In the Matter of Arbitration Between

LOCAL UNION 1342 OF THE AMALGAMATED TRANSIT UNION (UNION)

AND

NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC. (EMPLOYER)

Grievance: Discharge of James Craddock

Before: Joseph L. Randazzo, Esq., Neutral Arbitrator
William R. McGee, Employer Arbitrator
Kathryn M. Ehrig, Union Arbitrator

OPINION AND AWARD

Appearances

For the Employer: **Susan P. Wheatley, Esq.**
NFTA Counsel

For the Union: **Joseph E. O'Donnell, Esq.**
Reden & O'Donnell, LLP

The Parties duly designated the Arbitration Panel in the instant proceeding, in accordance with the provisions of their Collective Bargaining Agreement. A hearing was conducted before the Arbitration Panel on October 11, 29, and November 28, 2007, and January 8, 2008, in Buffalo, New York. Appearing before the Arbitration Panel was Susan P. Wheatley, Esq., on behalf of the Employer, and Joseph E. O'Donnell, Esq., on behalf of the Union. The Parties were in all respects accorded a full and fair hearing, including the right to present oral argument, oral and written evidence, and to examine and cross-examine witnesses. Post-Hearing Briefs were filed by both Parties.

THE ISSUE

At the hearing, the Parties were unable to agree as to the framing of the issue to be resolved in the instant proceeding, leaving such to be determined by the Arbitration Panel.

On the basis of the contentions of the Parties and the entire Record, it is determined that the issue to be resolved in the instant proceeding is whether the Grievant, James Craddock, was discharged for just cause, and if not, what shall the remedy be?

THE FACTS

The facts involved in the instant proceeding are virtually undisputed. Thus, at all times material, the Parties have been signatory to a Collective Bargaining Agreement (CBA), effective by its terms from August 1, 2006 to July 31, 2009. Also in effect at all times material was the "Absenteeism Control Program For Full-time, Fixed Route Employees Represented By The Amalgamated Transit Union" (Absenteeism Control Policy), providing for progressive discipline culminating in discharge for absence and tardiness violations.

The Grievant commenced his full-time employment with the Employer in June 2005 as a Bus Driver. Prior to that time, the Grievant served as a part-time Bus Driver. At the time of his discharge, the Grievant was scheduled to work Saturdays to Wednesdays.

On Wednesday, May 16, 2007, the Grievant placed a telephone call to the Employer advising that he was incarcerated and would be unable to report for work. He also advised that he anticipated returning to work on May 21, 2007. At this time the

Grievant had no paid time available for his use. The Grievant was again absent on May 17 and 18, 2007 for the same reason. As a result, the Employer considered the Grievant's three consecutive work days of unexcused absence as his 6th, 7th and 8th "Misses" under Section "B" of the Absenteeism Control Policy, thus warranting the Grievant's discharge as provided for in such Policy.

On May 24, 2007, the Union filed the instant Grievance on the Grievant's behalf, contesting his discharge, which was ultimately moved to arbitration.

THE CONTENTIONS OF THE PARTIES

The Union contends: (1) That the Grievant's discharge was without just cause on the basis that the Employer misapplied the Absenteeism Control Policy; (2) That the Employer improperly failed to excuse the Grievant's absences due to incarceration, which absences resulted in his discharge; (3) That the Grievance should be sustained, and; (4) That the Grievant should be reinstated, and awarded back wages.

The Employer contends: (1) That the Grievant's discharge was consistent with the practice under which the Absenteeism Control Policy has been applied; (2) That the Employer's failure to excuse the Grievant's absences due to incarceration was consistent with Company Policy; (3) That the Grievant was discharge for just cause and; (4) That the Grievance should be dismissed.

DISCUSSION

The Record establishes that the Absenteeism Control Policy is a written Policy that was agreed upon by the Parties, providing separate progressive discipline procedures for two types of attendance violations. In this regard, Section "A" of the Policy pertains to instances of full day unpaid unexcused absences from work, referred to as "Instances,"

and Section "B" pertaining to the failure to timely report, referred to as "Misses." It is undisputed that the Grievant was discharged by the Employer, based upon its determination that the Grievant had received the maximum number of "Misses" under Section "B" of the Policy, based upon his full day, unpaid, unexcused absences due to his incarceration on May 16, 19 and 20, 2007; that the Employer determined that such unpaid, unexcused, full-day absences constituted the Grievant's 6th, 7th and 8th "Misses" under Section "B" of the Absenteeism Control Policy; and that Grievant's discharge was consistent with the provisions of Section "B" of such Policy.

The Union, in reliance upon the language of the Absenteeism Control Policy, contends that Section "B" of such Policy was not applicable in the instant situation, and that only Section "A" of such Policy was applicable; that Section "A" of the Policy pertains to full day, unpaid, unexcused absences which are subject to being excused; that the Grievant's absences due to incarceration should have been excused; that even assuming that such absences were unexcused, that an application of Section "A" of the Policy would not have resulted in the required number of "Instances" to warrant the Grievant's discharge.

The Employer relies upon the fact that it has historically applied **Section "B"** of the Absenteeism Control Policy to full day, unpaid, unexcused absences pertaining to absences **other than illness**; that **Section "A"** of the Policy has been applied only to full day, unpaid, unexcused absences **due to illness**; and that the Grievant's discharge was consistent with this historical application of Section "B" of the Policy.

The forgoing establishes that the dispute involved in the instant proceeding presents a conflict between the clear and unambiguous language of the Absenteeism Control Policy, and the practice and manner in which the Policy has been applied.

The provisions of the Written Absenteeism Control Policy

Section "A" of the Absenteeism Control Policy pertains to "Full-day Absence From Work" (Emphasis supplied), described as "Instances" of absenteeism, describing such as "an unpaid, unexcused full day absence from work ... (Emphasis supplied)," except if excused for a number of enumerated conditions. Section "A" also provides that multiple consecutive day absences are to be treated as one "Instance" and that full day unpaid unexcused absences under Section "A" are subject to being excused by the Employer. Finally, Section "A" provides for discharge from employment for five "Instances" of absenteeism in a calendar year period.

Section "B" of the Absenteeism Control Policy pertains to "Missing (Bus and Rail Operators." In this regard, Section 12-11.1 of the CBA defines "Missing" as involving Bus Operators "who fail to report for their run... " The Route Guide and Operating Procedures define "Missing" as follows: "A. ... you must report, ready to work, to the station clerk on duty at the window no later than (before is better) your scheduled report time. Failure to do so or reporting late will constitute a "miss." Consistent with the forgoing, Arbitrator Charles J. Tann, in his March 12, 1991 Award, stated at page 3 that "A "miss" is best defined as an unexcused failure by an operator to report on time for a run."(Emphasis supplied)

Section "B" of the Policy further provides that "In administering the Progressive Discipline Code, extenuating circumstances causing a "Miss" will not be considered," and that seven (7), and in some circumstances, eight (8) "Misses" in a rolling twelve (12) month period will result in discharge from employment. In addition, the Record reflects that "Misses" on consecutive days are treated as separate "Misses," and that a "Miss" will be issued for an untimely call-in, even if such results in paid time off. Section "B" of the Policy is devoid of any reference to full day, unpaid, unexcused absences in any regard.

The clear and unambiguous language Sections "A" and " B" of the Absenteeism Control Policy, warrant the following conclusions: that Section "A" of the Absenteeism Control Policy pertains to **all** full day unpaid, unexcused absences from work, and is not restricted to such absences related only to illness; that "Instances" of absence under Section "A" of the Policy are subject to being excused on the basis of the reasons set forth in Section "A," including excuses granted by supervision; and that a single "Instance" under Section "A" of the Policy may be comprised of consecutive days.

Section "B" of the Absenteeism Control Policy, pertains to tardiness with respect to reporting for a "Run" or first report, and does not pertain to any full day, unpaid, unexcused absence of any kind; that a "Miss" under Section "B" of the Policy is not subject to being excused on the basis of extenuating circumstances; and that a single "Miss" under Section "B" of the Policy may not be comprised of consecutive days.

The distinction between an "Instance" under Section "A" of the Policy and a "Miss" as defined in Section 12.11.1 of the CBA, and Section "B" of the Policy, is illustrated by the fact that it is undisputed that a full day, unpaid, unexcused absence for medical reasons constitutes an "Instance" under Section "A" of the Policy, notwithstanding that such full day absence would also necessarily involve a failure to timely report for a run, which is defined in Section 12-11.1 of the CBA as a "Miss." It is also undisputed that a single infraction under the Absence Control Policy **cannot** constitute both an "Instance" under Section "A" of the Policy, and a "Miss" under Section "B" of the Policy. On the basis of the forgoing, the conclusion is warranted that there is no basis to treat any full day, unpaid, unexcused absence, constituting an "Instance" under Section "A" of the Policy, as a "Miss" under Section "B" of the Policy on the basis that such involves a failure to timely report for a run.

The practice in applying the Absenteeism Control Policy

The Record establishes that the Absenteeism Control Policy has been applied on a basis that is inconsistent with the clear written language of the Policy. In this regard, Section "A" of the Policy, which clearly pertains to all full day, unpaid, unexcused absences, has been applied **only** to such full day, unpaid, unexcused absences involving illness, and all other such days have been treated as "Misses" under Section "B" of the Policy. In this latter regard, the Employer has applied Section "B" of the Policy to full day, unpaid, unexcused absences for legal proceedings, even though such are specifically referred to in Section "A" of the Policy. In addition, all full day, unpaid, unexcused absences treated as "Misses" under Section "B" are subject to being excused by the Employer, notwithstanding clear language in Section "B" prohibiting such.

Conclusion regarding the Absenteeism Control Policy

It is significant that the Absenteeism Control Policy is a Policy that has resulted from negotiation and agreement of the Parties. In resolving the conflict between the specific written language of the Absenteeism Control Policy, and the manner in which such Policy has been applied, resort is made to several principles of well-established arbitration concepts and precedent.

It is well established that an Arbitrator's Award "draws its essence" from the CBA, and in this case, the agreed upon Absenteeism Control Policy, and that Arbitrators should not "dispense ... (their) own brand of industrial justice." How Arbitration Works, Fifth Edition, Elkouri & Elkouri, pages 142 and 474, citing Steelworkers v. Enterprise Wheel & Car Corp., 80 S. Ct. 1358. It is equally well established that Arbitrators cannot ignore clear agreed upon language, nor give such language a meaning other than expressed. How Arbitration Works, Fifth Edition, Elkouri & Elkouri, page 482. It is

equally well established that "The fact that a word is used indicates that the Parties intended it to have some meaning..." How Arbitration Works, Fifth Edition, Elkouri & Elkouri, at page 483. The forgoing clearly establishes that in resolving the conflict between the specific language of the Absenteeism Control Policy, and the manner in which it has been applied, the clear and unambiguous language of the Absenteeism Control Policy must prevail.

The Employer relies upon the fact that the Grievant's prior discipline under the Absenteeism Control Policy was consistent with the manner in which such Policy was applied to the Grievant's discharge (the Grievant received several "Misses" for full day, unpaid, unexcused non-medical related absences), and that the Grievant was advised as to the manner in which the Policy was to be applied, which was consistent with the forgoing. However, two days prior to his incarceration, which resulted in his discharge for receiving his 8th "Miss," the Employer gave the Grievant a letter, which was consistent with the clear language of the Absenteeism Control Policy, and inconsistent with the manner in which such Policy had been applied to the Grievant. The Grievant was advised in this letter that:

> "If you incur an additional Full Day Absence from work and do not have or choose not to use a bank day or paid personal day, you will be given an "instance" in the Absenteeism Control Program. However, you will not be given an "instance" if you provide a medical or legal explanation as specified in the Absenteeism Control Program.
>
> Your next UNPAID absence will result in an Instance under the Full Day Absence From Work section of the Absenteeism Control Program. (Emphasis supplied)

In any event, it is well established that "a written agreement may not be changed or modified by any oral statements or agreements made by the Parties in connection with the negotiation of the agreement." How Arbitration Works, Fifth Edition, Elkouri & Elkouri, page 598. Accordingly, the facts upon which the Employer relies are insufficient to modify the clear language of the Absenteeism Control Policy.

In addition, even assuming the existence of a past practice which is inconsistent with the express written provisions of the agreed upon Absenteeism Control Policy, it is well established that a past practice may be utilized to fill in contract gaps and interpret ambiguous contract language, but may not be utilized to set aside clear and unambiguous contract language. How Arbitration Works, Fifth Edition, Elkouri and Elkouri, pages 651 and 655. See also Texas Utility Generating Division, (McDermott), 92 LA 1308, 1312, citing Line Materials Industries, 46 LA 1106, 1108, holding that "past practice cannot operate to eliminate or change the meaning of express contract language."

Finally, it is inconceivable that the Parties would have agreed to a comprehensive Absenteeism Control Policy, and then intend that it be applied inconsistent with the precise language that they agreed upon, or that they would condone the application of such Policy on a basis that would enable employees to manipulate such Policy to their own advantage. In this regard, under the manner in which the Employer has applied the Absenteeism Control Policy, an employee who sustains a full day, unpaid, unexcused absence could avoid a "Miss" under Section "B" of the Policy, by claiming that such absence was due to illness, and could avoid an "Instance" under Section "A" of the Policy by claiming that such absence was for reasons other than illness.

Accordingly, the conclusion is warranted that where inconsistent, the clear and unambiguous language of the Absenteeism Control Policy should prevail over the manner in which such Policy has been applied.

The application of the clear and unambiguous language of the Absenteeism Control Policy to the Grievant's situation involved in the instant proceeding

It is clear that the Grievant's three-day, unpaid, unexcused absence on May 16, 19, and 20, 2007, due to his incarceration, should have been processed as an "Instance," under Section "A" of the Absenteeism Control Policy, and not as a "Miss" under Section

"B" of such Policy. At the time of such absence, the Grievant had no outstanding "Instances" in the 2007 calendar year, and therefore was not, in any event, subject to discharge at that time. Accordingly, the Grievant's discharge at that time was without just cause.

The Union's contention that incarceration constitutes a valid excuse for absence

The Union contends that the Grievant's three, full day, unpaid and unexcused absence from work on May 16, 19 and 20, 2007 due to his incarceration, should have been excused by the Employer, and that the failure to do so rendered Grievant's discharge to be without cause. The Union contends in this regard, that the Grievant's incarceration constituted a legal proceeding, and thus subject to excuse under Section "A" of the Absenteeism Control Policy; that the Employer failed to give notice that incarceration would not be accepted as an excuse for an absence; and that Grievant's incarceration constituted a "reasonable explanation," and thus justification for excusing such absence.

With respect to the Union's contention that incarceration constitutes a legal proceeding under Section "A" of the Absenteeism Control Policy, paragraph 7 of such provision provides that "You must provide verification from the court or an attorney that your attendance at the legal proceeding (real estate closing, hearing, etc.) was required." (Emphasis supplied) The Employer contends to the contrary, that the above provision pertains to legal proceedings, not to legally related reasons for absence. It is well established that the meaning of words is controlled by the words with which they are associated. How Arbitration Works, Fifth Edition, Elkouri & Elkouri, page 499. Thus, it is determined, consistent with the Employer's contention, that incarceration does not come within the term "legal proceeding" as that term is described in paragraph 7 (real estate closings, hearings, etc.). Accordingly the Union's contention in this regard is rejected. With respect to the Union's contention regarding notice, the Absenteeism Control Policy and the CBA do not require that the Employer specify the basis or reasons

under which it will grant or deny an excuse. Accordingly the Union's contention in this regard is rejected.

With respect to the Union's contention that the Employer was required to excuse the Grievant's absences due to incarceration on the basis that incarceration constituted a "reasonable explanation," the Employer correctly stated in its post-hearing brief that "supervision has the right to determine what particular reason or category of reasons or circumstances it will use to excuse an absence under that provision." However, it is well established that "...where the agreement expressly states a right in management, expressly gives it discretion as to a matter, or expressly makes it the "sole judge" of a matter, management's action must not be arbitrary, capricious, or in bad faith" (with citations). How Arbitration Works, Fifth Edition, Elkouri & Elkouri, at page 660. Accordingly, an application of this concept in the instant proceeding requires analysis of the basis for the Employer's failure to excuse absences due to incarceration, for which the Record is devoid. Analysis would also require a determination of the Employer's consistency in the application of such policy to other employees. In this regard, the Record reflects a previous memo issued by the Employer with respect to another matter, in which the Employer distinguished between pre and post sentence incarceration; that the Employer has advised the Union that incarceration will not constitute a basis for excuse; that Employer witnesses testified that there existed a verbal policy precluding excuse for incarceration; that one Union witness testified that he was unaware of any such verbal policy; and that one employee has been excused for incarceration. Finally, two witnesses testified that the granting of excuse for an absence is also based upon the staffing needs at the time. In this latter regard, the Record is devoid of any evidence of staffing at the time of the Grievant's absences for incarceration, or that such was considered.

The Arbitration Panel finds and concludes, that the Record is insufficient to establish the propriety, or lack thereof, in the Employer's failure to excuse the Grievant's absence due to incarceration under Section "A" of the Absenteeism Control Policy, particularly without an explanation as to the basis for rejecting incarceration as an excuse,

and without sufficient evidence as to the staffing needs at the time of the Grievant's incarceration. The Record is thus deficient as to whether the Employer has been arbitrary, capricious, or in bad faith in this regard. In addition, the resolution of this issue would not affect the Grievant's status under Section "A" of such Policy. In this regard, had the Grievant's three day, unpaid, unexcused absence on May 16, 19 and 20, 2007, resulted in an "Instance" under Section "A" of the Policy, such would have constituted the first "Instance" in Calendar year 2007, which would have been removed on January 1, 2008.

Accordingly, for the reasons discussed above, no determination is made with respect to the Employer's failure to excuse the Grievant's three-day absence due to incarceration.

The determination of an appropriate remedy

Having determined that the Grievant's discharge was without just cause, he is entitled to be reinstated to employment. With respect to back wages, Section 11-3.9 of the CBA, provides that:

> "If an employee is discharged, ...and thereafter in the final adjustment of such grievance it is determined that such discipline was not justified, the employee shall be reimbursed by the Company at his or her regular hourly rates for the actual time lost by reason of such discipline, ..." (Emphasis supplied)

Accordingly, the Grievant is contractually entitled to be reimbursed at his regular hourly rate of pay for the time that he actually lost as a result of his discharge. The Arbitration Panel shall defer the issue of back pay to the Parties to negotiate a resolution of the amount of back pay that the Grievant is entitled to, taking into consideration any days and/or periods of time when the Grievant was unable or unavailable to work (such as due to sickness, disability, out of the geographic area, etc,), and whether the Grievant made a reasonable effort to obtain interim employment during the back pay period. Also to be taken into consideration, shall be the Grievant's prior attendance record, for the

purpose of projecting the number of unpaid days that the Grievant would have sustained during the back pay period. Finally, back wages shall be reduced by all interim earnings, including unemployment compensation, public assistance, etc., received during the back pay period. The Grievant shall provide all information (including documentation) that may be requested by either Party, in the determination of back wages, and that the Grievant shall be required to submit a sworn affidavit regarding such information if requested by either Party.

AWARD

On the basis of the forgoing, the Arbitration Panel finds and concludes that the Grievance is sustained as follows:

1. That the Grievant's discharge was not for just cause.
2. That the Grievant should be reinstated to his former position
3. That the Parties shall attempt to negotiate an appropriate amount of back pay consistent with the guidelines set forth in this Award. Finally, the Arbitration Panel shall retain jurisdiction with respect to the back pay in the event that the Parties are unable to mutually resolve the amount of back pay.
4. That nothing contained in this Award, shall constitute a basis for modification of any other disciplinary action previously imposed upon any other employee(s), and that the application of the Absenteeism Control Policy, as construed by this Award, shall commence on May 1, 2008.

Joseph L. Randazzo, Kathryn M. Ehrig, and William R. McGee do hereby affirm upon our oaths as Arbitrators, that we are the individuals described herein and who executed this instrument, which is our Award.

Joseph L. Randazzo, Esq.

Dated: March 11, 2008
Buffalo, New York

Kathryn M. Ehrig

Dated: March 11, 2008
Buffalo, New York

William R. McGee

Dated: March 11, 2008
Buffalo, New York