STATE OF NEW YORK
COUNTY OF ERIE

AMALGAMATED TRANSIT UNION, LOCAL 1342,

-And-

NIAGARA FRONTIER TRANSIT METRO SYSTEMS, INC.

Re: Discipline – Continual Call-Offs

Before: Dennis J. Campagna, Esq. – Arbitrator

Hearing Date: January 28, 2015

Hearing Location: NFTA Offices, Buffalo, N.Y.

APPEARANCES

A. For the Company:

Wayne R. Gradl, Esq. – Of Counsel
James Thorpe – Labor Relations
David Rugg – Manager, Bus Maintenance
John Dembik – Superintendent, Bus Garages

B. For the Union:

Robert J. Reden, Esq. – Local 1342 Counsel
Vincent Crehan – Local 1342 President/Business Manager
Len Oieksy – Local 1342 Board Member

THE ISSUE (As Determined by the Arbitrator)

Did the Company's imposition of a one (1) day suspension on James Brunner as a result of his repeated pattern of call-offs by use of sick leave time either immediately before or immediately following use of vacation time violate the Collective Bargaining Agreement ("CBA")?

If so, what shall the remedy be?

BACKGROUND

Pursuant to my authority under the Parties' Collective Bargaining agreement, a hearing was conducted at the Offices of the N.F.T.A. on January 28, 2015. The parties hereto were represented by Counsel who were, at all times throughout the hearing process, accorded the right to call and examine witnesses, as well as the right to introduce relevant evidence. At the conclusion of the arbitration hearing, the parties elected to summarize their respective positions with the filing of post-hearing briefs, filed electronically on or about March 16, 2015. Upon receipt of said briefs by this Arbitrator, the hearing was closed.

A. The Parties to This Dispute

The Niagara Frontier Transit Metro System, Inc. ("Company") and the Amalgamated Transit Union, Local 1342, ("Union") are parties to a Collective Bargaining Agreement with effective dates August 1, 2006 through July 1, 2009. ("CBA"" – Joint Exhibit 1). As discussed in greater detail below, the instant grievance challenges the Company's imposition of a one (1) day unpaid suspension on James Brunner, the Grievant herein, for what the Company sees as a repeated pattern of calling off immediately preceding or following a vacation period of one or more weeks. The Union has challenged the Company's action as violative of Section 18-6.12 of the CBA.

B. Relevant Contract Language

Section 11, *Discipline, Grievances and Arbitration*, at 11.1 provides as follows:

> 11-1 Power of promotions, and of demotions, discharge, suspension and other discipline, shall be vested in the Company, but the justification therefor may constitute a grievance to be adjusted as hereinafter provided. Any dispute arising out of the interpretation or application of this Agreement shall be subject to the grievance and arbitration procedure.

Section 18 – *Provisions Relating to All Employees*, at 18-6.12, *Failure to Report Before or After a Vacation Period of One Week or More*, provides as follows:

> An employee who fails to report for work on his or her scheduled work-day immediately before or immediately after his or her vacation period, or when the

> vacation period has been extended by the use of a personal day, floating holiday or individual vacation day, the employee fails to report for work immediately before or immediately after the personal leave day(s), floating holiday or individual vacation day(s) taken immediately before or immediately after his or her vacation period, will, after reporting for and working on the regularly scheduled work-day on which he or she does report under existing rules and regulations, be automatically suspended for the next following three of his or her scheduled work-days, subject to the grievance procedure in the event of extenuating circumstances provided that the Manager, Supervisor or Department Head, or his or her representative in each case, is advised of the facts at the time that the employee reports for work on the day that he or she returns to work. As provided in Paragraph 8-6 herein, however, any employee who on any occasion without reasonable explanation fails to report within forty-eight (48) consecutive hours shall be considered as having voluntarily quit the employ of the Company. It is understood that the Company shall have the right to require any such employee to provide tangible evidence satisfactory to the Company, to support his or her stated reason for failure to report on his or her scheduled work day immediately before or immediately after his or her vacation, which in the case of claimed illness could include a doctor's certificate describing the nature of the claimed illness.

C. <u>Circumstances Giving Rise to the Instant Grievance</u>

The relevant facts giving rise to the instant grievance are essentially undisputed. James Brunner was employed by the Company on or about January 1994 and has, for all relevant time periods herein, worked in the Cold Spring Garage. The record reflects, and there is generally no dispute, that from at least the year 2000 and as documented in disciplinary reports from 2007 to 2013, Mr. Brunner has, on numerous occasions, extended his vacation time by use of a sick leave day. (See Company Exhibits 2 and 3) On each such occasion, Mr. Brunner served a three (3) day unpaid suspension consistent with Section 18-6.12 above. Thus, in reviewing these Company documents, from April 30, 2007 until August 5, 2013, there were eighteen (18) separate instances where Mr. Brunner chose to "extend" his vacation through the use of a sick leave day, and on each such occasion, he served a three (3) day unpaid suspension. (Id.) Each such three day suspension period was issued and approved by James Jones, Brunner's immediate supervisor.

Mr. Brunner's continued and persistent violation of Section 18-6.12 came to a head when John Dembik, Superintendent of the Bus Garage, advised David Rugg, Bus Maintenance and

Equipment Manager, about Mr. Brunner's persistent pattern of violating Section 18-6.12 each time he went on vacation. In an effort to curb Mr. Brunner's action in this regard, on or about May 18, 2014, Mr. Brunner was issued a Written Warning for having "established a pattern of calling in sick the day prior to or after a scheduled week of vacation." (See Company Exhibit 1) Significantly, Mr. Brunner was further warned that further violations of Section 18-6.12 may result in "discipline up to and including termination." (Id.) There is nothing in the record showing that Mr. Brunner grieved or in any other way challenged the written warning he was issued.

Following the issuance of the foregoing written warning, the record reflects that Mr. Brunner booked off on a scheduled vacation followed by the use of a sick leave day on June 22, 2014, the date he was scheduled to return to work. Mr. Brunner received a three (3) day unpaid suspension as prescribed in Section 18-6.12. However, in addition to this three day suspension, on or about June 24, 2014, Mr. Brunner was issued a Disciplinary Notice which advised that he would be suspended for one day, July 1, 2014 as a result of the following:

> Mr. Brunner has established a pattern of calling in sick the day prior to or after a scheduled week of vacation. Mr. Brunner was previously warned on 5-20-14 that this pattern needs to cease.

(See Joint Exhibit 2)

In addition, Mr. Brunner was again warned that further violations could result in "progressive discipline up to and including termination." (Id.)

The instant grievance dated June 24, 2014 followed. Unresolved at the lower steps of the Grievance Procedure, the grievance as noted for arbitration on or about July 17, 2014. There are no procedural objections by the Company to the Union's processing of the instant grievance to arbitration.

POSITION OF THE PARTIES

A. The Company's Position

It is the Company's decision that given the facts and circumstances at hand, its decision to impose a one (1) day suspension separate and apart from the three day suspension imposed under Section 18-6.12 of the CBA was justified and not inconsistent with the terms of the CBA. Accordingly, the Company urges dismissal of the instant grievance in its entirety. The Company offers the following points in support of its position.

First, the Company notes that the primary issue that separates Mr. Brunner from the rest of the bargaining unit is his "flagrant" repeated violations of Section 18-6.12's prohibition against calling off sick before or after a schedule vacation of one week or more. In this regard, the Company notes that "for as far back as one may care to go, the Grievant has violated the no call off provisions of §18-6.12 essentially every time he took a scheduled vacation, including, 4 separate times in 2010, 2011, 2012 and 2013; 3 separate times in 2007, 2008 and 2009; and 3 separate times up through the instance leading to the present arbitration in 2014." Clearly, the Company urges, this flagrant pattern of abuse provides sufficient "justification" to impose discipline in this case. Moreover, the Company adds, the Union's stance in asserting that §18-6.12 provides the sole and exclusive discipline available ignores the fact that Brunner's persistent rule infractions are represent a different and more serious matter than the isolated violation. In addition, doing nothing more than what §18-6.12 provides would provide an employee benefit which the Grievant would be permitted to continue to enjoy as he has. Indeed, the Company adds, the 3 day suspension set forth in §18-6.12 is and always has been looked upon as a penalty and not a back door method of extending one's vacation.

Next, the Company asserts that given that the instant matter involves a repeated work violation, the Company has sufficient "justification" to impose discipline pursuant to §11.1 of the CBA since Mr. Brunner has presented facts and circumstances that distinguish him from those other employees who have shown an isolated or sporadic violation of §18-6.12. Moreover, the Company adds, this is not a case where the Company is seeking the Grievant's termination.

Rather, the Company seeks an affirmation of its right to impose a one day suspension as a means of getting the Grievant's attention with the desired outcome of having the Grievant cease his flagrant violation of 18-6.12. Indeed, the Company notes, despite the written warning served on the Grievant in May 2014, it is apparent that it had no effect whatsoever as reflected by the Grievant's continued violation of §18-6.12 following this written warning. Thus, the Grievant's continued violation of §18-6.12 without any remorse or intent on changing his ways provides sufficient and justifiable basis for the imposition of a one day suspension as part of the progressive discipline scheme associated with the just cause protocol.

Finally, the Company urges that its decision to impose a one day suspension should be upheld since the Grievant's conduct of improperly extending his vacation has had the effect of disrupting productivity and/or the scheduling of other employees' vacations during peak demand weeks, especially if other employees such as Shawn Krauss follow the Grievant's example.

B. The Union's Position

It is the Union's position that the Company's decision to impose one day of suspension on the Grievant violates Section 18-6.12 and as a result, the instant grievance should be sustained. The Union offers the following points in support of its position.

First, the Union asserts that Section 18-6.12 is clear as to the discipline to be imposed. In this regard, the Union notes that the parties negotiated the level of discipline to be imposed and memorialized their agreement in Section 18-6.12 and while the language provides a means to reduce the noted discipline, there are no exceptions to increase the discipline. As a result, the Union maintains that the addition of one day of suspension represents a back door method of changing Section 18-6.12 without the benefit of good faith negotiations. Moreover, the Union adds, the Company has been aware of those who have violated Section 18-6.12 on repeated occasions yet over the years, the Company has never approached the Union to negotiate an additional penalty for committing the offense and suffering the three-day suspension repeatedly.

Next, the Union notes that the Company's action in imposing a one day suspension on the Grievant represents an attempt to secure a benefit that the Company should have achieved at the bargaining table. In this regard, the Union notes that in current negotiations for a successor agreement, the parties discussed expanding the penalty from 3 to 5 days to further dissuade employees from violating Section 18-6.12 – however, the Company withdrew that proposal.

Next, the Union asserts that one needs to look no further than Mr. Jones', (the Grievant's supervisor) issuance of every disciplinary notice from 2000 to 2013 - each one a three day suspension consistent with Section 18-6.12. As a result, the Union maintains that Mr. Jones must have understood that when an employee violates Section 18-6.12 he/she suffers a three-day penalty and no more. In the instant matter, the Union notes that while the Company seeks to justify its imposition of an additional day of suspension resulting from the Grievant's "pattern" of violating Section 18-6.12, the Company has been aware of this "pattern" for years and has done nothing throughout due to the fact that the Company was keenly aware that there was no justification of adding to the penalty prescribed in Section 18-6.12.

Next, the Union notes that the Company and the Union have negotiated various disciplinary penalties that apply for violations of various Company policies and rules. This has significant meaning the Union argues, since the parties have negotiated specific penalties for various offenses and in the case of Section 18-6.12, the parties have agreed on a maximum three-day suspension and no more.

Next, the Union notes that the Company's imposition of an additional one-day suspension of the Grievant no only violates Section 18-12.6, but also represents double jeopardy since the Grievant has essentially been penalized twice for the same offense.

For all the foregoing reasons, the Union seeks an affirmation of the instant grievance together with an order of the remedy requested.

DISCUSSION

A. The Arbitrator's Task in This Matter

This is first and foremost a contract interpretation case involving, among other Articles of the CBA, the application of Section 18-6.12 of the CBA in light of the Company's imposition of an additional one day suspension arguably authorized by Section 11.1 of the CBA. It must be determined whether or not a fair reading of these Sections, most notably 18-12.6, in light of the record evidence supports the Union's claim that the Company acted improperly in its decision to impose this additional one-day of suspension in addition to the three-day suspension authorized by Section 18-12.6. Given its non-disciplinary nature, it is well established arbitration precedent that the Union carries the burden of proof under the preponderance of the credible evidence standard. Accordingly, in order to prevail, the Union must demonstrate that it is more likely than not that its position that the Company, by its action, violated Article 18-12.6 is supported by the language of CBA.

Arbitrators seek to interpret contract language based on the precise language itself or lack thereof, bargaining history, and in some cases, particularly where the language at issue can be said to be ambiguous, "past practice". With this in mind, we now review the circumstances giving rise to this dispute.

B. Review Under Section 18-12.6 and Other Relevant Contract Provisions

As both parties to this dispute agree, Section 18-12.6 was designed as a mechanism to curtail the extension of one's vacation through the use of a sick leave taken immediately before or after the vacation period. Accordingly, the parties negotiated that violators of Section 18-12.6 would be subject to an unpaid three day suspension. It is the Union's position in this case that the parties have negotiated the level of discipline to be imposed for this particular infraction, and that Section 18-6.12 contains no exceptions. In support of its position, the Union notes that in addition to Section 18-6.12, the parties also negotiated side agreements regarding discipline to be applied for absences, misses, tardiness, failure to work a full shift and the failure to sign in or

out. Accordingly, the Union maintains that in order for the Company's action herein to withstand scrutiny, it must find support somewhere within the CBA or other agreements negotiated by the parties. It is here where we begin our analysis of this case.

In reviewing Section 18-6.12 together with the testimony received at the arbitration hearing of January 28, 2015, it is clear to this Arbitrator that this language was carefully crafted and modified over time to deal with what the parties' had hoped to be isolated or sporadic instances of an employee's extension of his/her vacation through the use of a sick leave day, and to curtail such isolated instances. And in all but 2 instances, those involving Mr. Brunner and most recently, Shawn Krauss (See Company Exhibit 5), it appears that Section 18-6.12 has generally served its purpose. However, in the case involving Mr. Brunner, as noted above, from April 30, 2007 until August 5, 2013, there have been 18 separate instances where Mr. Brunner has extended his vacation through the use of a sick leave day, and in each such instance, Mr. Brunner has served a three day unpaid disciplinary suspension. Accordingly, it is apparent that Section 18-6.12 when drafted did not contemplate a chronic abuser of this provision and/or Mr. Brunner was not impacted by the three day suspension in Section 18-6.12. More importantly therefore, it is clear that in the case of Mr. Brunner (and most recently Mr. Kraus), Section 18-6.12 has not served its purpose. Therefore, for the Company's action in imposing the one-day suspension on Mr. Brunner to sustain scrutiny, there must be another provision of the CBA that supports its action.

Section 11-2.1 of the CBA, "Employee Having 20 or More Years of Service", provides in relevant part, that employees who have been continuously in the service of the Company for at least twenty (20) or more years shall not be discharged . . "except for willful or flagrant or deliberate violation of rules or regulations of the Company, *but may be otherwise disciplined as circumstances may in the opinion of the Company justify.*" (Emphasis mine) In addition, and also relevant in this matter, Section 8-8.1(e), Employee Responsibility, provides:

> Any employee found to have abused the sickness benefit by falsification or misrepresentation shall thereupon be subject to disciplinary action and reduction or elimination of sickness benefits, and shall further restore to the Company amounts paid to him or her for the periods of such absence.

Finally and significantly, Section 8-8.1(d), Exclusions, provides, in relevant part: "No employee shall receive benefits under this plan while on vacation . . "

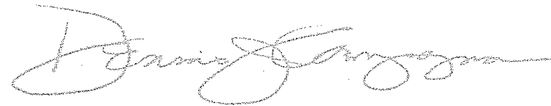
In the opinion of this Arbitrator, Sections 18-6.12, 8-8.1 (d) & (e), and 11-2.1, when read together, provide a sound basis for addressing the actions of an employee, such as Mr. Brunner, who has distinguished himself from others in the bargaining unit through his chronic and persistent violation of Section 18-6.12 by way of his abuse of the sick leave privileges provided in Section 8 of the CBA. In this regard, a review of Mr. Brunner's attendance record, with particular emphasis on those instances where Mr. Brunner has served a three day unpaid suspension, results in the unfortunate conclusion that he has, in each and every instance where a violation of Section 18-6.12 has occurred, used a sick leave day for the sole purpose of extending his vacation – clearly a "falsification or misrepresentation" of this sick leave benefit, since in each of those occasions, Mr. Brunner was not sick. Accordingly, to any reasonable on-looker, Mr. Brunner has clearly "abused the sick leave benefit" since the obvious intent of the sick leave provision of Article 8 was to cover instances of genuine illness and not to extend ones' vacation.

Finally, and significantly, the record reflects that the Company had previously issued a disciplinary action in the form of a written warning to Mr. Brunner on or about May 18, 2014 as a result of his "[p]attern of calling in sick the day prior to or after a scheduled week of vacation", with a warning that further violations [of 18-6.12] may result in "discipline up to and including termination." As noted above, there is nothing in the record showing that upon receipt of this written warning, Mr. Brunner grieved or in any other way challenged this disciplinary action. Accordingly, given Mr. Brunner's flagrant and continued violation of Section 18-6.12 following the written warning, a one day unpaid disciplinary suspension represents a reasonable next step in the progressive disciplinary process.

It is for the foregoing reasons that I find the Company's actions in this case reasonable and not violative of any provision of the CBA.

CONCLUSION & AWARD

For the reasons noted and discussed above, I find and conclude that the Company's imposition of a one (1) day unpaid suspension on James Brunner as a result of his repeated pattern of call offs by the use of sick leave time either immediately before or immediately following use of vacation to be a reasonable response to said repeated pattern, and not violative of any provision of the CBA. Accordingly, the instant grievance is denied in its entirety.

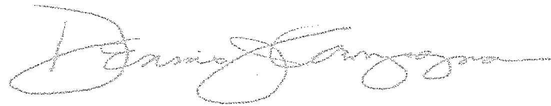


Dated: April 17, 2015

Dennis J. Campagna, Esq.
Arbitrator

STATE OF NEW YORK
COUNTY OF WESTCHESTER

I, Dennis J. Campagna, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award in the matter involving the grievance-arbitration between the Niagara Frontier Transit Metro System, Inc. and ATU Local 1342 regarding continual call-offs under Section 18-12.6 of the CBA.



Dated: April 17, 2015

Dennis J. Campagna, Esq.
Arbitrator