

**BEFORE THE ARBITRATOR**

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In the Matter of the Arbitration Between

**METRO TRANSIT,  
a division of Metropolitan Council**

and

**AMALGAMATED TRANSIT UNION  
LOCAL 1005,  
Minneapolis and St. Paul**  
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BMS Case No. 11 PA-0490

Grievant:

**Arbitrator: Sharon K. Imes**

***APPEARANCES:***

**Andrew Parker**, Parker Rosen, appearing on behalf of Metro Transit.

**Roger Jensen**, Miller O'Brien Cummins, PLLP, appearing on behalf of Amalgamated Transit Union, Local 1005 and the Grievant.

***JURISDICTION:***

Metro Transit, a division of Metropolitan Council, referred to herein as the Employer, and Amalgamated Transit Union, Local 1005, referred to herein as the Union, are parties to a collective bargaining agreement effective August 1, 2008 to July 31, 2010 and from year to year thereafter unless changed, revised or amended as provided for in Article 2. Under this agreement, the undersigned was selected to decide a dispute that has occurred between them. Hearing was held on June 16, 2011 in Minneapolis, Minnesota. The parties, both present, were afforded full opportunity to be heard. The hearing was closed with oral arguments and the matter is now ready for determination.

***STATEMENT OF THE ISSUE:***

Was the Grievant disciplined for just and merited cause? 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 employees, but Metro Transit agrees that such discipline shall be just and merited.

...

**Section 3.** Any dispute or controversy between Metro Transit and an employee covered by this Agreement, or between Metro Transit and the ATU, regarding the application, interpretation or enforcement of any of the provisions of this Agreement shall constitute a grievance.

...

**ARTICLE 11  
WORK RULES AND PRACTICES**

All practices and agreements governing employees enforced by Metro Transit or its predecessors on or after November 1, 1957, not in conflict with nor changed by the provisions of this Agreement, may be changed subject to the following conditions:

(a) Work rules and/or practices may not be in conflict with the contract;

...

(c) New work rules and/or practices must be reasonable.

...

(e) Work Rules and/or practices are subject to the Grievance Procedure.

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**ARTICLE 13  
ARBITRATION PROCEDURES**

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In making such submission the issue to be arbitrated shall be clearly set forth in writing. The Board so constituted shall weigh all evidence and arguments on the points in dispute, and the written decision . . . shall be final, binding and conclusive and shall be rendered within forty-five (45) days from the date the arbitration hearing is completed.

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**OTHER RELEVANT DOCUMENTS:**

**Metro Transit Absenteeism Program  
Non-Operator  
3/26/2008**

**I. PURPOSE**

In order to reduce excessive absenteeism among Metro Transit employees covered by this policy, the following program will be implemented on December 1, 2007. This program establishes the procedure and guidelines under

which progressive discipline will be administered. This program applies to all non-operator positions covered by the ATU Bargaining Agreement.

## II. TRANSITION

All employees covered by this program will start with a clean attendance record as of the program implementation date. Only occurrences after that date will be counted. Any absenteeism records prior to the implementation date will only be used as supporting documentation should discipline be merited at a later date.

## III. ROLES AND RESPONSIBILITIES

- A. Management is responsible for seeing that employee absence is properly and accurately maintained in each employee's personnel record.
- B. Management shall closely monitor absenteeism and review each Employee Work History every time an entry is made. This will facilitate an ongoing review of employee absenteeism and highlight those employees who are in need of counseling or other disciplinary action.
- C. Management is responsible for ensuring that records can substantiate any disciplinary action, and that no employee is unjustly disciplined due to improper, incomplete or inaccurate records.
- D. Employees will be required to initial entries relative to absence on their Employee Work History. If the employee refuses to initial the record, it shall be noted and initialed by management in the presence of the employee.

## IV. DEFINITION OF ABSENCE

- A. For purposes of administering this policy, the following occurrences will be monitored and charged against the employees (sic) record on a non-fault basis (reason for an occurrence will not be considered relevant).
  - 1. Sickness/off-duty injury.
  - 2. Late: Every third late instance from 1 minute to 14 minutes in a rolling calendar year will be counted as an occurrence. Metro Transit will not pay employees for time not worked when they are late.
  - 3. No call no show: Failure to show up or call-in to work within two hours after an employee's scheduled start time. The first two instances of no call no show will count as one occasion each. The third no-call no-show and every no-call-no-show thereafter, within a rolling calendar year will count as two occurrences.
  - 4. Request Off-denied (leave without pay): Any request off that has not been approved by employee's manager/supervisor. Requests off that have been granted are not an occurrence.
  - 5. Leaving work early is considered an occurrence of absence.
- B. An occurrence is defined as part of a workday, or a single workday, or consecutive workdays missed. An FMLA-certified absence is not considered an occurrence. An employee may only accrue one occurrence per day.
- C. The employee will be required to sign their attendance record for each occurrence. The supervisor will discuss with the employee their status in regard to overall attendance.
- D. If an employee is in a warning status under this policy, and is absent from work for a period of time longer than five (5) working days, the clock will stop and the warning period will be extended by the number of days missed.
- E. When an employee is absent for forty-eight (48) hours, two consecutive working days, without notice they may be determined to have abandoned their job and their employment will be terminated.

## V. THE STEPS OF PROGRESSIVE DISCIPLINE

- A. Management must always administer discipline in a progressive and timely manner. This means (a) that employees must have an adequate oral and written warning that their attendance is not satisfactory before such a suspension or termination, is administered; (b) employees shall be given adequate opportunity to improve their attendance; (c) additional discipline will be administered when attendance does not improve; and (d) an employee shall be given a formal warning and hearing before being terminated.
- B. The steps of progressive discipline are as follows:
- Seven (7) occurrences in a rolling calendar year will result in a Record of Warning and a counseling session.
  - Ten (10) occurrences in a rolling calendar year will result in a Final Record of Warning.
  - Thirteen (13) occurrences in a rolling calendar year may result in termination.

In the discipline procedures above, copies of the warnings, counseling documentation and termination notice should be sent to the Division Director, Deputy Director and the ATU.

- C. In assessing discipline, greater or lesser severity may be applied, based upon the circumstances of a particular case.
- D. In preparing materials for letters and hearings, the absenteeism record of the previous thirty-six (36) months will be referenced.
- E. All hearing letters must be hand delivered on the job, or, if necessary, mailed by certified mail with "return receipt requested."

## VI. ADMINISTERING DISCIPLINE

- A. When assessing discipline, the supervisor should take whatever actions are necessary, consistent with the progressive discipline guidelines, to resolve the employee's attendance problem.
- B. The supervisor should consider the following factors in determining whether the employee should be disciplined, suspended or terminated.
1. Expectations of improvement.
  2. The employee's past record.
  3. The employee's performance in other areas.
  4. Mitigating circumstances, such as emergencies, or personal problems.
  5. The cause of the excessive missed work.
  6. Other relevant considerations.
- C. If, after a review of the above factors, the supervisor determines that disciplinary action taken was justified, the supervisor shall so notify the concerned employee as described above.

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**Metro Transit Non-Operators Absenteeism Program**  
**TIC: Addressing Chronic Absenteeism**  
**June 1, 2010**

The Metro Transit Non-Operators Absenteeism Program was implemented on December 1, 2007 with the intent of reducing excessive absenteeism among Metro Transit employees. The program states that "In assessing discipline, greater or lesser severity may be applied, based upon the circumstances of a particular case."

In order to resolve instances of chronic absenteeism among employees in the Transit Information Center as they occur, and enable TIC to provide the best possible service for regional transit customers, effective August 16, 2010, the following conditions will apply:

Excessive absenteeism in the Transit Information Center is defined as: receiving three final warnings in a 12 month period, or staying in a final record of warning status for 12 consecutive months.

Representatives who receive three final warnings in a 12 month period:

- will not be issued another final warning within a three year time period. The three year period begins on the date the final warning is issued. Reaching final warning status again within the three year period may result in termination.(sic)
- and must clear a Final Record of Warning within 12 months of the date that the third final record of warning is issued. Failure to do so within the one year period may result in termination (sic)

Upon implementation of the TIC chronic absenteeism disciplinary steps, Representatives who have been in final warning status for 12 consecutive months:

- must clear a Final Record of Warning within the next year. The one year period begins one year from the date the last final warning was issued. Failure to clear final warning status within the specified timeframe may result in termination
- and will not be issued another final warning within a three year time period. The three year period begins one year from the date the last final warning was issued. Reaching final warning status again within the specified three year period may result in termination (sic)

If you have any questions regarding expectations for TIC employee attendance, please see a supervisor.

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***BACKGROUND AND FACTS:***

Metro Transit provides transportation services to a seven county metro area. It has 882 buses in its fleet; 159 routes; 1 light rail, and 1 commuter rail. The Transit Information Center (TIC) is one of its departments and its purpose is to assist customers with transportation needs and to handle all transit-related inquiries and complaints. While the number varies, there were approximately 35 full-time employees (representatives) in this department and there were 4 supervisors at the time this incident occurred. The department is open weekdays from 6:30 a.m. to 9:00 p.m. and from 9:00 a.m. to 5:00 p.m. on weekends and holidays with the exception of Thanksgiving and Christmas when it is closed. The first scheduled shift operates from 6:30 a.m. to 3:00 p.m. and the second scheduled shift is from 12:30 p.m. to 9:00 p.m. Each representative handles between 250 and 300 telephone calls per shift. In 2010, the department received

between approximately 126,000 and 142,000 calls per month of which somewhere between 16 and 29 percent were lost.

In December 2007 in a meet and confer, Metro Transit advised the Amalgamated Transit Union (ATU) that it was adopting an absenteeism program for non-operators. The Union objected to the wording in the program and a mediated resolution of their differences was reached. The revised policy was put into place on March 26, 2008.

On August 20, 2010, an employee, not the Grievant in this dispute, was discharged under this revised policy and her discharge was grieved by the Union on August 23. In arguing before the arbitrator as to whether the grievant was terminated for just and merited cause, the Union challenged the reasonableness of the program.

In her decision, the arbitrator found that the absenteeism program differed from most no-fault programs in several ways. Among the differences she cited were that the only absence the program excluded from occurrences was FMLA-certified; that unlike most no-fault policies, this policy directs supervisors to consider several factors in determining whether an employee should be disciplined; that the program's progressive disciplinary steps do not include suspension, and that the program does not mandate an employee's termination following thirteen occurrences but, instead, allows supervisors discretion in determining whether the employee should be terminated. In her discussion of the dispute, the arbitrator found the absenteeism program to be reasonable; stated that her job was to reconcile application of the program with the just cause standard in the contract; found that terminating the employee for tardiness on August 16th constituted "a perverse application" of the program, and reinstated the employee.

Earlier, on May 1, 2010, TIC distributed a document entitled "TIC: Addressing Chronic Absenteeism" to its supervisors and employees. The document stated that its purpose was to "resolve instances of chronic absenteeism" among TIC employees as they occur and that the document would become effective July 19, 2010. In the document, management defined "excessive absenteeism" as three final warnings in a twelve month period or staying in a final record of warning status for twelve consecutive months; set forth conditions employees in each status must meet, and stated that it would have just cause to terminate employees who failed to meet the conditions.

Management also stated in the document that an employee with three final warnings within a twelve month period would not be issued another final warning within a three year period; defined the three-year period, and declared that if the employee reaches final warning status within the three year period, it will have just cause to terminate the employee. Further, it stated that these same employees must clear a final record of warning within twelve months of the date that the third final warning is issued and that failure to do so would also be just cause for termination.

In addition, the document stated that employees who have been in final warning status for twelve consecutive months must clear a final record of warning within the next year; defined when the year period would begin, and again stated that management would have just cause to terminate the employee if the employee failed to clear final warning status within the year. Moreover, the document stated that these employees would not be issued another final warning within a three year period which begins one year from the date the last final warning was issued and that management would have just cause to terminate the employee if that employee reached final warning status again within the three year period.

On August 18, 2010, the Grievant in this dispute was issued a final record of warning for excessive absenteeism. The warning identified ten occurrences between September 12, 2009 and August 16, 2010; told the Grievant that it was management's intent to discharge her at the thirteenth occurrence; gave her the telephone number she could contact if she believed she needed employee assistance, and said that if her absence from work exceeded five working days, the clock would stop and the warning period would be extended by the number of days missed. In her counseling session held the same day the Grievant was told that since the absenteeism program allowed management to apply discipline in greater or lesser severity based upon the circumstances of a particular case; that since TIC has defined excessive absenteeism as receiving three final warnings in a twelve month period, or staying in a final record of warning status for twelve consecutive months, and that since the Grievant has received four final warnings in a twelve month period of time, it was applying the conditions set forth in the May 1, 2010 document.

A grievance contesting this action was filed September 2, 2010. At each step of the grievance procedure, the Union challenged the new conditions that TIC had put in place on May 1,

2010 and argued that the additional conditions imposed upon the Grievant were excessive. The grievance was denied at all three steps. It is this grievance which is before this Arbitrator.

***ARGUMENTS OF THE PARTIES:***

The Employer maintains that this is a just cause case which involves a habitual abuser of the absenteeism policy. It adds that this employee is not an employee with an occasional warning or even an occasional final warning but one that has had continuous warnings and continuous final warnings but avoids being terminated by waiting for an occurrence to drop off before being absent again. In support of its position, it declares that while absenteeism is a problem for any employer it is particularly problematic for this department since the grievant's work cannot be set aside when she is absent; since answering customer calls is key to the department's existence, and since employee absences have a serious impact upon other employees in the department due to the large number of calls each employee must answer daily in order to provide customer service.

Continuing, the Employer states that the parties agreed to a new absenteeism program in May 2008 following mediation to resolve their differences over the proposed program and that under Section V.C. of that agreement it not only has the authority to impose severe discipline upon the Grievant since her conduct is so egregious but to impose the discipline outlined in the June 2010 guidelines. Further, it rejects the Union's argument that the June 2010 document re-writes the absenteeism program and charges that if the arbitrator concludes management does not have the authority to implement the June 2010 guidelines and impose that discipline upon the Grievant, the mediated absenteeism program would be inappropriately overruled.

Specifically referring to the Grievant, the Employer asserts that her attendance record is so poor that it warrants more severe discipline and that the record shows that it acted reasonably when it imposed the discipline it did. In support of its position, it states the Grievant has one of the two worst attendance records in the department; that she has had 27 occurrences totaling 55 days in the past three years; that she has been on a final record of warning four times, and that she has been in continuous warning status the past two years. It also notes that the Grievant has added an occurrence as quickly as one falls off her record, and that every one of her absences came before or immediately after a day off and declares that, based upon this record, it must act to resolve this problem since it can't have employees doing this for years and years without

negatively affecting both its customers and other employees. As further proof of its reasonableness, it states that it has met with the Grievant after each occurrence; has explained to her where she stands, and has asked her if she needs employee assistance or something else and that since it has dealt with her fairly the discipline is just and merited.

The Union, however, argues that while it is grieving the discipline imposed upon the Grievant, it is also concerned about management's attempt to modify the policy the parties agreed to in 2008 by using the exception included in that policy which allows management to impose discipline of greater or lesser severity based on case by case circumstances. Further it maintains that if management is allowed to use this exception to adopt a new attendance policy for one department it can do that for every single department it has. In addition, it voices its objection to the June 2010 document implemented by the Employer asserting that while employees may be terminated after thirteen occurrences in a rolling calendar year under the mediated absenteeism program the guidelines the Employer is adopting allows the Employer to terminate the Grievant and other employees after ten occurrences since they cannot have another final record of warning within a three year period. It continues that by imposing this discipline upon the Grievant, the Employer is treating her differently than other employees.

At the close of hearing, the Union asserted that the Section V.C. of the absenteeism program which management is relying upon to change its policy is meant to be an exception; that it should be used only in extreme situations, and that when it is used it should be used not only to impose more severe discipline but should also be used to impose less severe discipline. It continues that management is using this clause to say that it can terminate an employee after ten occurrences and that its action defeats the purpose of the no-fault absenteeism program that was negotiated. And, finally, it declares that the June 2010 document is not a guideline but management's effort to adopt a new disciplinary program since it does not like the way the mediated absenteeism program is working.

As the discipline relates to the Grievant, the Union declares that any discipline imposed pursuant to the June 2010 document should be set aside since it is overly harsh and not just and merited. As proof, it cites a similar grievance filed in 2007 addressing the same type of discipline which the parties settled by throwing out the discipline and it argues that this settlement should serve as precedent for sustaining the grievance in this dispute.

In response, the Employer rejects the Union's assertion that the 2007 absenteeism program was a negotiated agreement and, stating its only obligation is to meet and confer with the Union over its work rules, declares that the implemented work rule was the result of a grievance which was mediated and resolved. Continuing, it charges that, now, the Union is grieving management's right to provide its employees and supervisors a document which identifies the degree of discipline an employee will receive when that employee is chronically absent and asserts this is a "ridiculous" grievance since management has the authority to do that under Section V.C. of the absenteeism program. Specifically addressing that issue, the Employer argues that Section V.C. of the absenteeism program grants it the discretion to impose more severe discipline upon an employee if that employee's conduct warrants it and that more severe discipline means it can terminate an employee after ten occurrences, or even one occurrence, if the record warrants it. It adds that if it takes this action, the Union may grieve it and an arbitrator can rule whether the Employer's action was reasonable.

It also asserts that the discipline identified in the 2010 document does not re-write the absenteeism program but merely advises the employees as to discipline which might be imposed if an employee is chronically absent from work and as proof, it states that the document only says "may" and "potentially" in reference to the identified discipline and does not suggest otherwise. Moreover, addressing the previous grievance referred to by the Union, the Employer asserts that the settlement may have occurred for many different reasons and that it is not precedential unless there is a written agreement and there was no written agreement. In addition, it argues that this settlement should not be considered since it was an operator grievance and absenteeism in that system creates much less of a problem than absenteeism in this department creates.

Further, the Employer charges that the Union is asking the Arbitrator to ignore Section V.C. of the agreement and that meaning must be given to that provision just as meaning must be given to every provision in an agreement. Continuing, it declares not only that it has the authority to take the action it has taken under that provision but that the discipline spelled out in the June 2010 document is needed since there is no replacement for an employee who is absent and that absences create a greater burden on the other employees who must absorb the work and that chronic absenteeism will cause morale issues. In addition, it declares that the reduction in employees being excessively absent is proof that the document was needed and cites the fact that

three years before the discipline was implemented more than half of the department's employees were on a record of warning and that ten of those employees are no longer in warning status.

Specifically referring to its decision to impose the discipline identified in the June 2010 document upon the Grievant, the Employer declares that in cases of chronic absenteeism, like the Grievant's, which is the worst in the department, the Arbitrator must decide if the circumstances surrounding the Grievant's absences warrant the action it has taken. It adds that those circumstances include the Grievant having twenty-seven occurrences amounting to fifty-five days of absence over the past three year period as well as five final records of warning in a year and two weeks. And, in response to the "exception swallows the rule" adage the Union used in its argument in this dispute, the Employer declares that "an exception is an exception" and that while it "virtually always follows" the progressive discipline outlined in the absenteeism program it doesn't "swallow the rule" when it can establish that something more should be done based upon an employee's exceptionally poor and chronic absenteeism record. Finally, addressing the mitigating circumstances argument raised by the Union, the Employer asserts that it did consider whether there were any mitigating circumstances when it decided to impose more severe discipline upon the Grievant and notes that not only were none of the occurrences grieved but that the Grievant was given full notice that her absences would not be tolerated; that it reviewed her overall record before imposing the discipline, and that it had discussed with the Grievant each time she had final warning whether she needed employee assistance of FMLA certification.

In rebuttal, the Union rejects the Employer's assertion that the June 2010 document is a guideline and asks the Arbitrator to read the language, particularly that which states "the following conditions will apply". It also declares that the record shows that the Employer did not consider the Grievant's mitigating circumstances since the Grievant did have an FMLA certified illness which she didn't think would apply and the Employer never questioned whether that was the case. It cites the fact that the illness is now covered by FMLA as proof.

***DISCUSSION:***

The grievance before the Arbitrator is framed as whether the discipline imposed upon the Grievant is just and merited but the primary issue argued by the parties is whether Section V.C. of the mediated absenteeism program proposed in December 2007 and implemented in May 2008

grants the Employer the authority to more severely discipline employees who receive three final warnings in a twelve-month period or who stay in a final record warning status for twelve consecutive months by imposing upon them absenteeism standards different from the progressive steps outline in the mediated absenteeism program. As part of that issue, the Union argues that the discipline outlined in the June 10, 2010 document the Employer distributed to employees and supervisors re-writes the 2008 mediated absenteeism program and imposes discipline which is not only too harsh but unreasonable. The Employer rejects this argument, however, asserting that Section V.C. of the absenteeism program grants it the right to impose more severe discipline upon employees whose misconduct warrant it and that the June 10th document regarding its intent to do this is merely a guideline.

After reviewing the record and considering the parties' arguments it is concluded that Section V.C. of the mediated absenteeism program does not grant the Employer the authority to uniformly exclude a group of employees from the progressive steps of discipline outlined in the program and to impose upon them discipline which is not defined in the progressive steps of discipline. It is also concluded that the June 10, 2010 document is not a guideline; that it re-writes the May 2008 implemented absenteeism program, and that, ultimately, this change in the work rules is not reasonable.

Previously, the parties have argued whether the May 2008 absenteeism program was reasonable. In one of the two arbitrations addressing this issue, the arbitrator stated that she did not view the absenteeism program as a "true no-fault policy" since unlike most no-fault policies this program grants supervisors a great deal of discretion both in charging employees with occurrences and in deciding whether to terminate an employee after thirteen occurrences.<sup>1</sup> Now, based upon her statement, the Employer's asserts that its absenteeism program is only no-fault as it relates to accumulating occurrences but not as it relates to discipline. Implied in this assertion is that the Employer is not required to impose the progressive steps of discipline outlined in the program and may impose more severe discipline for employees whose absences meet certain conditions since it has discretion to determine whether it should impose more or less severe discipline and since it can decide whether an employee's absence warrants discipline. Given this

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<sup>1</sup> See page 17, BMS Case No. 11PA0414 (M. Smith Discharge) decided April 30, 2011.

assertion, it is important to determine whether the May 2008 absenteeism program is a no-fault absenteeism program not only as it relates to occurrences but as it relates to discipline.

In general, no-fault absenteeism plans establish fixed disciplinary standards for excessive absenteeism regardless of the reason for the absences. The intent of such plans is to treat all employees' absences alike; to eliminate disparate treatment and to establish what management considers excessive absenteeism. These plans vary widely. Those plans arbitrators generally find reasonable identify a specific number of allowable absences before discipline is imposed; exclude certain types of absences, provide progressive discipline for absences beyond a certain number, and put in place a system that allows employees to clear their record. The goal is to establish a system that addresses absences and discipline for absences which applies uniformly to all employees.<sup>2</sup> The May 2008 absenteeism program implemented by the Employer essentially meets these four criteria although it lacks the certainty many plans contain since it allows supervisors discretion in determining whether an employee should be disciplined, suspended or terminated and allows the Employer to impose discipline which is more or less severe than the progressive discipline steps outlined in the program based upon an employee's individual circumstances.

Despite this lack of certainty, the record adequately supports a finding that it was the Employer's intent to establish a no-fault absenteeism plan both as it relates to occurrences and as it relates to discipline. The program defines what management considers excessive absenteeism; identifies the number of occurrences allowed before discipline is imposed; provides progressive steps of discipline, and allows employees to clear their record. Further, although the plan allows the Employer discretion in determining whether discipline should be imposed and/or whether it should be more or less severe depending upon an employee's individual circumstances, this discretion is subject to arbitration and a potential finding of disparate treatment if the Employer has acted arbitrarily or capriciously in ignoring the discipline outlined in the program. Consequently, the question that must be answered is whether the Employer's definition of excessive absenteeism and its implementation of discipline for absences that meet that definition

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<sup>2</sup> "Arbitration and the Absent Employee", Howard Block and Richard Mittenenthal, **Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions, Proceedings of the Thirty-Seventh Annual Meeting National Academy of Arbitrators**, The Bureau of National Affairs, Inc., Washington D.C. 20037, (1985); **The Common Law of the Workplace**, Theodore J. St. Antoine, Editor, The Bureau of National Affairs, Inc., Washington, D.C., (2005); **Discipline and Discharge in Arbitration**, Norman Brand, Editor-in-Chief, The American Bar Association, Chicago, Illinois, (1999).

in the June 2010 document redefined the absenteeism program and whether the Employer was granted the authority to do so under Section V.C. of the absenteeism program.

As the Employer stated, meaning must be given to all provisions, including Section V.C., just as meaning must be given to every provision in an agreement in deciding whether it has authority to implement the June 2010 document. When interpreting the meaning of a work rule, just as when interpreting contract language, one must attempt to determine the party or parties' intent from the instrument as a whole. In this dispute, Section V.C. states "In assessing discipline, greater or lesser severity may be applied, based upon the circumstances of a particular case." According to the Employer, this language grants it the authority to define excessive absenteeism for all employees as three final warnings in a twelve-month period or staying in a final record of warning status for twelve consecutive months and to assess discipline other than the progressive steps outlined in the absenteeism program for these absences. Section V.C. does not grant that authority, however. The language clearly and unambiguously states only that management may decide to impose more or less severe discipline if a single employee's misconduct warrants it. Nothing in the provision states that management may add to the excessive absenteeism definition already spelled out in the absenteeism program or assess discipline other than the progressive steps outlined in the program to any and all employees who meet that definition.

During the hearing, the Employer argued that the June 2010 document was only a guideline and not a change in the work rule. As proof, it stated that the document contained words such as "may" and "potentially". Those words appear in management's notes reflecting its meet and confer discussion with the Union but do not appear in the June 2010 document distributed to employees and supervisors. Instead, the June 2010 document states employees "will not" and "must" meet certain conditions and that failure to meet these requirements "may" result in termination. More specifically, it states that employees who receive three final warnings in a twelve-month period "will not be issued another final warning within a three year time period"; "must clear a Final Record of Warning within 12 months of the date that the third final record of warning is issued", and that the penalty for reaching final warning status again within the three year period or for failing to clear the final record of warning may result in termination. It also states that employees who stay in a final record of warning status for twelve consecutive months "must clear a Final Record of Warning within the next year"; "will not be issued another final

warning within a three year time period", and that the penalty for failing to clear the final record of warning or reaching final warning status within the three year period, again, may result in termination. Clearly, it is the Employer's intent in this document to add to its definition of excessive absenteeism conditions which it considers employee abuse of the system outlined in May 2008 absenteeism program and to impose discipline for that abuse which goes far beyond the progressive steps of discipline outlined in the program. Given this fact, it can only be concluded that the June 2010 document distributed by the Employer was not intended as a guideline but as a change to the previously implemented absenteeism program, a change which would result in an arbitrator having no authority to determine whether the discipline was reasonable in grievances challenging the Employer's action.

Further proof that the Employer did not consider the June 2010 document a guideline is the fact that it gave a draft copy of the June 2010 document to the Union and held a meet and confer meeting with it on May 6, 2010 to discuss its intent to implement the document. At that meeting, the Union objected to the draft stating that it unilaterally changed the mediated absenteeism program; that the discipline was too harsh, and that it wanted to grieve the reasonableness of the proposal. The Employer's response to the Union's objections at that time was that based upon the discretion it had built into the program it was exercising its prerogative; that it intended "to implement these new steps as an option in addressing chronic absenteeism", and that the guidelines were "not grievable" until a specific employee receives this discipline. The Employer's response and its actions suggest the Employer intended to implement a change in its absenteeism practice and that it was seeking to avoid a finding as to whether the change was reasonable as is provided for under Article 11 of the collective bargaining by calling the document a guideline and asserting it had the authority to issue a guideline under Section V.C. of the absenteeism program.

As a proposed change to the existing work rule, the change is unreasonable even though the record shows that the Employer has a legitimate need to curb chronic absenteeism and that some employees have learned to take advantage of the plan and are over-using or abusing the system. As stated before, the intent of a no-fault plan is to establish an absence control system that applies uniformly to all employees. Under the plan originally implemented, the Employer stated that it considered thirteen occurrences in a rolling calendar year excessive and

unacceptable and identified the number of occurrences which may result in an employee being terminated. Now, rather than discipline an employee for abusing this system, which it may do under Section V.C. of the existing absenteeism program, the Employer is proposing that any employee who appears to abuse the system by receiving three final warnings in a twelve-month period or staying in a final record of warning status for twelve consecutive months be subjected to discipline that will remove that employee from the progressive discipline steps in place for all employees in the department and subject that employee to possible termination after only ten occurrences. Since a no-fault absenteeism system only works well when progressive discipline gives employees a chance to modify their behavior, considering sequential absences as reason to deny an employee progressive discipline and to subject that employee to accrual of a lesser number of occurrences over a three year period and to require that employee to clear his or her final record of warning status within a year where failure to do so may result in termination severely tests the principle of equitable treatment for all employees.

While the Employer correctly states that it may terminate an employee after only one occurrence if the absence warrants it, it is required to prove that the employee's individual circumstances warrants its action and that it had just cause to impose more severe discipline. To summarily decide that any employee who appears to abuse its absenteeism policy must meet conditions other employees are not required to meet and to subject them to possible termination for failure to meet those conditions or for incurring ten occurrences within a three year period ignores the Employer's duty to consider whether this penalty is reasonable given the specific circumstances of that employee's absences in accord with its requirement that supervisors must consider a number of factors in determining when an employee should be disciplined, suspended or terminated.

In addition to finding that the Employer did not have the authority to implement a change in its work rule under Section V.C. of the existing absenteeism program and that the discipline it proposes in that change is not reasonable, the record does not establish that the Grievant's absences warranted more severe discipline under Section V.C. of the existing absenteeism program. On August 16, 2010, the Grievant received a final record of warning after accruing ten occurrences between September 12, 2009 and August 16, 2010. At her counseling session that same day, the Grievant was told that because she had received four final warnings in a twelve-

month period she would not be issued another final warning within the three year time period that begins August 16, 2010; that she must clear her final record of warning within twelve months of this warning, and that failure to meet either condition may result in termination. There is no evidence that the Employer considered any other factor, including any identified in VI.B. of the absenteeism program than the definition it outlined in its June 10, 2010 document as reason to discipline the Grievant although reference was made to the fact that the Grievant had had twenty-seven occurrences, amounting to fifty-five days of absence, in the past three-year period; that she had been in a warning status since November 22, 2008, and that this was her fourth final warning in the past year.<sup>3</sup>

At hearing, the Employer argued that its actions were just and merited based upon the fact that the Grievant had accrued twenty-seven occurrences totaling fifty-five days in the past three years; the fact that her absences show a chronic pattern of absenteeism, and the fact that the August 16th final record of warning was her fourth between September 12, 2009 and August 16, 2010. It also argued that its actions were just and merited since it has defined excessive absenteeism as receiving three final warnings in a twelve-month period and the Grievant had had four final warnings in that period of time. If the Employer had actually reviewed the Grievant's work history and established that absences show a chronic pattern of absenteeism, Section V.C. would have allowed the Employer the right to assess more severe discipline for the Grievant's absences. The record does not establish this fact, however. Instead, it shows that the only reason the Grievant the conditions were imposed upon the Grievant was because she had had four final warnings within a twelve-month period of time.

In concluding that the Employer acted arbitrarily and that the discipline imposed upon the Grievant was not just and merited, two findings were made. The first was that Section V.C. did not grant the Employer the authority to redefine excessive absenteeism and exempt those employees who met that definition from the progressive steps of discipline and that even if Employer did have that authority the discipline is unusually harsh and unreasonable. The second is that the Employer failed to prove that it considered her individual circumstances, as required by Section V.C. of the absenteeism program, when it decided to impose more severe discipline. Nothing in the record

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<sup>3</sup> In the counseling record, the Employer stated that the conditions were being imposed upon the Grievant because she had received four final warnings in a twelve-month period.

proves that the Grievant was chronically absent, as asserted by the Employer, or that the Employer considered any other factors outlined in Section VI.B. of the absenteeism program when it decided to impose more severe discipline.

According to the Employer, the Grievant had had twenty-seven occurrences totaling fifty-five days in the past three years. The evidence does not support that assertion. Try as one might, a review of the three exhibits which were purported to account for the Grievant's absences over the three year period of time between November 22, 2008 and August 16, 2010, does not show that the Grievant had twenty-seven occurrences or was absent from work for a total of fifty-five days. Instead, the evidence indicates that while the Grievant had four final warnings between November 22, 2008 and August 16, 2010 based upon the fact that occurrences are tallied by rolling calendar year, she actually had only nineteen occurrences and was absent from work a total of thirty-four days during that period of time.<sup>4</sup> While her absences from work might be proof that she was chronically absent, the Employer provided no evidence to support its assertion other than

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<sup>4</sup>Below is a chart reflecting the dates the Grievant was absent from work and the accounting done by management. Those with red numbers in parentheses indicate conflicts within the three documents provided. In each case the number in red was used for accounting purposes. Occurrences, although counted more than once for disciplinary purposes, were not counted more than once for purposes of determining the extent to which the Grievant had been absent from work.

Date	# days	Date	# days	Date	# days	Date	# days	Date	# days	Date	# days
12/23/07	3 days										
2/2/08	4										
4/14/08	3 (2)										
5/19	3										
6/9	3										
8/9	1	8/9	1								
11/22	2	11/22	2	11/22	2						
		12/20	3	12/20	3						
		1/17/09	1	1/17/09	1						
		2/14	2	2/14	2						
		4/4	3	4/4	3	4/4	3				
		4/25	2	4/25	2	4/25	2				
		6/6	1	6/6	1	6/6	1				
		6/21	1	6/21	1	6/21	1				
		8/1	1	8/1	1	8/1	1	8/1	1		
				9/12	1	9/12	3(1)	9/12	1	9/12	1
						10/20	2(1)(1)	10/20	1	10/20	1
						12/5	1(3)(3)	12/5	3	12/5	3
						1/9/10	1(2)	1/9/10	2	1/9	2
						2/20	1(3)	2/20	3(3)	2/20	3
								3/13	2	3/13	2
								4/24	1	4/24	1
								6/1	2	6/1	2
								7/24	2	7/24	2
										8/16	1

the amount of time she was absent from work and that data, as shown in the chart below, is vastly overstated. Further, while the Employer stated her absenteeism record was the second worst in the department (or the worst, depending upon when the argument was made) it provided no evidence that her occurrences or total number of days absent from work vary significantly from the absenteeism record of other employees and given the fact that almost half of them have been in warning status prior to implementation of the June 10, 2010 document one must question whether the Grievant's absences were significantly greater than those of other employees.<sup>5</sup>

Further, there is no evidence that the Grievant waited for an occurrence to drop off before being absent again in order to avoid being terminated. A review of the record shows there is nothing in the record which suggests that the Grievant waited for an occurrence to fall off before she was absent again or that she exceeded ten occurrences in a rolling calendar year. Consequently, an argument that the Grievant would wait for an occurrence to drop off before being absent again in order to avoid being terminated would be more believable had the record shown such a pattern or that the Grievant regularly accrued twelve occurrences in a rolling calendar year since an employee may be terminated after accruing thirteen occurrences in a rolling calendar year.

Because the issue of whether there was just and merited cause to discipline the Grievant included the question of whether Section V.C. of the absenteeism program allowed the Employer the authority to implement the June 10, 2010 document; whether the June 10, 2010 document re-wrote the existing absenteeism program and whether the discipline identified in the document was reasonable a recap of the findings made in this decision seems needed. Consequently, outlined below are the findings that were made in the above discussion:

1. Section V.C. of the absenteeism program allows the Employer to impose more severe discipline upon an employee when the circumstances surrounding that individual employee's absence or absences warrant it but does not allow the Employer to implement a document that re-defines excessive absenteeism so that employees who have received three final warnings in a twelve-month period or who stay in a final record of warning status for twelve consecutive month

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<sup>5</sup> At one point, the Employer also asserted that the Grievant's absences always occurred before or after her scheduled days off or scheduled vacation days and the evidence supports that assertion, there is no evidence that the Employer relied upon this pattern as reason to assess more severe discipline, consequently, that assertion was not considered.

may be more severely disciplined than that provided for in the program's progressive steps of discipline.

2. The June 10, 2010 document was intended to remove employees who have received three final warnings in a twelve-month period or who stay in a final record of warning status for twelve consecutive months from the progressive steps of discipline outlined in the existing absenteeism program and to impose upon them conditions that would not allow them to be treated like other employees who accrue occurrences.

3. The discipline outlined in the June 10, 2010 document is unusually harsh and unreasonable since it prevents employees from accruing ten occurrences over a three-year period and potentially subjects certain employees to termination after ten occurrences rather than thirteen as outlined in the existing absenteeism program or for failure to clear a final record of warning within twelve months of the date the last final warning was issued.

4. Since the Employer failed to prove that the Grievant was chronically absent from work or that it considered any of the factors outlined in Section VI.B. of the absenteeism program when it decided to impose more severe discipline for her absences it acted arbitrarily in disciplining the Grievant. Therefore, there was not merited and just cause to discipline the Grievant.

5. Even if the Employer had proved that there was just and merited cause to discipline the Grievant, the discipline it imposed was unusually harsh and unreasonable. Therefore, the grievance is sustained.

Accordingly, based upon the record, the arguments and the discussion above, the following award is issued.

**AWARD**

The grievance is sustained and the Employer is ordered to remove the discipline it issued the Grievant on August 16, 2010.

By:   
Sharon K. Imes, Arbitrator

August 22, 2011  
SKI