

IN THE MATTER OF ARBITRATION BETWEEN

AMALGAMATED TRANSIT UNION)	
LOCAL 1005)	ARBITRATION
)	AWARD
)	
and)	
)	XIONG DISCHARGE
)	GRIEVANCE
)	
)	
METROPOLITAN COUNCIL)	BMS CASE NO. 08-PA-0901

Arbitrator: Stephen F. Befort

Hearing Date: April 29, 2008

Post-hearing briefs received: May 19, 2008

Date of decision: June 20, 2008

APPEARANCES

For the Union: Roger A. Jensen

For the Employer: Anthony G. Edwards

INTRODUCTION

Amalgamated Transit Union Local 1005 (Union), as exclusive representative, brings this grievance challenging the decision of the Metropolitan Council (Employer) to terminate the employment of bus driver Sia Xiong. The Union contends that the Employer violated the parties' collective bargaining agreement by discharging Ms. Xiong without cause. The grievance proceeded to an arbitration hearing at which the parties

were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUE

Did the Employer have just cause to discharge the grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 5 GRIEVANCE PROCEDURE

Section 1. Metro Transit reserves to itself, and this Agreement shall not be construed as in any way interfering with or limiting its right to discipline its employees, but Metro Transit agrees that such discipline shall be just and merited.

Section 2. . . . When contemplating disciplinary action, Metro Transit shall not give consideration to adverse entries on an employee's disciplinary record involving incidents occurring more than thirty-six (36) months prior to the date of the incident which gives rise to the contemplated discipline. . . .

FACTUAL BACKGROUND

Metro Transit operates the public bus transportation system in the metropolitan Minneapolis-St. Paul area. The grievant, Sia Xiong, has been employed by Metro Transit as a bus operator since 1999. At the time of her discharge, Xiong worked as an "Extra board" driver out of the East Metro Garage. An Extra board driver is not assigned to drive a specific route, but fills in on routes on an as-needed basis.

The Employer has adopted two disciplinary policies. One is a no-fault absenteeism policy. Under this policy, seven attendance occurrences in a rolling calendar year will result in a record of warning and a counseling session, ten occurrences will result in a final record of warning, and thirteen occurrences may result in termination. The Employer issued Ms. Xiong a Record of Warning on September 10, 2006 based on

this policy. At the time of her discharge, she had five chargeable occurrences of absenteeism on her record.

The second policy tracks employee violations of operating rules, safety standards, and customer service expectations. Violations that trigger a warning under any of these categories can either singly or in combination constitute a debit. According to the policy, two debits are grounds for a final written warning with three debits serving as grounds for discharge.

Ms. Xiong has been the subject of numerous disciplinary citations over the two years prior to her discharge. On May 24, 2005, a bus operated by Ms. Xiong struck the left mirror of a parked car. A safety supervisor reviewed the incident and concluded that Xiong was responsible for causing the accident. This incident resulted in the issuance of a safety violation warning.

During the summer of 2007, Ms. Xiong was twice late in servicing her assigned bus route. These two adherence code violations constituted a debit under the Employer's policy and resulted in the Employer issuing a formal Record of Warning. On August 4, 2007, Ms. Xiong misread her daily assignment and, instead of meeting the assigned relief driver at the designated checkpoint, pulled her bus into the East Metro Garage. This additional violation put Xiong in debit two status and prompted the Employer to issue a Final Record of Warning. This document stated that "another warning in Customer Service, Adherence Code, or Safety will automatically create Debit 3 and will be just cause for termination providing one of the three (3) warnings was a final."

The parties dispute whether the Employer actually presented this Final Record of Warning to Ms. Xiong. Assistant Transportation Manager Greer Gentry, Ms. Xiong's

direct supervisor, testified that he personally served Ms. Xiong with the Final Record of Warning on August 20, 2007, but that, consistent with her practice, she refused to acknowledge the warning with her signature. Ms. Xiong testified that she never received the Final Record of Warning, and the Union argues that is not logical that she would have signed the Notice of Violation for the incident in question yet refuse to sign the Final Record of Warning.

Four additional potential disciplinary events occurred during the remainder of 2007. On August 24, a third-party investigator observed that Ms. Xiong failed to verbally announce any street crossings during the operation of a route. One month later, Xiong was five minutes late in pulling out for her daily run. Mr. Gentry testified that each of these incidents constituted legitimate grounds for an additional warning and a debit three discharge. Gentry testified that he decided to give Xiong a break because of her family situation and instead handled these incidents through verbal counseling. Gentry further testified that he warned Xiong with respect to the latter incident that this would be the last time he would reduce a dischargeable violation to counseling.

On September 26, 2007, a bus operated by Ms. Xiong struck a pedestrian walk signal while turning a corner, resulting in some damage to both the signal and the rear of the bus. Ms. Xiong testified that she did not think that any damage had occurred, so she did not stop to investigate or to report the accident.

On October 18, 2007, Ms. Xiong called dispatch three minutes after her assigned pull out time asking for assistance because her assigned bus would not start. The Union maintains that Xiong would not have had a late start but for the fact that the bus had electrical problems, and that Xiong spent time attempting to start the bus with the outside

back-up system. The Employer asserts that Xiong should have contacted dispatch immediately upon experiencing problems with the bus, and that, if she had done so on a timely basis, she would have been assigned a substitute “pre-tripped” bus and avoided a late start. Mr. Gentry issued an adherence code Notice of Violation for this late start.

Meanwhile, an investigation of the September 26 accident determined that Ms. Xiong was the responsible party for that incident. As a result, the Employer issued two Records of Warning on November 8, 2007, one a safety violation for a second responsible accident within a three year period, and the other for failing to follow procedures in reporting the accident. The former document noted that Ms. Xiong was now in a debit two status and that a future violation could constitute grounds for discharge.

The Employer presented Ms. Xiong with a Notice of Discharge on November 8, 2007. While the Notice does not specify the basis for the discharge decision, Assistant Transportation Manager Gentry testified that the decision was based upon the totality of the grievant’s record, including the Final Record of Warning, the September 26 accident, and the October 18 late pull out. On cross-examination, Mr. Gentry conceded that the Employer would not have terminated Ms. Xiong but for the late pull out on October 18.

POSITIONS OF THE PARTIES

Employer:

The Employer contends that its decision to discharge the grievant is supported by just cause. The Employer submits that the grievant’s record is deficient in all three of the major areas of bus operator performance, including safety, attendance, and adherence to company rules. The Employer maintains that it served Ms. Xiong with a Final Record of

Warning in August 2007 stating that any further basis for a warning would be grounds for discharge. The Employer points out that Xiong had four additional violations during the fall of 2007, including two that warranted discharge. The Employer concludes that it treated Xiong with leniency on numerous occasions, but that her continued violations of company rules justify termination.

Union:

The Union asserts that the Employer's discharge decision lacks just cause for two reasons. First, the Union maintains that the Employer never served Ms. Xiong with the August 2007 Final Record of Warning, a procedural defect that precludes termination. Second, while the Union acknowledges that Ms. Xiong had a less than perfect performance record, it contends that she would not have been fired but for the October 18 late pull out. The Union argues that the minimal nature of that infraction, coupled with extenuating circumstances, warrant that she be put back to work at the final warning level.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See Elkouri & Elkouri, HOW*

ARBITRATION WORKS 948 (6th ed. 2003). Since the occurrence of the alleged misconduct in this case is not in dispute, only the latter issue will be discussed below.

The Alleged Misconduct

The parties do not dispute the conduct that serves as the underlying basis for discipline in this matter. The Employer submitted evidence that Ms. Xiong committed several violations of its disciplinary policies. The Union, in turn, acknowledges these violations, but disputes their severity. As such, the only contested issue is whether discharge is the appropriate remedy under the circumstances.

The Appropriate Remedy

Receipt of the Final Record of Warning

The parties contest whether the Employer presented Ms. Xiong with a Final Record of Warning in August 2007. Service of this document on the grievant is a prerequisite to further progressive discipline under the Employer's disciplinary policy.

Ms. Xiong testified that she never received a copy of the Final Record of Warning. In support of this position, the Union points out that Xiong's signature does not appear on the Final Record of Warning document. The Union argues that it is not logical that she would have refused to sign the final warning upon presentment in light of the fact that she did sign the Notice of Violation for the underlying incident.

Nonetheless, I believe that the Employer's position provides the more plausible version of events with respect to this issue. Mr. Gentry testified that he presented the Final Record of Warning to Ms. Xiong on August 20, 2007, and that she refused to acknowledge receipt, a fact noted by Gentry on the face of the document. The record shows that Xiong routinely refused to sign records of warning (refusing to sign three of

four), even though she invariably signed the underlying violation notices. Finally, in terms of credibility, Gentry had nothing to gain by failing to present the Final Record of Warning to Xiong, while Xiong had much to gain by claiming that she did not receive a copy of that document. Under these circumstances, it is likely that the Employer laid the proper foundation for additional discipline by presenting the grievant with the Final Record of Warning.

Level of Discipline

Under the Employer's disciplinary policy, any Class B violation or equivalent beyond that of a Final Record of Warning constitutes grounds for discharge. According to Mr. Gentry's testimony, Ms. Xiong had four such violations during the fall of 2007. In late August, an investigator observed that Xiong violated company policy by failing to announce street crossings during her route. A month later, Xiong was late in starting her scheduled run. Gentry testified that he decided to give Xiong a break with these two incidents due to some family problems that Xiong was experiencing, but that he warned Xiong on the latter occasion that this would be the last time that he would reduce a dischargeable violation to counseling.

The September 26 accident, when a bus Ms. Xiong was operating struck a pedestrian walk signal, also was sufficient under the Employer's disciplinary policy to create a debit three discharge situation. However, the investigation into this incident and the resulting Record of Warning, were not completed until November 8, 2007. In the meantime, Xiong experienced the October 18 late pull out for her scheduled run; also a dischargeable event under the Employer's policy. The Employer terminated Ms. Xiong on November 8, 2007.

Under these circumstances, the Employer clearly has established grounds for discharge under the terms of its unilaterally established disciplinary policy. That conclusion, however, does not necessarily determine whether the discharge is supported by just cause.

The Union argues that it is not. The Union's principal contention is that the dischargeable offense in this instance was the late pull-out of October 18 which is too minor of an event to warrant the ultimate penalty of discharge. Even though the September 26 accident pre-dates the late pull out, the Union maintains that the latter event was the one that triggered Ms. Xiong's discharge. Mr. Gentry apparently agrees with this position, as he conceded on cross-examination that the Employer would not have terminated Xiong but for the October 18 late pull out.

The Union argues in its brief that "Metro Transit should have cut Ms. Xiong three minutes of slack." The Union urges several extenuating circumstances concerning this incident. Ms. Xiong punched in, as required, ten minutes before her scheduled start time. She spent most of these ten minutes hurrying to find her bus which was parked in a far corner of the spacious East Metro Garage. Most significantly, she was unable to start the bus. After several unsuccessful attempts, she then went to the rear of the bus and attempted ignition by using the outside back-up system. When that alternative also failed, she went to the nearest garage telephone and called dispatch for help. Even after all of those efforts, her call was only three minutes beyond the scheduled start time. The Union contends that it would not be fair or reasonable to fire Ms. Xiong under these circumstances.

I agree. Ms. Xiong acted responsibly on October 18, and it would be unreasonable to fire her for being assigned a bus that would not start.

As an alternative position, the Employer argues that discharge is warranted by looking at the broader record, particularly the September 26 accident which was found to be attributable to Ms. Xiong's negligence. Although this argument is not without some merit, its shortcoming is that the Employer did not treat the September 26 accident as a dischargeable offense at the time and instead noted on the Record of Warning that it placed the grievant into a debit two status. Only after the Employer discharged Ms. Xiong for the October 18 late start did the Employer offer the earlier accident as an alternative basis for the discharge decision. Since the Employer did not treat the accident as a basis for the discharge decision when made, it is not appropriate to now amend the Record of Warning into an after-the-fact substitute grounds for termination.

Given these circumstances, but balanced by the fact that the Ms. Xiong has a decidedly poor disciplinary record, the termination decision is vacated and the grievant is reinstated at a final record of warning status without an award of back pay. Even though the grievant's position is sustained in part, it is important that she recognize that she must avoid future infractions if she hopes to continue her employment into the future. In that regard, her reinstatement is conditioned on a last chance "Suspension or Decision-Making Leave" as described in the Employer's Bus Operators Rule Book and Guide, Section 480, Step 3:

This is the employee's final opportunity to improve performance or cease rule infractions. It includes formal documentation and may include a requirement that the employee submit a written plan to improve performance or change behavior. The employee is informed that the next step will be termination of the employment relationship.

The parties should negotiate the exact contours of this arrangement, and the arbitrator will retain jurisdiction for sixty days to address any areas of disagreement as may be necessary.

AWARD

The grievance is sustained in part and denied in part. The Employer had just cause to discipline the grievant, but the sanction is reduced and the grievant is reinstated without back pay. The grievant's reinstatement is conditioned on a last chance basis as described above, and the parties are directed to negotiate and establish the terms of that arrangement. Jurisdiction is retained for a period of sixty (60) days from the date of this award to address any remedial issues as may be necessary.

Dated: June 20, 2008

Stephen F. Befort
Arbitrator