----------x

In the Matter of the Arbitration between

AMALGAMATED TRANSIT UNION, LOCAL 1342

-and-

NIAGARA FRONTIER TRANSIT
METRO SYSTEM, INC.

**OPINION**

**AND**

**AWARD**

Grievance: Lisa Tucker - Discharge

----------x

BEFORE: Jay M. Siegel, Esq.
Arbitrator

APPEARANCES: For Amalgamated Transit Union, Local 1342
Blitman & King, LLP
By: Nolan J. Lafler, Esq., of Counsel

For the Niagara Frontier Transit Metro System, Inc.
David J. State, Esq., General Counsel
By: Wayne R. Gradl, Esq. of Counsel

In accordance with the Collective Bargaining Agreement (Joint Exhibit 1) between the parties (Union & Company), the undersigned Arbitrator was selected by the parties to hear a grievance and render a binding determination. A hearing was held at the Company's offices on July 11, 2018 in Buffalo, New York.

The parties were accorded a full and fair hearing, including the opportunity to present evidence, examine witnesses and make arguments in support of their respective positions. The record was closed on or about August 17, 2018 after the Arbitrator received the parties' written closing arguments.

## ISSUE

The parties did not agree to a stipulated issue for the Arbitrator's review and determination and asked the Arbitrator to determine the issue. The Arbitrator determines that he will decide the following issue:

> Did the Company violate Section 8-3.3 of the CBA when it terminated Grievant's employment on or about February 8, 2018?
>
> If so, what shall be the remedy?

## RELEVANT CONTRACT PROVISIONS

### SECTION 8 – LEAVES OF ABSENCE

8-3.3 The employee on such leave, compensable or non-compensable, shall report personally and sign in, or if not reasonably possible then in writing, to the Company's Industrial Nurse during normal business hours for the Human Resources Department at least every thirty (30) days and the Company shall be privileged from time to time during the period of such leave to have the employee examined by a physician of its choice. All such employees shall be compensated at the normal rate of pay for forty (40) minutes of travel time to the office of the Company's nurse and shall be paid at the normal rate of pay, for a minimum of one (1) hour, or for the actual amount of time from the time of their arrival at the nurse's office, until released, whichever is greater. An employee failing to make such thirty (30) day report will be considered as having resigned and will be terminated unless he or she produces evidence satisfactory to the Company that he or she was unable to make such report. An employee reporting sick, but not receiving a definite leave of absence shall not leave the community in which he or she resided for a period of longer than ten (10) days. Prior to returning to work an employee on such leave of absence, in addition to any physical examination that the Company may require to be performed by its physician, must submit to the Company his or her physician's report that he or she is physically able in all respect to perform all the duties and responsibilities of his or her job classification.

### SECTION 11 – DISCIPLINE, GRIEVANCES AND ARBITRATION

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 procedures

## BACKGROUND FACTS

Lisa Tucker (Grievant) has been employed by the Company as a bus operator for more than ten years. Prior to this matter, Grievant had no disciplinary record.

On or about April 13, 2017, Grievant was involved in an auto accident. She sustained serious injuries to her right shoulder and was not medically fit to operate a bus.

Grievant was removed from service and placed on a disability leave of absence pursuant to Section 8-3 of the CBA. Section 8-3 provides a job-protected leave of absence to employees who suffer on-duty or off-duty injuries that render them unable to perform their duties. Based on Grievant's years of service, she was entitled to 48 months of job-protected leave and 12 months of paid health insurance coverage.

Under Section 8-3, employees who are out of work on a disability leave of absence must report to the Company's occupational health department every 30 days to provide a 30-day report. The purpose of the 30-day report is to allow the Company to review updated assessments from the employee's treating physician substantiating the need for a continuation of the leave of absence. Under Section 8-3.3, an employee who fails to report within 30 days will be considered as having resigned and will be terminated unless the employee produces satisfactory evidence explaining why he or she was unable to report.

This dispute stems from Grievant's April 13, 2017 auto accident where she sustained injuries to her right rotator cuff. The last 30-day report Grievant submitted in connection with this leave was on December 12, 2017. On this date, Grievant submitted an electronically signed note from a physician's assistant from the medical group she treated with stating that she was unable to work through December 21, 2017 and would be reevaluated at that time.

The Company's Human Resources Medical Coordinator is Melanie Chiarmonte. Among other things, Ms. Chiarmonte is responsible for administering and accepting 30-day reports from employees who are out on medical leaves for non-job related disabilities. Ms. Chiarmonte accepted Grievant's December 12, 2017 medical note and required Grievant to submit her next 30-day report either on January 9, 2018 or January 12, 2018.

Grievant neither appeared nor submitted her 30-day report that was due either on January 9, 2018 or January 12, 2018. Grievant did not call the Company to advise that she would be unable to appear for her 30-day report or that she would be unable to submit her 30-day report.

On January 22, 2018, Karen Novo, the Company's Director of Human Resources sent Grievant a letter by certified and regular mail. The letter advised Grievant that since she had failed to make her last 30-day report, she was required to make a 30-day report with medical documentation from her physician substantiating the need for her continued absence on January 30, 2018. The letter directed her to contact the Company's Medical Department at one of two phone numbers if she was unable to report. Finally, the letter

warned Grievant that if she failed to report or was unable to provide a reasonable explanation for her failure to report, that the Company would consider her to have quit the Company's employ in accordance with Section 8-3.3 of the CBA.

Grievant did not appear for the 30-day report on January 30, 2018 or call the Company to advise that she was unable to appear for the 30-day report. On January 31, 2018, the Company sent another letter to Grievant via regular and certified mail. The January 31, 2018 letter instructed Grievant to appear on February 6, 2018 with medical documentation from her physician substantiating the need for her continued absence. The letter again warned Grievant that if she failed to report or was unable to provide a reasonable explanation for her failure to report, that the Company would consider her to have quit the Company's employ in accordance with Section 8-3.3 of the CBA.

Grievant's next medical appointment with her doctor was scheduled for February 7, 2018. On February 2, 2018, Grievant called Ms. Chiarmonte and left a voicemail stating that she was unable to report on February 6, 2018, but that she was seeing her physician on February 7, 2018 and would bring in the required documentation after seeing her physician.

Grievant did not appear at the Company's Medical Department on February 7, 2018 and did not contact the Company to explain why she could not appear with her doctor's note.

On February 8, 2018, the Company sent Grievant a termination letter via regular and certified mail. It stated:

> Be advised on January 31, 2018 you were mailed a letter instructing you to report to the NFTA Medical Office located at 181 Ellicott Street on February 6, 2018, to fulfill your 30-day report requirement under Section 8-3.3 of the Collective Bargaining Agreement. As of today, you have failed to make this report as directed. Please be advised that as a result of your failure to report, we have considered you as resigning your position with NFT Metro System Inc., and your employment will terminate immediately. (Joint Exhibit 3).

On February 9, 2018, Grievant attempted to reach Ms. Chiarmonte but was unsuccessful. On February 12, 2018, Grievant appeared at the Company Medical Department. She did not have a note concerning her medical status. Grievant told Ms. Chiarmonte that she had a medical appointment the following day and would submit her 30-day report. Grievant was advised by both Ms. Chiarmonte and Ms. Novo that the decision to terminate her was final.

On February 13, 2018, Grievant visited her doctor's office. She received a note stating that she was excused from work until March 16, 2018 due to illness/injury and that she would be re-evaluated in the following month.

On February 21, 2018, Grievant filed a grievance challenging her termination. The undersigned Arbitrator was mutually selected by the parties after the grievance remained unresolved at the pre-arbitration steps of the grievance procedure.

## POSITION OF THE COMPANY

The parties did not agree the standard of review the Arbitrator should adopt in this case. The Company maintains that its proposed issue comports with the express language of the CBA, namely, whether the Company properly considered the Grievant as having resigned under Section 8-3.3 of the CBA. The Company asserts that it has consistently

advised Grievant that her failure to comply with the provisions of Section 8 would be considered a resignation because that is what the CBA expressly states.

The Company insists that the Union's proposed just cause standard is plainly wrong because the Grievant's termination was based on her failure to act, which is tantamount to a resignation under Section 8-3.3. Since the express language should be given its full import, there is no basis for consideration of fundamental just cause principles such as progressive discipline, length of service, etc. In other words, since Section 8-3.3 is not a work rule, the just cause standard does not apply.

The Company contends that since both parties do not dispute the basic fact that Grievant did not timely comply with her obligation to appear and make her 30-day report, it is Grievant who has the obligation to produce evidence satisfactory to the Company that she was unable to make the 30-day report. The Company cites a 2008 Award from Arbitrator Bonnie Bogue in *Central Contra Costa Transit Authority & ATU Local1605* with a virtually identical fact pattern as this case. In *Central Contra Costa Transit Authority*, the parties had contract language just like Section 8-3.3. Their language defined an unexcused absence as a job abandonment and, just like Grievant in this case, the grievant in *Central Contra Costa Transit Authority* failed to provide a required medical certification to justify continued absence.

The Company stresses that Arbitrator Bogue did not apply the just cause standard suggested by the Union. Rather, she held that the job abandonment rule was fairly applied to consider that grievant had quit even though she claimed that she had called the employer to advise that she had a medical appointment scheduled for the following week.

Just like the instant case, Arbitrator Bogue noted that the employer had warned grievant that she risked job abandonment. Since the employer complied with its obligations and grievant did not comply with hers, Arbitrator Bogue sustained the employer's decision.

The Company insists that its case is directly comparable to Arbitrator Bogue's. Starting as far back as December 12, 2017, Grievant received a reminder of her obligation to provide her next 30-day report and the consequences for failing to do so. More express reminders were sent by the Company to Grievant in letters dated January 22, 2018 and January 31, 2018, where Grievant was told that if she was delinquent with her 30-day report, she risked being terminated for voluntarily quitting under Section 8-3.3.

The Company objects to the Union's claim that Grievant should be spared from the voluntary resignation due to lax enforcement. The Company stresses that it submitted evidence showing it has regularly enforced the provisions of Section 8-3.3 with other employees who were considered to have voluntarily quit after failing to timely submit their 30-day reports. Equally important, Grievant's testimony shows that she was keenly aware of her obligations under Section 8-3.3 and the consequences for failing to meet those obligations.

Grievant's explanations for failing to comply with Section 8-3.3 and her excuses did not ring true. Although Grievant claimed that she spoke with her doctor and they mutually agreed she should cancel her appointment because she was still sick, this testimony was not supported by a medical note or even a description by Grievant of the type of illness that prevented her from getting to the doctor. Moreover, even after

Grievant received notice from the Company that it was terminating Grievant for job abandonment, she appeared at the Company on February 12, 2018 without a medical note. She merely promised she would be seeing her doctor the following day. Hence, Grievant utterly failed to show why she could not make her 30-day report and there was no reason for Ms. Novo to rescind her decision that Grievant had abandoned her job.

Grievant's actions during the relevant time period are entirely suspect and wholly undermine her claim that she was unable to work or so ill that she could not make her 30-day report. Grievant admitted that after her December 12, 2017 evaluation she failed to appear for her next evaluation on December 21, 2017. Despite being threatened with termination, Grievant did not visit her doctor again until February 13, 2018. In other words, the record establishes that Grievant was not undergoing any regular treatment to try to cure her shoulder ailment with the aim of getting back to work.

In the end analysis, the Company argues that Grievant voluntarily resigned. When Grievant's actions are measured against the clear language of the CBA it is abundantly clear that she resigned. Since Grievant failed to follow up with the Company on numerous occasions and failed to show that she was unable to have her 30-day report, the grievance should be denied.

## POSITION OF THE UNION

The Union asserts that the standard in this case must be whether the Company had just cause to terminate Grievant. While acknowledging that the Company acted on Grievant's termination pursuant to Article 8-3.3, the Union stresses that this remains a

discharge case. In the Union's view, the language of Section 8-3.3 in no way negates the fact that the case is a discharge case. There is no language evincing the parties' intent to disallow the Union from grieving a Section 8-3.3 termination under the just cause provision of Section 11-1. Since the parties expressly agreed in Section 11-1 that all terminations under the CBA must be for cause and the Company terminated Grievant, the only logical issue to be decided is whether Grievant's discharge was for cause.

The Union insists that the Company lacked just cause to terminate Grievant because it failed to consistently enforce Section 8-3.3 of the CBA. The evidence establishes that the Company never enforced the termination provision of Section 8-3.3 despite Grievant's repeated failure to make timely 30-day reports in the past. The Company's termination lacked just cause because it suddenly enforced Section 8-3.3 without providing either Grievant or the Union with any effective notice that it now intended to actually enforce the provision.

The Union stresses that one of the most basic principles of disciplinary arbitration is that non-enforcement or lax enforcement of a rule will neutralize its enforceability unless there is advance warning that the rule will be enforced going forward. This commonly accepted principle is fundamentally fair because when an employer fails to enforce its rules, it creates an expectation among employees that the conduct in question is condoned even though it violates a written rule. The Union cites a 2010 arbitration decision where an arbitrator held there to be no just cause to discipline an employee for a cash shortage where the employer consistently failed to discipline employees for similar cash shortages in the past.

The Union maintains that the record unequivocally establishes that the Company has never applied the 30-day termination provision to Grievant in the past, despite her repeated failure to comply with it. The Union cites a 2014 leave where Grievant did not report for more than three months, yet was not terminated. In that instance, the Company sent Grievant a letter dated June 10, 2014 stating that it had been more than 30 days since her last report of April 29, 2014. Rather than enforce Article 8-3.3, the Company simply set a new 30-day report date of June 17, 2014. The Company still did not discipline Grievant after she missed the June 17, 2014 deadline.

In 2015, Grievant had another disability leave where she failed to report for four consecutive months. Just like 2014, the Company set new deadlines and did not act after Grievant failed to comply with the deadlines.

The Company gave Grievant every reason to believe it was taking the same approach in its dealings with her in the months leading to her termination. In September 2017, Grievant was scheduled to report either on September 12 or September 15. When she failed to appear, the Company instructed her to report on October 17, 2017 instead of terminating her. When Grievant again failed to report on October 17, 2017, the Company set a new date for the 30-day report.

In November 2017, Grievant was scheduled to report on November 21 or November 24. When Grievant failed to report she was not disciplined. Similarly in January 2018, Grievant was scheduled to report either on January 9 or January 12. She did not appear and was not disciplined. Her report was rescheduled for January 30, 2018. When Grievant failed to appear, she was not disciplined.

In the Union's estimation, if the Company wanted to begin enforcing Section 8-3.3 after such an extended period of non-enforcement, it was obligated to clearly notify Grievant that it intended to change course and start enforcing the express language of the provision. Grievant's expectations were informed by her own experience. She had no reason to believe that the Company, after repeatedly threatening her with termination and never acting, would suddenly act on it. Since Grievant's expectations were that the provision would not be enforced, it is irrelevant that the Company exercised its rights under Section 8-3.3 with two other employees. For these reasons, the Union urges the Arbitrator to sustain the grievance, reinstate Grievant to her former position and make Grievant whole for her losses.

Finally, the Union argues that the Company unreasonably failed to excuse Grievant from her February 6, 2018 report date. The Union maintains that Grievant was unable to report on February 6, 2018 because her medical appointment was scheduled for the next day and because she was sick. To the Union, the Company's failure to excuse Grievant's non-compliance with February 6, 2018 is an unreasonable exercise of its discretion.

## OPINION

After carefully considering the evidence in the record and the arguments of the parties, the Arbitrator hereby determines that the Company violated Article 8-3.3 of the CBA when it terminated Grievant's employment on or about February 8, 2018.

The Arbitrator must begin this decision by explaining why he finds in favor of the Company on the appropriate issue for review and is not considering this a traditional just cause case. One of the most fundamental principles of contract interpretation is for the Arbitrator to give meaning to all of the provisions in a collective bargaining agreement. While the parties have a just cause standard in Section 11 of the CBA, the parties saw fit to do something different in Section 8-3.3 of the CBA. They mutually agreed that the Company had the express right to terminate employees when they fail to comply with the obligation to file a 30-day medical report while they are on approved compensable or non-compensable leaves. Section 8-3.3 gives the Company more rights than it otherwise would have if the sentence in this section giving it the right to terminate employees was not in the CBA. Otherwise, the provision would have no purpose.

The only logical conclusion to reach from a plain reading of Section 8-3.3 is that it gives the Company greater authority to terminate employees than it would otherwise have under a just cause provision. For example, if the Company correctly implements a termination under this provision, it would be inappropriate for the Arbitrator to consider typical mitigating factors that are considered under a just cause provision, such as years of service and an exemplary work record. The Arbitrator reaches this conclusion because the parties discretely agreed in Section 8-3.3 that when employees fail to file their 30-day

medical reports, the Company has the right to terminate them. This convinces the Arbitrator that many of the substantive and procedural considerations attendant with a just cause analysis are not applicable to terminations under Section 8-3.3.

At the same time, Section 8-3.3, like all of the provisions in the CBA, must be applied by the Company in a way that is fundamentally fair. In other words, in a termination proceeding under Section 8-3.3, while the Company is not obligated to meet all the standards inherent in a just cause termination, it must apply Section 8-3.3 in a manner that is neither arbitrary, capricious or unreasonable. When the Arbitrator considers Grievant's termination in the context of the arbitrary, capricious and unreasonable standard, he finds that the Company violated Section 8-3.3 because of its lax enforcement of Section 8-3.3 insofar as Grievant is concerned. In other words, the evidence establishes that the Company was so lax in enforcing this rule with Grievant that its sudden enforcement of the rule was wholly unfair and unreasonable.

When an employer is lax in enforcing a rule, it lulls an employee into a false sense of security. In these situations, fundamental fairness mandates an employer to expressly notify employees and the union that it is ending its period of lax enforcement and implementing the express language of a contract going forward. Indeed, it is well established that an employer may not suddenly begin enforcing a rule without giving clear notice to employees that the rule will be enforced going forward.

The Arbitrator finds the Company's termination of Grievant to be in violation of Section 8-3.3 because its enforcement was completely lax vis-a-vis Grievant and woefully inadequate. On numerous occasions over a period of several years, the

Company threatened Grievant with discharge for failing to submit a 30-day medical report and did nothing. For example, in 2014, Grievant did not submit a 30-day report for more than three months and was not terminated. On June 14, 2014, Grievant was threatened with termination under Section 8-8.3 for not making a 30-day report since April 29, 2014. The Company not only failed to act, but it did not follow up again until July 31, 2014, at which time it again directed Grievant so submit her 30-day report on August 8, 2014.

In 2015, Grievant was not disciplined after failing to make her 30-day report for four consecutive months. Instead of discharging Grievant, the Company set a new date for her to submit her 30-day report.

The Company's lax enforcement continued in the months leading up to Grievant's termination. In January 2018, Grievant was scheduled to submit her 30-day report either on January 9, 2018 or January 12, 2018. When she did not appear, she was not disciplined. The Company rescheduled her report date to January 30, 2018. When she did not report on January 30, 2018, she was not disciplined.

The Arbitrator agrees with the Union that Grievant's expectations were informed by her experience with Section 8-3.3. That experience showed that in three separate disability leaves in 2014, 2015 and 2017/2018, the Company threatened Grievant with termination for noncompliance on several occasions but it never acted. Grievant had no reason to believe that anything would change. The provision was laxly enforced for so long that it was fundamentally unfair for Grievant to suddenly be terminated on February 8, 2018. Prior to Grievant's termination, there is nothing in the record that made it clear

to Grievant and the Union that the days of lax enforcement were ending and strict enforcement was beginning. Under these circumstances, the Arbitrator finds the Grievant's termination to be in violation of Section 8-3.3.

The Arbitrator rejects the Union's claim that the Company unreasonably failed to excuse Grievant from her February 6, 2018 report date. Grievant's conduct cannot be credited in any way. She repeatedly ignored the Company's directives. She repeatedly failed to appear at scheduled doctor's appointments. During the period from late December 2017 through early February 2018, it does not appear as if Grievant was being seen by any medical professionals for her disabling injury. Grievant's conduct was wholly inappropriate and her reasons for missing the February 6, 2018 report date do not ring true. For these reasons, the Arbitrator rejects the Union's claim that the Company unreasonably failed to excuse Grievant from her February 6, 2018 report date and the Arbitrator also rejects the Union's request that Grievant be made whole. Grievant shall simply be reinstated to her position.

Accordingly, and based on the foregoing, I find and make the following:

## AWARD

1. The Company violated Section 8-3.3 of the CBA when it terminated Grievant's employment on or about February 8, 2018. Grievant's termination shall be converted to an unpaid suspension from the date she was terminated until ten business days after the Company receives this Award.
2. As a remedy, Grievant shall be restored to her position with the Company within ten business days after the Company receives this Award. Grievant is not entitled to back pay or the accumulation of any seniority during the period of her unpaid suspension.
3. The Arbitrator shall retain jurisdiction to resolve any and all questions that may arise regarding the remedy awarded herein.

Dated: September 11, 2018
Cold Spring, New York

Jay M. Siegel, Esq.
Arbitrator

STATE OF NEW YORK)
COUNTY OF PUTNAM)

I, Jay M. Siegel, do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this Instrument, which is my Opinion and Award.

Dated: September 11, 2018

Jay M. Siegel, Esq.
Arbitrator