer?”¹

Again, through its Attorney, the Employer has taken a position that, “It is well settled that in cases involving discipline, the employer bears the burden of proof.” And again the Arbitrator agrees. If the Employer fails to meet the standards of any of the test of “just cause” then “just cause” does not exist and the Employer did not act in a “just and merited” way.

The Employer has complied with the issue of **Notification**, The Grievant was given the Bus Operator’s Rule Book and Guide (Ex. 19) on December 10, 2010 (Ex. 20). There was no evidence presented that any substantial changes were made to the document since it was presented to the Grievant.

The Employer has complied with the issue of **Reasonable Rule or Order**. Article 11 provides for reasonable work rules and such work rules are grievable through the collective bargaining agreement. The Arbitrator sees the Union has had ample opportunity to challenge the rules before this case was heard.

¹ Koven, Adolph M. and Susan L. Smith “Just Cause: The Seven Tests”. Pg. 10, Coloracre Publication Inc., San Francisco, CA 1985

The Employer has complied with the issue of **Investigation**. The Employer did “make an effort to discover whether the employee did in fact violate or disobey a rule or order of management.” Two meetings were held with the Grievant (one with Union Representation) before notice of dismissal was sent to him on March 1st. The Grievant was provided a Loudermill Hearing before his Notice of Discharge was issued on March 11th.

The Arbitrator questions whether there was a **Fair Investigation**. The only evidence that was presented concerning the Grievant’s inability to work before he was terminated were the Conditional Release Contract (Ex. 4.1) and the Conditional Release – No Contact Order (4.2). There is no evidence available to show any other outcome than that a complaint of some kind has been made, which the Grievant denies, and most importantly the Grievant is innocent until proven guilty by a court of law. In the following discussion by the Arbitrator relies strongly on these points.

In the meeting on February 19 the Grievant provided the Employer Representatives with the bail documents. (Ex. 4.1 and 4.2) Through testimony of the Grievant and Ellen Jackson the Grievant understood he would be on “Held Off” status until there was some resolution. In the meeting there was discussion about the bond amount. (Ex. 7) Testimony in the hearing suggested strongly the Employer knew the Grievant was going to ask the Court to change the bail restrictions so he could return to work. When the restrictions were revised for the Grievant, the Employer rejected the changes of the Court. The Employer position was statements in the bail hearing by

the Grievant's Attorney were misleading. There is no evidence the Employer contacted the Court to justify the Employer assumptions.

It is clear to the Arbitrator that as early as February 19th Employer representatives were aware the Grievant could be under no restrictions if he were able to post the full bail. While there is little testimony about the Grievant's ability to pay it is mentioned by Ellen Jackson in her notes dated March 29th. She states the Union's argument the Grievant is not a threat because, "The only reason Mr. XXXXX has "conditions" is because he is not rich enough to be able to pay the "cash bail"." (Ex. 16) While there is little of no testimony about the Grievant's ability to pay to not have restrictions the Employer had an obligation to check. Article 1 of the Collective Bargaining Agreement states, "Metro Transit and the ATU agree that they shall not discriminate against any individual with respect to hiring, promotion, discharge, compensation and other terms, condition and privileges of employment, nor unlawfully deprive any individual of employment opportunities because of such individual's race, color, religion, sex , sexual orientation, national origin, age or disability." Could the Grievant's inability to pay be at all linked to his race? While this issue is not before the Arbitrator the question goes to the base argument of "just and merited" treatment.

Lastly, the Employer did not seek to determine its obligation to the Grievant through either the work rules, the collective bargaining agreement or past practice in similar events. The Employer failed to convene an additional investigative meeting it committed to at the February 26 meeting (Ex. 11) before the initial dismissal letter.

Later meetings were held under the grievance procedure, but any new evidence resulted in no change in the Employer's positions.

To determine the investigation was unfair the Arbitrator would have to have proof the Employer's only motivation was to dismiss the Grievant. Although the circumstance appears to show the Employer was motivated to dismiss the Grievant before he could have his bail restrictions modified no specific evidence was presented and therefore the Arbitrator cannot say the Employer failed in this standard by perhaps meeting the letter of the law.

The Employer has complied with the issue of **Proof**. The circumstances of the inability of the Grievant to return to work on or prior to March 14th is not contested (Ex. 4.1 and 4.2). The letter of dismissal date March 1st is "technically" correct.

In the Arbitrator's opinion the Employer has failed to provide **Equal Treatment**. On February 12th the Grievant was arrested by Metro Transit Police and held on behalf of the Plymouth Police. The Employer placed the Grievant on "Held Off" status. On February 15th the Grievant was released on bail with the specific restriction, "No unsupervised contact with children." The Grievant contacted his immediate supervisor on February 18th and was advised to come to work on February 19th for a meeting "to discuss his absence" with Greer Gentry, ATM, and Ellen Jackson, Nicollet Garage Operations Manager (Ex. 8).

At that meeting the Grievant informed the Employer Representatives he had been charged with criminal sexual contact, a charge which he denied. His bail had been reduced to \$250,000.00² from \$500,000.00. He was restricted from having contact with children. The Grievant was advised by the Employer's Representatives he would be on "Held Off" status until this matter reached resolution." (Ex. 7 and 8) This action would seem to be in compliance with Rule 111 of the Employer Rule Book and Guide, "If for any reason you are arrested while on duty, you must report the matter immediately to the TCC by radio or by calling 000-000-0000. If the alleged offense occurred while you were on duty and is a gross misdemeanor or felony, you may be suspended or placed on administrative leave, pending completion of an investigation by the authorities." (Ex. 19)

At no time has the Employer charged the Grievant as being AWOL as described in Rule 99, "Any employee who is absent without leave (AWOL) for 48 or more hours may be determined to have abandoned his/her position and may be discharged." (Ex. 19) In the Arbitrator's view the Employer recognized the inability of the Grievant to be absent from work through no fault of his own and that his absence constituted an emergency.

In a letter dated February 21st (Ex. 9) the Employer directs the Grievant to attend a meeting where the Grievant, "will have an opportunity to make statements and present evidence supporting your most recent absence." In the meeting in his report

² Ex. 4.2 states the bail amount to be \$250,000.00. Ex. 7 refers to the reduced bail amount as 25,000.00. Ex. 8 refers to a \$2,500.00 bail bond. For purposes of accuracy the Arbitrator understands the bail to be in the amount of \$250,000.00 with a \$2,500.00 bail bond as shown in Ex. 4.2.

Greer Gentry asked specific questions about the conditions of release contract, but at no time did he reflect the Grievant was going to request bail modification at his March 14th hearing. (Ex. 11) Ellen Jackson testified that she knew in the week before the March 1st dismissal letter the Grievant was going to ask for bail modification. There was no follow up meeting with the Grievant before the March 1st dismissal meeting as described in the memo (Ex. 11). The Arbitrator believes this is a clear violation the commitment to a follow-up investigative meeting and of Rule 111's intent to allow "completion of an investigation by the authorities" of a criminal act. While the rule is specific to "on duty" acts the practice of applying the rule must certainly apply to the lesser extreme of off duty acts. The example of this is shown in the treatment of a similar incident by a Mechanic who the Arbitrator will identify by his initials TDP. (Ex. 22) Ultimately TDP was convicted of the crime and dismissed from Employment. The only difference between these two incidents is the bail conditions which the Arbitrator will address later in this discussion.

It is the Arbitrator's belief that representatives of the Employer acted to dismiss the Grievant before he could change his conditions for bail. Without the change in the bail conditions the dismiss letter of March 1st would be technically correct. During testimony by both Ellen Johnson and Steve McLaird they stated they were both aware the Grievant would have no bail conditions if he could post the \$250,000.00 bond. There is no testimony or evidence as to why at any level of the Employer's investigation it did not seek to find out why the Grievant did not post the full bond. The Arbitrator addressed his concern about this in the issue of Fair investigation and

will not address it further. The Arbitrator assumes the Grievant could not afford the higher bond as there was no evidence provided to the contrary in the hearing. It is not necessary for the Arbitrator to have a finding of an inability to pay to show the Grievant had the same ability to have no conditions of bail as did TDP.

On March 14th the Grievant had his bail restrictions changed to allow him to return to work. Here the testimony of Steve McLaird and Ellen Jackson is crucial to the Arbitrator's decision. Ellen Jackson testified she did not know about the change in bail restrictions until the First Step Grievance Hearing on March 29th. The Union submitted copies of e-mails dated March 14th from Ellen Jackson which contain a copy of the Conditional Release – No Contact Order. (Ex. 23) The Employer knew before the first step grievance meeting the bail restrictions had changed. The Grievant had asked for a leave of absence for time to clear his name which the Employer could have done under Article 15 Leave of Absence for up to ninety days with no loss to the Employer. In the meeting of March 4th the Employer's representative first responded, "At this time I cannot grant your request, but we will consider, and review everything prior to making a decision.". It is the testimony of Ellen Jackson who testified the Grievant never made a written request for a leave and therefore she did not consider a leave of absence for the Grievant. The testimony of Steve McLaird stated he could not consider a leave of absence because these things go on and on in his experience.

The only reasons the Arbitrator could determine the Grievant was not returned to work after his bail restrictions were amended were a perceived risk to the Employer by the Employer's Representatives due to the off duty restrictions of the Grievant, and the Employer Representatives' belief the Grievant and his Attorney misrepresented the facts about the video capability to monitor the Grievant at work. Ms. Jackson and Mr. McLaird consistently testified the amended bail restrictions did not absolve the Employer from risk. From the above observations the Arbitrator can only assume the Employer's representatives were not interested in any solution that did not maintain the dismissal of the Grievant except the Grievant posting full bail to achieve no bail restrictions. The Arbitrator is unable to discern if the Employer would have even accepted no bail restrictions for return to work after the decision was made to send the May 1st dismissal letter.

The Arbitrator has no jurisdiction concerning the off duty requirements set by the Court, nor does the Employer. The Arbitrator has no jurisdiction to absolve the Employer from the actions of the Grievant or any other of its employees against illegal acts perpetrated on or off duty. Testimony provided the Grievant had a clean work record. Although the Grievant was charged with a grievous charge, he is still considered innocent until proven guilty by a court of law.

The Court, by its amendment of the bail restrictions, allowed the Grievant the ability to perform the duties the Employer dismissed him for in the March 1st letter (Ex. 12) and to return to work. Bail and its restrictions are not intended to prevent further

actions, but to assure to the court the alleged perpetrator will return to court for proper prosecution. In this case, based on the evidence provided, the Judge and the Prosecutor felt that the Grievant was not a threat to the public, including children under the age of 18 while the Grievant was operating a bus. The Arbitrator finds no misrepresentation by the Grievant or his Attorney as to the monitoring capability of the METC buses in the testimony provided by the Employer in the court transcript. (Ex. 18).

In the Arbitrator's opinion the Employer has failed to provide a fair **Penalty**. The Employer had several opportunities to adjust the grievance without additional risk to itself. When it acted to send the May 1st letter of dismissal it violated its own policies concerning waiting for the authorities to investigate and resolve the issues surrounding the Grievant. The Employer could have given the Grievant a leave of absence or continued the Grievant on "Held Off" status until the March 14th Court Hearing.

In the Arbitrator's opinion the Employer attempted to undermine the decision of the Court to allow the Grievant to return to work. The Court made its decision based on the ability to recover evidence if there was a complaint about the Grievant and such ability would be a deterrent to protect the public. The Prosecuting Attorney agreed with the Judge. Based on the evidence presented the Judge made a decision. It was clearly the intent of the Court to return the Grievant to work.

In the Arbitrator's opinion the Employer's Representative rushed to dismiss the Grievant before he could get a change in his bail restrictions. This is a clear violation of both the Collective Bargaining Agreement, Employer's Rules and past practice. Further the Employer stated, "(The) Metropolitan Council has policies and procedures in place we must follow." The Arbitrator finds the Employer did not follow its own policies and procedures and therefore for all the reason listed above finds the Employer failed to meet just cause and sustains the Grievance.

VII. AWARD

The Grievant shall be reinstated to employment immediately. The Grievant shall receive all pay and benefits back to March 14, 2013 and in all ways made whole. This award is final and binding and the undersigned retains jurisdiction over the case for the limited purpose of overseeing the intended implementation of this award,

Issued and ordered on this 19 day of October,
2013 from Duluth, Minnesota.

Anthony R. Orman, Labor Arbitrator