

IN RE ARBITRATION BETWEEN:

METROPOLITAN COUNCIL TRANSIT OPERATIONS, (MCTO)

and

AMALGAMATED TRANSIT UNION (ATU), Local 1005

DECISION AND AWARD OF ARBITRATOR

BMS Case # 11-PA-0724

JEFFREY W. JACOBS

ARBITRATOR

August 8, 2011

IN RE ARBITRATION BETWEEN:

MCTO,

and

ATU, #1005.

DECISION AND AWARD OF ARBITRATOR
BMS CASE #11-PA-0724
Willie Beasley Grievance

APPEARANCES:

FOR THE EMPLOYER:

Sydnee Woods, Attorney for the Employer
Ben Jones, Law Clerk
Mickey Young, Asst. Station Mgr. Nicollet Garage
Christy Bailly, Dir. of Bus Operations
Ellen Jackson, Operations Mgr. Nicollet Garage
Howard Brown, Dispatcher Nicollet Garage

FOR THE UNION:

Kelley Jeanetta, Attorney for the Union
Willie Beasley, grievant
Michelle Sommers, Union President
James Babcock, Relief Dispatcher
Shervon Thames Beasley, grievant's wife

PRELIMINARY STATEMENT

The hearing in the above matter was held July 19, 2011 at the Metro Transit Operations Center 725 North 7th St, Minneapolis, MN. The parties presented oral and documentary evidence and the record was closed on July 19, 2011. The parties filed Post-Hearing Briefs July 26, 2011.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement dated August 1, 2008 through July 31, 2010. Article 13 provides for binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. The parties stipulated that there were no procedural or substantive arbitrability issues and the matter was properly before the arbitrator.

ISSUES PRESENTED

Was the discharge of the grievant just and merited as required by Article 5 of the Collective Bargaining Agreement? If not what shall the remedy be?

PARTIES' POSITIONS

EMPLOYER'S POSITION

The MCTO took the position that the discipline of the grievant was just and merited. In support of this position, the MCTO made the following contentions:

1. The MCTO indicated that this case is about job abandonment. The grievant called in on October 2, 2010 and said only that he would not be in, as opposed to calling in sick, and that was all MCTO knew. The MCTO asserted that he did not say “sick and carry,” or even that he was “sick,” which would have set in motion an entirely different set of responses and procedures – he simply said he would not be in and no one knew why he was gone or when he would return.

2. The grievant spoke with a Mr. Brown when he called in who became frustrated since the grievant had called in at the last minute like this before so he instructed the grievant to contact another dispatcher to replace him. The grievant then contacted a coworker, Mr. Babcock, who initially thought that the grievant would be back to work the following day and so indicated that on the Daily Attendance Report, also known as the “yellow sheet.”

3. Babcock also tried to reach the grievant that day but was able to get only a cryptic and confusing message through text messaging. He made an assumption that the grievant was sick and crossed out what he had written on the yellow sheet and wrote “sick and carry.” The MCTO argued that this was not based on anything the grievant told either Babcock or Brown and was simply an invalid assumption. The MCTO then tried to contact the grievant to try to verify what his status was, whether he was sick and when he was coming back.

4. Despite multiple efforts to reach the grievant no one was able to reach him, talk to him or find out what the problem was that kept him out of work. The MCTO tried reaching the grievant many times on his cell and home phone numbers and left messages but were never able to talk to him for weeks. They also sent letters to his home, including one by courier, but they went unanswered.

5. The grievant was given MCTO policies regarding attendance, sick leave and workplace procedures and was aware of his obligations to report in when he was unable to come to work and the procedures for doing so. See MCTO Exhibits 4 & 5.

6. Further, MCTO Exhibit 2 @ #421 provides that an employee who is absent more than 48 hours is considered to have abandoned their jobs. See also MCTO Exhibit 3, Procedure 4-7d. See also, MCTO Exhibit 22 setting forth the rights and responsibilities of the employee who is sick and cannot come to work. The MCTO further noted its clear policy that provides that “Any operator who is absent without leave for 48 hours or more will be considered as abandoning their job.”

7. If the grievant had called in sick or “sick and carry” it would have set in motion a whole set of procedures to verify the illness and/or to institute FMLA requirements. The MCTO did not have the necessary information to do that however because they were never able to find the grievant or get any medical information about him despite many attempts to do so.

8. The grievant is a relief dispatcher and it is crucial that he is there or operations can be jeopardized. The duties of a relief dispatcher are quite involved, perhaps more so than a regular dispatcher. The MCTO emphasized the need to provide customer service and thus the need for its employees to be at work when they are supposed to.

9. The MCTO indicated that it would have dealt with this case far differently if the grievant had called in sick but that he did not; he merely indicated he would not be in and no one was able to reach him for more than 20 days. Under those circumstances, the MCTO argued that it was reasonable to treat this matter as though the employee had simply abandoned his job. The MCTO acknowledged that the grievant called in on or about October 14th and used a phone number that was either his cell or home phone number. He left only another cryptic message indicating that he would “call them back,” but then when managers tried to contact him only minutes after the message they got no answer.

10. The MCTO took issue with the grievant’s claim that he called from a pay phone and asserted that their witnesses believed they saw the caller ID come up as one of the listed phone numbers they had on file for the grievant. The MCTO asserted that this reaffirmed their understanding that these were still working phone numbers and that the grievant was avoiding them for some reason.

11. The MCTO questioned how the grievant's phone could have been broken *before* 6:30 a.m. on October 2nd and that he had been ousted from his home yet he was able to make a phone call to Mr. Brown. The MCTO further questioned how he was able to send and receive text messages on a supposedly broken cell phone at 9:00 a.m. that same day as well as to contact Mr. Babcock. By this time he claimed he was out of his house, had no access to the land line or cell phone. Mr. Brown indicated that he recognized the caller ID when the original call was made and that it was the grievant's name and phone number. How could that be true with a cell phone that was not working?

12. The MCTO pointed out that these facts simply do not add up and that the grievant's claim about the cell phone not working is false. Further, one can get voicemail messages left on a cell phone even if the phone itself is broken; *if* someone is really trying to do that. Here though the grievant was not trying to get in touch with anyone or to take any reasonable action to protect his job.

13. The MCTO finally sent the grievant a letter on October 18th by courier to the grievant's home, which was signed for by the grievant's wife, advising him of a *Loudermill* hearing. See Employer Exhibit 9. He failed to appear for that hearing.

14. The MCTO further asserted that they bent over backwards to give the grievant additional time to appear and explain why he was gone. They even gave him an extra few days to respond to the *Loudermill* hearing letter. There was no further contact. Thus, on October 25th the MCTO felt it had no other choice but to terminate the grievant for job abandonment.

15. It was only after that letter that the grievant asked for his job back. The MCTO asserted that when the Union and management met over this a few days later the grievant never asserted he said "sick and carry" during the call on October 2nd. It was not until the third step that he said that but by that time it was apparent that saying that was the only way he was going to have any argument at all to save his job. The MCTO witnesses indicated that they did not believe him at that point.

16. The MCTO further asserted that the grievant never told Mr. Babcock he was “sick and carry” and that one would think he would have said that since he was calling him as a replacement for the day. Moreover, the grievant should have known that Mr. Brown would have been upset having to find a replacement less than half an hour prior to the end of the shift and that he needed to be very clear with him – yet he was not and simply assumed that Brown had heard him say “sick and carry.”

17. Further, Babcock sent him a specific message asking if he was “sick and carry” and the only response was “I can’t.” The employer asked rhetorically, what should they have assumed from this? The MCTO also pointed out that even if the grievant’s phone numbers were invalid and his cell phone broken, he could have called in and he certainly could have driven to the garage to advise management of his whereabouts, any new address or phone numbers they could use to reach him and to advise them when he might be back to work. He did none of that and yet expects the MCTO to keep his job open forever while he got his life back in order.

18. The MCTO noted that even though the grievant had been using frequent sick leave for weeks prior to October 2nd they had no information regarding the marital troubles and other medical problems he was having or why he had left so abruptly on the 2nd without any word on a return date.

19. The MCTO countered the claim that “sick and carry” automatically means that the grievant had no obligation to contact management for 23 days. The Policy on this point, Employer Exhibit 22, makes no such statement and there is no specific policy or rule that provides for this. To the contrary, the policy requires that an employee who is sick, even one who is “sick and carry,” must maintain weekly contact with their supervisor.

20. Further it is unreasonable to assume that an employer will hold a job open indefinitely. To adopt the Union’s interpretation of this policy would allow employees to simply say the magic words, “sick and carry” and disappear for up to 30 days without any word to or from management regarding their status. Such blatant disregard for one’s job cannot be allowed.

21. The essence of the MCTO's position is that the grievant never indicated that he was sick and that management repeatedly attempted to find him and gave him more than enough chances to contact them yet he failed to do so. Under these circumstances, whether the employees liked him or not, the result must be that he abandoned his job.

The MCTO seeks an award denying the grievance in its entirety.

UNION'S POSITION

The Union took the position that there was no just cause for the grievant's discipline. In support of this position the Union made the following contentions:

1. The grievant has been with MCTO since 2003 and is proficient at his job and is a good employee. He has received numerous awards and commendations throughout his career and other than one minor instance of tapping a mirror, for which there was no discipline; he has never had any safety violations or other concerns about his work performance at MCTO. He has had some attendance issues but has worked very hard at his job and at getting to work on time. He is well liked and respected by his peers at work and is generally regarded as an excellent employee.

2. The grievant has had a number of personal health problems as well as some marital difficulties and depression problems in the last few years. These became worse in 2010 and on October 2, 2010 he and his wife fought and he left the home. In the process his cell phone was broken and his life went into a tailspin. He began drinking, stopped taking the meds for his diabetes and developed a medical condition that ultimately required surgery.

3. He even spoke to his manager, Mr. Caron, who did not testify at the hearing, about his personal problems. He was instructed to contact Ms. Jackson and tried to but she was not in at the time. Even though he did not follow up, his managers and supervisors clearly knew that something was wrong with the grievant's health and that he needed time off to deal with these problems.

4. The Union noted that there was no countervailing evidence in this regard and it must be assumed that the MCTO was aware of the troubles the grievant was having and that he was trying to find ways to take leave to get a handle on his health and other issues.

5. Turning to the events of October 2, 2010, the Union asserted that the grievant called in to inform the MCTO that he would not be in and spoke to Howard Brown. Pursuant to policy, the grievant was required to call in and tell dispatch he would not be in. The Union noted that the grievant did in fact say he was sick and that he should be listed as “sick and carry” or words to that effect.

6. The Union also pointed out that Mr. Brown’s actions were not only not according to policy they were highly inappropriate. He hung up on the grievant, swore at him and frankly admitted at the hearing that the grievant might well have said that he was calling in sick and could have even used the words “sick and carry” but that he was so busy screaming, swearing and hanging up on the grievant that he did not hear him say that.

7. The Union asserted that even though Mr. Brown had his own personal problems, his responsibility was to take the information down appropriately and to find a replacement for the grievant. Instead he instructed the grievant to find a replacement – something that is clearly wrong.

8. The Union’s argument is that the real fault lies in the way Mr. Brown handled this and that the chain of events that his actions set in motion resulted in the misunderstanding that led to this. While it is understandable that he was frustrated by the late notice of the grievant’s call that day, this was no reason to fail to follow procedure and, more importantly, not a reason to blame the grievant for the chain of events that led to his termination.

9. It was further clear that the conversation the grievant had with Mr. Brown to report sick was indeed very short. Mr. Brown never truly listened to him, blew up in anger once he was told that the grievant would not be in, yelled at him to “get his ass into work” (since he had to get to the hospital to visit his wife) and hung up on the grievant. Brown also instructed the grievant to find his own replacement – something which was clearly against policy.

10. The Union pointed out that it is well known by both management and line employees alike that the phrase “sick and carry” means that the person would not be in due to illness and that the status “carries” forward such that he does not need to call in again until he is ready to return to work. The Union argued most strenuously that even the MCTO acknowledged that if he in fact said “sick and carry” they would not have terminated him. The Union pointed out that several MCTO witnesses acknowledged that if the grievant had been “sick and carry” none of this would have happened.

11. The Union further cast doubts on the credibility of Mr. Brown since he indicated in the investigation that he *did* speak to the grievant a second time that evening but at the hearing said he did *not* speak to the grievant again. Clearly, according to the Union, Mr. Brown’s recollections were sketchy at best and it was further clear that Mr. Brown was not even listening to what the grievant had to say and that his “recollection” about the phone call was not accurate.

12. The Union further argued that the grievant did follow proper procedure. The Union countered the MCTO’s claim that the grievant failed to follow procedure and argued that he was not required to call in after he had said “sick and carry.” The Union noted that in fact the grievant called Brown back on the 2nd to inform him that he had found a replacement. Brown, despite his claimed confusion about the grievant's status, never asked him to clarify it so the grievant naturally assumed that his status was known and had been appropriately and accurately reported.

13. Further, the grievant called in on October 14th and left a message for his manager. He felt that he was going above and beyond what was required since he knew he had no obligation to call in for another two weeks. The Union asserted too that he used a pay phone, since he had no access to his cell or home phone at that time. The Union also pointed out that the MCTO claimed that their caller ID said it was the grievant’s number but never presented evidence to that effect. MCTO witnesses said only they “thought” it was one of the grievant’s phone numbers.

14. The Union further noted that the grievant has had continued problems with an anal fissure condition that was aggravated by the struggle with his wife on October 2nd. He was in considerable pain and was in fact unable to work. There was no evidence that the grievant was malingering or had fraudulently used sick leave.

15. The Union also pointed to the MCTO's own guidelines for discipline and noted that managers have discretion to use these factors to determine if discipline is appropriate. See Employer Exhibit 4. These factors include: expectation of improvement – there is no reason to expect that this will happen again; past record – it is quite good and by all accounts the grievant is a competent well-liked employee; mitigating circumstances – here the grievant had no working phones, no home for a while, serious health issues one of which required surgery, and serious financial and marital difficulties, which the MCTO was aware of; cause of the excessive missed work – the MCTO was aware of the grievant's health issues and his need for sick time to deal with them and “other relevant considerations” – the grievant's conduct can hardly be faulted given the overall circumstances.

16. While he did not assert “sick and carry” at early grievance steps, it was because he assumed the MCTO knew that. He was concerned about the actual time he was gone rather than what he had told Mr. Brown when he called in. By the time of the third step grievance meeting, the MCTO knew what had happened; that the grievant had been thrown out of his house and had no working phone, that the grievant was not getting the letters they were sending him, had personal, marital, financial and health related problems yet they used none of these to mitigate the harsh result here.

17. The Union went through the various factors traditionally used to determine just cause, or whether the discharge was just and merited. The Union asserted that there was no warning of the consequences of the actions and that there is no clear rule or procedure for what happens if someone is “sick and carry.” He assumed he had called in “sick and carry,” there were no clear written policies applicable to his situation here. The Union further asserted that since there are no written rules applicable to this situation he cannot be charged with knowledge of such rules.

18. The Union also asserted that there was not a fair investigation here. The MCTO should have done more to nail down exactly what was said in the conversation with Mr. Brown that morning and to determine that the grievant did follow proper procedure and that it was Brown who did not.

19. The essence of the Union's case is that the grievant did not violate any policy, appropriately called in as he was supposed to and is now being blamed for the inappropriate actions of another employee and for a lack of communication that employee caused. The Union acknowledged that the grievant bears some responsibility for his actions here, but that the MCTO deserves the greater weight of fault in what happened and should bear the burden for failing to tell him what to do. The grievant was the victim of a series of unfortunate circumstances that should not result in termination.

The Union seeks an award sustaining the grievance and reinstating the grievant with back pay and accrued benefits.

MEMORANDUM AND DISCUSSION

The grievant has been with MCTO since 2003 and by all accounts is proficient at his job and was otherwise a good employee. He was promoted to the relief dispatcher position in 2007 and was by all accounts good at this job and was well regarded by co-workers and managers alike.

The grievant does have a Record of Warning for absences in 2010. MCTO policy allows for 7 absences in a rolling year but after 10 such occurrences employees are issued a Final Record of Warning, which is essentially a warning that any further absences may result in termination. The grievant received a Record of Warning in 2010 but no Final Record of Warning was ever issued.

This evidence cuts both ways – it shows that the grievant has had attendance issues and that is certainly a concern. It also showed that the MCTO was on notice that the grievant was missing work due to illnesses and other problems. There was no evidence that the grievant was unaware of how to report that he was not coming in; in fact quite the opposite, as it shows that he was well aware of what he needed to do. The question, discussed more below, is whether he did that in this instance.

There was little question that MCTO operations depend on attendance and that it is important that people appear for work unless they are sick or there is some other valid excuse. Dispatchers' duties include assigning buses to routes, coordinating daily routes and contacting operators who have not reported to work and documenting absences. It was also clear that if a dispatcher is not coming to work he/she must contact dispatch and inform them of that, inform them whether they are sick and if they know when they may be back to relay that information. If the dispatcher is not certain when they will be back due to illness they can indicate that they are "sick and carry."

There is no specific policy on this term but the evidence showed that using that "sick and carry," has significance to those in the dispatch area and that it effectively means that they will be out for an indeterminate period. It was clear from the evidence that while there is no specific policy as to what the term means it was clear that once it is used the MCTO uses a very different procedure and that under these circumstances the grievant would not have been terminated. There was evidence however that being listed as "sick and carry" does not mean that a person can simply disappear for weeks or indefinitely without calling in or informing MCTO supervisors of their status. What is important on this record is that if the grievant had indeed said that he was sick or that he was "sick and carry" he would not have been fired.¹ It was at least clear that the MCTO would have handled this very differently but, as discussed further, the grievant would still have had the obligation to stay in better touch with the managers than he did.

The Policy, Employer exhibit 4, provides that even an employee who is sick must maintain weekly contact with the employer. Clearly, as discussed below, the grievant did not. At best, he called in once on October 14 and not again until after his discharge in late October.

¹ At least two employer witnesses testified to this and indicated that while the grievant may not have been entirely absolved from any or all responsibility, termination would not have been the result here.

This brings us to the events of October 2nd. Several facts are quite evident. The grievant called in at approximately 6:40 a.m. that day to report that he would not be in. This was appropriate and he followed policy in this regard. In the vernacular, so far so good.

On this record it was abundantly clear that Mr. Brown's response to the grievant was not in accordance with policy and frankly materially contributed to this whole fiasco. It was apparent that Mr. Brown was angry about the call even before he picked up the phone. He indicated that he saw that the call was from the grievant and assumed, correctly, that the grievant was going to call in and report that he was unable to come to work that day. As discussed below, even though he certainly did not follow protocol, that did not absolve the grievant from contacting his managers nor did it undercut the credibility issues that pervade this matter.

Mr. Brown indicated that his frustration was due to lateness in the shift and that he would then have to find a replacement for the grievant, which angered him. He shouted at the grievant almost from the very start of the call and clearly never listened to him or heard what he had to say. The evidence was clear that he told the grievant to find his own replacement, which was against policy, and/or to "get his ass into work." He then hung up on the grievant. Mr. Brown was obviously quite terse with the grievant due to his own personal issues with needing to get to the hospital to visit his wife who was there.

There was also the evidence that the grievant called in again and still did not tell Mr. Brown that he was sick or that he should be on "sick and carry" status. While there was some indication that the grievant may have already assumed he had said he was he also indicated that Mr. Brown hung up on him and that he may not have heard what he said. Ordinary prudence would dictate that the grievant reiterate that he was sick but there was no evidence of that.

Mr. Babcock testified that in one of the text messages he and the grievant exchanged at about 9:00 a.m. on October 2nd, he asked the grievant if he needed him to fill in for more than the one day, and the grievant replied “as far as he knew.” It was not completely clear how many text messages went back and forth but that in one of them there was an apparent misstep by Mr. Babcock that simply said “boo.” The grievant responded with “Boo, boo, I can’t.”

Further, there was some evidence that the grievant was quite distraught and in considerable pain that day so it would be more reasonable that the conversation would be short and that it would have ended right after it was agreed that Mr. Babcock would come in to work for the grievant that day. Based on this he wrote on the “yellow sheet,” which is the Daily Attendance Report on which such information about absences is written, that the grievant was “sick and carry.” This form was scrutinized quite extensively at the hearing since something under that term was crossed out and “sick and carry” was written over the top of it

Mr. Babcock testified credibly that he had written “back to work” on the line next to the grievant's name but that this was an error and that it should have been written next to another employee. He then crossed that out, something that he perhaps should not have done either, and wrote “sick and carry.” Further, the entry of “sick and carry” on the yellow sheet was clearly based on an assumption Mr. Babcock made without having any actual facts. Thus, the fact that the yellow sheet said that did not provide adequate evidence that he really was “sick and carry.”

Despite this information being on the yellow sheet, MCTO managers were still confused about the grievant’s status. They attempted to contact him using the phone numbers they had. Later they attempted to reach him by mail and at one point even used a courier service to deliver a letter to him outlining the importance of contacting the employer and warning the grievant he was on the verge of being fired. This letter did get to the house but the grievant’s wife never gave it to him.

As will be discussed more, the MCTO undertook a great many efforts to reach the grievant to find out what his status was but this was based on the assumption that he was not “sick and carry,” even though the yellow sheet said he was.

Over the course of the next three weeks MCTO managers undertook extraordinary efforts to reach the grievant. They gave credible testimony that they made numerous phone calls to both his home and cell phone that went unanswered and sent letters to his home advising him to get in touch with them. They even sent one by courier, which the grievant’s wife acknowledged that she received but never gave to the grievant.

MCTO managers were on the brink of terminating the grievant but received a phone message from the grievant on October 14th saying he would call them back. They testified credibly too that they immediately called him back but were unable to reach him. The grievant indicated that he had called from a pay phone but managers testified that they saw the grievant’s name a number come up on the caller ID and tried to reach him on that number.²

As noted above, this case boils down to whether the grievant should have been on “sick and carry” status. A number of things conspired to undercut the grievant’s claims here

Several things weighed into this decision. While the grievant may have assumed he told Mr. Brown he was sick or to place him on “sick and carry” status, it was clear that he was as distraught by the events in his life as Mr. Brown was frustrated by the call itself. On this record there was insufficient evidence to establish that the grievant told Mr. Brown that he as sick or that he should be on “sick and carry” status.

² The caller ID screen was not placed in evidence nor was there completely clear evidence of what exactly pops up when a person calls in. That frankly would have been helpful in assisting the credibility determination as it would have eliminated any doubt about what the managers saw and what information they had. It would also have clarified whether they could have simply listened to the message and then gotten the phone number from a separate listing versus just hitting the “redial” button. On this record though the greater weight of the evidence supports the assertion by the MCTO that the grievant used one of the numbers they already had for him and that they immediately tried to return his call. The MCTO managers had no incentive to fabricate their story though whereas the grievant, as discussed below, had serious issues with his story.

The evidence further showed that the grievant then called Mr. Babcock to ask if he could work for him. Mr. Babcock agreed and went in. The grievant then called Mr. Brown back and told him that Babcock would be there.³ There was no clear evidence that he told Mr. Brown he was sick during that phone call either.

Further, there was the clear evidence that the grievant did not even mention that he was on “sick and carry” status until the third step of the grievance steps. That was a curious finding and one which undercut the grievant’s claim here.

Unbeknownst to MCTO managers, the grievant had been thrown out of his house after a verbal and physical altercation with his wife early in the morning of October 2nd and that this aggravated a painful condition, which eventually required surgery. The grievant claimed that during this battle, his cell phone had been broken and that since he was no longer in the home and had no working cell phone he was unable to get the messages from the garage asking where he was. The grievant stayed with a friend while he got his life back in order. He assumed that he had properly reported his absence and that he was on “sick and carry” status. While the policy requires that employees who are out sick must contact their supervisors the employer’s main basis for termination was that he was *not* on that status.

The essential question is whether the record as a whole supports the grievant’s assertion that he told Mr. Brown he was sick and carry. By a slim margin it does not.

As always, it is best not to overlook the obvious. While he claimed that his cell phone was broken he was able to call in and talk to Mr. Brown – twice – after 6:40 a.m. He was further able to contact Mr. Babcock to come in for him and he was able to send and receive text messages. How these clear facts square with the claim that he had no phone at that point is puzzling at best and frankly completely undercut the claim that he had no phone.

³ The record reveals that the “real” reason this matter came to the attention of management was that Mr. Babcock was not the most senior person and was not in line to be called in. That fact does not materially affect the outcome however since the reason the MCTO undertook to investigate this does not undermine the other salient facts here.

The grievant's claim depends entirely on his credibility and rests upon the claim that he was "sick and carry" yet it also must depend to some degree on the claim that he had no phone and could not be reached. This was clearly not true. For one thing he called into the MCTO at 6:40 a.m. on October 2nd, well after he claimed he had been thrown out of the house and had left his cell phone there and that it had been broken. He claimed he called again and Mr. Brown indicated that he saw the grievant's name on the caller ID. He was also able to contact Mr. Babcock and there was no evidence that he used any phone other than one he already had. He never asserted that he called from a pay phone or that he used someone else's phone. The only plausible conclusion on this record is that these calls were made – on the grievant's cell phone – the one he claimed was both at home and broken.

In addition, and a hugely significant fact here, was the evidence that he received and sent a text message to Mr. Babcock at approximately 9:00 a.m. that day. Land lines do not accept or send text messages; cell phones do and the only one he would have had access to was his. The only one on which Mr. Babcock could possibly have known to reach the grievant – was the grievant's cell phone. These holes in the story undercut any claim that the grievant has that he told Mr. Brown "sick and carry."

Moreover, even if he had been on "sick and carry" status, that would not have absolved him from contacting his managers during his absence. While this case does not necessarily proceed on the terms of the employer's Policy it is axiomatic that any employee must maintain some sort of regular contact with the employer if they are sick and unable to come to work.

Here the operative fact is that for whatever reason the grievant *did* have a working phone yet ignored the many messages about reporting in. Irrespective of what his assumptions were about his status, once it became clear that his employer was calling him repeatedly to at least call them – and that was all they wanted – it was incumbent upon him to do so in a timely fashion. Here sadly, he failed to follow through on this and there was no persuasive evidence that he was unable to – there was no medical reason he could not have called and as noted, evidence that he in fact had access to a phone and either intentionally or negligently ignored the messages from the employer to contact them.

There were other inconsistencies as well. He indicated that he was out of the home as of October 2nd yet his wife's November 30, 2010 statement to the MCTO indicated he was out as of September 29, 2010. See Employer Exhibit 25. It is of some significance that the wife's letter was written in an apparent attempt to save the grievant's job yet is inconsistent with testimony and other documentary evidence presented at the hearing. Shakespeare's old adage holds true – it is a tangled web we weave when first we fashion to deceive.

While these discrepancies may seem minor they add up to a disturbing conclusion, that the grievant is not being truthful with his employer about his status and why he never responded to the multiple messages to find out when he would be back to work and what his health status was. Further, there was no evidence that the grievant was incapacitated or otherwise unable to make any calls or to simply stop by the garage to talk to his managers.

It should be noted too that the MCTO raised a valid concern about the Union's claim that all one needs to say is "sick and carry" and be absolved from any responsibility for calling in or contacting the employer for at least 30 days. It should be noted that this is not what the policy says and it was abundantly clear from the evidence that an employee cannot simply say a few magic words and disappear for 30 days without any contact whatsoever as to their status or expected return to work. The Policy requires weekly contact and the grievant failed to do that.

If ever there was a scenario of a perfect storm of unfortunate misunderstandings that gave rise to the phrase "failure to communicate" it would be this one. Had even one thing been different in the factual scenario presented here, this case would likely not have happened. As examples, had Mr. Brown clarified the grievant's status when he called back, had the grievant gotten any of the letters that were sent to him, had the grievant been able to reach his manager on October 14th rather than just leaving a message all of this might have been avoided. The list of "what ifs" could go on and on and cases of this nature are not decided on such speculation but rather upon facts.

On this record the termination was just and merited as required under the terms of the contract based on the evidence that he abandoned his job and that he failed to follow the Policy and one of the most basic of all rules in employment - protect your job by letting the employer know where you are, what your status is and when you are coming back. On this record, the inescapable conclusion is that he abandoned his job and that the discharge must stand.

To be sure this is an unsavory result. It should also be noted that the various discretionary factors in Employer Exhibit 4 were reviewed. While some of these factors appear to support a lesser form of discipline, the various inconsistencies in the story, the fact that he never mentioned that he thought he was “sick an carry” until the third step of the grievance procedure, even though that was the very crux of his claim here, and the other inconsistencies in the story conspired to compel this result. While the grievant’s situation is a sympathetic one given his physical and mental health conditions, one cannot expect to be gone for weeks on end without any contact, even though there was no compelling evidence on this record that such contact could not have been maintained to warrant a contrary result.

Accordingly, the grievance must be denied

AWARD

The grievance is DENIED

Dated: August 8, 2011

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Jeffrey W. Jacobs, arbitrator