

Before the Arbitrator

In the Matter of a Dispute Between

Metro Transit (div. of
Metropolitan Council)

and

BMS Case No. 11PA0414 (M. Smith
Discharge)

Amalgamated Transit Union, Loc. 1055

Appearances:

Mr. Roger A. Jensen, Esq., Miller O'Brien & Cummins, LLC, One Financial Plaza, Suite 2400, 120 South 6th Street, Minneapolis, Minnesota 55402, on behalf of the Union and the Grievant.

Mr. Anthony G. Edwards, Esq., Parker Rosen, LLC, 300 First Avenue North, Suite 200, Minneapolis, Minnesota 55401, on behalf of the Employer.

Arbitration Award

Prior to December 8, 2010, the parties jointly selected Arbitrator Sharon A. Gallagher through the Minnesota Bureau of Mediation Services as the sole arbitrator (waiving the Article 5 three-member panel) to hear and resolve a dispute between them involving the discharge of Marsha Smith. The parties agreed to hold the hearing in this matter on April 7, 2011 in Minneapolis, Minnesota. No stenographic transcript of the proceedings was taken.

The hearing was held as agreed on April 7th but as the parties could not complete the hearing that day, they agreed to hold a second day of hearing on April 8, 2011. On April 8th, the hearing was concluded. Two Employer witnesses and four Union witnesses were sworn on oath or affirmation and testified herein. Twenty-nine Joint Exhibits and one Employer Exhibit were admitted into evidence without objection. The parties chose to waive briefs in this case and make oral argument at the end of the hearing. As no other documents were to be filed herein, the record was closed upon completion of oral arguments on April 8, 2011.

Stipulated Issues:

The parties agreed that the matter is properly before the Arbitrator and that she should determine the following issues in this case:

- 1) Was the termination of the Grievant for "just and merited" cause?
- 2) If not, what is the appropriate remedy?

Relevant Contract and Policy Provisions:

Contract:

**ARTICLE 4
MANAGEMENT PREROGATIVES**

The ATU recognizes that all matters pertaining to the conduct and operation of the business are vested in Metro Transit and agrees that the following matters specifically mentioned are a function of the management of the business, including, without intent to exclude things of a similar nature not specified, the type and amount of equipment, machinery and other facilities to be used; the number of employees required on any work in any department; the routes and schedules of its buses; the standard of ability, performance and physical fitness of its employees and rules and regulations requisite to safety. Metro Transit shall not be required to submit such matters to the Board of Arbitration provided by Article 13.

. . .

It is understood and agreed, however, that in all such matters Metro Transit will consider, insofar as practicable, the convenience and comfort of its employees.

**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. No employee shall be suspended without pay or discharged until the employee's immediate superiors have made a full investigation of the charges against that employee and shall have obtained the approval of the applicable department head. No discipline, excepting discharge without reinstatement, shall be administered to any employee that shall permanently impair the employee's seniority rights. 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. Prior to a suspension of more than two (2) days, the ATU must be notified. If a case of discipline involves suspension or discharge of an employee, and such employee is not found sufficiently at fault to warrant such suspension or discharge, the employee shall then be restored to their former place in the service of Metro Transit with continuous seniority rights and shall be paid for lost time at the regular rate of pay.

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.

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Section 5. When an employee's grievance is sustained in whole, all negative narratives related to the incident, shall be removed from all records.

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**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;
- b) Metro Transit must meet and confer with the ATU prior to making any such changes or new work rules;
- c) New work rules and/or practices must be reasonable;
- d) The Metro Transit will furnish the ATU with a copy of all bulletins or orders changing any such rules, regulations and practices;
- e) Work rules and/or practices are subject to the Grievance Procedure.

. . .

**ARTICLE 15
LEAVES OF ABSENCE**

All employees covered by this Agreement may be granted reasonable leaves of absence not exceeding ninety (90) days during any calendar year, at the discretion of Metro Transit, except that longer leaves of absence may be granted in the event of sickness or disability. Seniority shall not be affected because of leaves of absence granted in accordance with this provision. Metro Transit undertakes to apply this Article to the Transportation Department so that a maximum of five (5) employees from each garage may be granted leaves of absence at any one time. In addition, Metro Transit agrees employees fifteen (15) years or more seniority will be granted longer leaves of not exceeding six (6) months within the limitation on numbers indicated above. With regard to other departments, Metro Transit undertakes to grant leaves of absence in the same manner and in the same proportion in each department with a maximum of five (5) at any one time in the non-transportation departments. The granting of leaves of absence above these limits is discretionary with Metro Transit. The leaves of absence are not to be used to seek or to engage in other remunerative employment.

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**ARTICLE 16
SICK LEAVE**

Section 1. Effective January 01, 2004, all Full-time employees will accrue 3.077 hours of sick leave on a bi-weekly basis, not to exceed 80 hours in a calendar year. Part-time employees shall accrue 50% of the Full-time accrual. Effective January 1, 2006, both Full-time and Part-time employees must have completed one year of continuous service to be eligible to use sick leave. Effective January 01, 2001, an employee with a combination of Full and Part-time service will be credited with their Full-time service and fifty percent (50%) of their part-time service equal to one year.

The 2003 sick leave accrual will be applied to eligible employee's sick leave bank on January 01, 2004.

Any employee reporting sick will be compensated using sick leave accruals, provided they have hours in their bank; unless Metro Transit is notified in writing within three calendar days of the occurrence....

Section 2. Sick leave pay shall not be allowed:

- a) For regular days off
- b) For any day on which the employee is entitled to holiday pay.

. . .

Section 4.

Up to ten (10) days of paid Sick Leave per year may be used for qualified Family Medical Leave (FMLA) time for the care of the employee's spouse and/or parent.

Section 5. Upon request of Metro Transit, an employee claiming sick leave pay under this Article shall submit to an examination by a physician designated by Metro Transit.

. . .

Absenteeism Program:

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 no-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. All instances over 14 minutes late 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 now 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 the 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 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 the disciplinary action taken was justified, the supervisor shall so notify the concerned employee as described above.¹

¹ “Recognition Time” is not mentioned in this Policy. However, it is sometimes granted by Metro Transit to its employees whose positive performance, attendance, or behavior at work merit rewarding.

Background:

Metro Transit (MT, or Employer) and the Amalgamated Transit Union, Local 1005 (ATU, or Union) have had a collective bargaining relationship for some time. The Metropolitan Council is a separate entity that is responsible for, among other things, urban and community development as well as for the provision of mass public transit (buses and light rail) in the seven-county area of Minneapolis-St. Paul. MT is a division of the Council employed for this latter purpose during high traffic hours. In addition, the Council also contracts with a private contractor known as First Group/First Transit to provide transit services when MT is not operating (such as before and after rush hour).

MT employs 2,300 employees represented by the Union. MT operates out of several garages including M.J. Ruter Garage (MJR) located at 6845 Shingle Creek Road. MT runs 148 buses out of MJR, 122 buses during peak hours. At all times relevant hereto, Robert Milleston has been Deputy Director of Maintenance and Anton Kolnik has been the Maintenance Manager at MJR. Kolnik oversees the work of building maintenance, mechanics, helpers and bus cleaners at MJR. The third shift supervisor at MJR all times relevant was Dan Werra.

In December, 2007, ATU and MT agreed to replace the previously effective absenteeism policy with a new Absenteeism Program.² As of the date of initial agreement to the new Program, the parties agreed that all employees' absentee records should be wiped clean.

The Union and MT agree that MT must have dependable employees so that MT can provide safe, clean and timely transit to the public. If unit employees are absent, the maintenance schedule at MJR can be adversely affected and buses may leave the barn dirtier. Absences are not cost effective for MT as other employees may have to be transferred or held over to complete work or overtime costs may have to be incurred. All of this may affect the quantity or quality of work completed.

Facts:

The Grievant, Marsha Smith, is a high school graduate who was hired by MT as a Cleaner/Sweeper³ in 2002 when she was 21 years of age, with the help of her mother, Judith Clark, a 14-year employee of MT. It is undisputed that Ms. Smith was a good employee. Prior to her discharge, Ms. Smith worked as a sweeper on third shift (8:00 p.m. to 4:00 a.m.) at MJR Garage; she then lived in Hopkins, Minnesota, across town from MJR; and she always took three or four MT buses to work, leaving at 4:30 or 5:00

Recognition time earned can be used to avoid absence occurrences for lateness. Smith had and used recognition time on nine occasions in the last year before her termination to avoid absence occurrences (Jt. Exh. 5).

² The Absenteeism Program quoted above was revised in March, 2008, after a grievance was filed thereon over the wording of the Program. Changes in the language of the Policy were made on May 2, 2008, and are reflected in the language quoted above in the Award.

³ Bus cleaners are normally assigned to hand wash all interior surfaces of the buses housed at MJR; they also sweep all buses and use sponges, mops and cleaning supplies to assure buses are thoroughly cleaned inside before they leave the garage each day.

p.m. in order to arrive prior to the start of her 8:00 p.m. shift. Following the December 1, 2007, implementation of the effective Absenteeism Program, Smith's absentee record, if any existed, was expunged.

On May 14, 2008, Smith was issued a Record of Warning (RW) for having accrued seven chargeable absence occurrences, all for sick days, as follows:

12/03/07
01/30/08
03/02/08
04/16/08
04/23/08
04/29/08
05/04/08 (Jt. Exh. 6).

On June 19, 2008, Smith was issued a Final Record of Warning (FRW), as follows:

05/07/08 – Unpaid Sick
06/17/08 – Late, 42 minutes
06/19/08 – Late, 5 minutes.

This FRW wrongly counted lateness on June 19, 2008, of less than 15 minutes, as one occurrence instead of 1/3 occurrence. It also retroactively counted one occurrence for May 7, 2008, which was not listed on the May 14th RW for some unknown reason. Thus, as of June 19, 2008, Smith actually had only 9 1/3 occurrences (Jt. Exh. 7).⁴

On July 15, 2008, Smith was issued another FRW. MT made another error on this Final Record of Warning as it listed a new occurrence not listed on either of the prior warnings: on March 5, 2008, Smith was allegedly less than fifteen minutes late for work (Jt. Exh. 8).⁵ There being more than ten occurrences listed on this FRW, Smith was expressly warned as follows:

Corrective Expectations:

Dependable maintenance employees are paramount in the delivery of reliable service. Your record is lacking in this regard and has failed to meet our expectations. Absenteeism costs the Metropolitan Council a significant amount of money each year.

The Absenteeism Policy stipulates seven (7) occurrences within a rolling calendar year will put you on a warning status. Should you have ten (10) occurrences within a rolling calendar year, you will be issued a Final Record of Warning, and upon receiving a Final Record of Warning, three (3) more occurrences will be just cause for your termination.

If you believe DOR & Associates may be of some benefit in assisting you with your attendance problems, they can be contacted at 612-332-4805.

⁴ Kolnik stated herein that he withdrew the FRW dated June 19, 2008, Joint Exhibit 7, because Smith had an on-the-job injury on June 11, 2008.

⁵ MT failed to give timely notice of this occurrence and it did not appear on either of two prior warnings.

Should you be absent from work for a period of time longer than five (5) days, the clock will stop and your warning period will be extended by the number of days missed.

This FRW also contained the following comment: “This final record of warning is a revision due to a mistake on previous final record of warning issued on 6/19/08” (Jt. Exh. 8).

From July 16, 2008, the day after Smith was late more than fifteen minutes and received her tenth occurrence according to the July 15, 2008 FRW, until June 22, 2009, Smith had no chargeable absenteeism occurrences. This eleven-month period with no chargeable occurrences shows that Smith was capable of good attendance.

From June 22, 2009, to August 17, 2009, Smith had no reported absences according to the record documents herein (Jt. Exhs. 5 & 9). From at least August 17, 2009, to November 2, 2009, Smith was off work on nine occasions, which under the Program should have been counted as occurrences. On October 19, 2009, Smith got an FMLA certification covering (her own) serious illness covering the time off she had taken back to at least August 17, 2009. However, as shown on Joint Exhibit 5, as of August 25, 2009, Smith had insufficient sick time and/or annual FMLA leave time to cover her FMLA certified absences. Significantly, no documents or testimony was put into this record to show that Smith was advised that she had no FMLA leave left so that she could no longer use her FMLA certification to cover her nine absences. Rather, Joint Exhibit 5 clearly shows that Smith was either allowed to use her October 19, 2009, FMLA certification (after the fact), when she had no accrued FMLA leave on the books to cover her absences from August 25, 2009 through November 1, 2009, or MT forgave these absences.⁶

Sometime in May, 2010, a meeting was held at which management and Union representatives and Smith talked about Smith’s absenteeism, and her carpal tunnel syndrome diagnosis. At this meeting, Smith stated that her injuries had been caused by “forecasters,” who had attacked her at MJR, pinned her between two buses at the knees. Smith stated that she had to ask Driver Leann Broten to pull a bus out to free her.⁷ At this time, Union representatives Hopwood and Maki, and Manager Kolnik and Occupational Health Nurse de Volder and EEO Officer Dietrich became aware, that Smith had mental health issues.⁸ After this meeting, MT asked Smith to sign a waiver so they could get her mental health records but Smith refused to authorize their release.

On May 15, 2010, Smith was issued an RW which listed the following occurrences:

⁶ This action by MT appears to contradict Kolnik’s testimony and MT’s arguments herein that whenever an employee does not have FMLA leave available the employee is always charged for occurrences even though an FMLA certification is on file which would have covered the time off taken.

⁷ Hopwood questioned Driver Broten about Smith’s assertion and Broten stated what Smith described never happened.

⁸ Hopwood stated that before this, he knew that Smith sometimes blew up at her coworkers which frightened them. Kolnik admitted that after this meeting, de Volder “diagnosed” Smith as suffering from delusions.

No.	Date	Paycode	Comments
[00]	06/22/2009	LATE FOR WORK	Late < 15 Minutes
[01]	11/02/2009	UNPAID SICK	
[02]	12/13/2009	LATE FOR WORK	
[02]	12/15/2009	LATE FOR WORK	Late < 15 Minutes
[03]	01/15/2010	SICK F/T EMPLOYEE	
[03]	01/18/2010	UNPAID SICK	
[04]	01/27/2010	NO SHOW	
[05]	02/15/2010	SICK F/T EMPLOYEE	
[06]	05/12/2010	SICK F/T EMPLOYEE	
[07]	05/14/2010	UNPAID SICK	

Again, there was an error on this RW because it counted only one occurrence for the two instances on 01/15/2010 and 01/18/2010, so there were actually 8 2/3 occurrences, not 7 occurrences, listed assuming the listed instances of absence were correct. Also, “Corrective Expectations” were stated on this RW as well as the following legend:

**** IT IS THE INTENT OF THIS NOTICE TO DISCHARGE YOU AT THE THIRTEENTH (13) OCCURRENCE ****

Each time Smith received a RW or FRW, Smith met with her supervisor who read each RW and FRW issued to her. Smith signed all of these RW’s and FRW’s. None of these Warnings was grieved by Smith.

On June 2, 2010, a Disability Management meeting was held by MT and the Union to prepare for Smith’s carpal tunnel surgery set for June 4, 2010. In attendance were de Volder,⁹ Kolnik, Union representatives Hopwood and Maki, and Smith. At this meeting, de Volder assured Smith and the Union that Smith had an FMLA certification so her leave for the surgery would be covered. Neither Kolnik nor de Volder told Smith that because she had no FMLA leave left she would be denied FMLA leave for her surgery and recuperation. It is undisputed that the details of Smith’s surgery were not discussed at this meeting. And no evidence was submitted to show that on June 2nd, the time of day of Smith’s surgery was known to anyone in management or the Union.¹⁰ At this time, no one considered the affect of Smith’s third shift schedule on her June 3rd morning surgery.

On July 30, 2010, Smith was issued another FRW which listed ten occurrences from November 2, 2009, through July 29, 2010. Comparing Joint Exhibits 5 & 10, it appears that Smith should not have been charged on the July 30, 2010 FRW for her absence on Martin Luther King Day, January 18, 2010; that Smith was allowed to use

⁹ Ms. de Volder, MT’s Occupational Health Nurse, runs MT’s FMLA program. She was not called as a witness herein.

¹⁰ Joint Exhibit 25 is dated April 14, 2010 and lists “anticipated date of procedure” as “TBS” (to be scheduled). Joint Exhibit 24 is dated June 7, 2010, three days *after* Smith had her surgery. This document listed prohibitions on Smith’s eating or drinking anything after midnight on June 4th and that she was required to wash with special soap the night before and the morning of surgery and not apply anything to her skin or hair.

Joint Exhibit 26 is dated May 28, 2010, and contains the date of Smith’s surgery as “06/04/10”, but no time of day for the surgery is listed anywhere on the three-page document.

The Union offered two pages which were appended to Joint exhibit 26 (as pages 4 and 5). These pages were not available/shared prior to Smith’s discharge or during the grievances process. Page 5 of Joint Exhibit 26 shows that Smith’s surgery began at 12:03 and ended at 12:43 on June 4th, although the evidence showed the operation was originally set for 8:30 a.m.

“Recognition time” to avoid occurrences she would have had for being late to work on five days during the period of the FRW; that Smith had an on-the-job injury on February 3, 2010, and that her FMLA certificate from October 19, 2009 would have covered all leave from February 8, 2010, through May 11, 2010, if Smith had had any FMLA leave time remaining. Nonetheless, again, MT excused some of Smith’s absences despite her lack of available FMLA leave time and the rest of her absences were covered by leave that was donated to her by her fellow MT employees (Jt. Exh. 5).¹¹ The FRW issued on July 30, 2010, listed the following ten occurrences:

No.	Date	Paycode	Comments
[01]	11/02/2009	UNPAID SICK	
[02]	12/13/2009	LATE FOR WORK	
[02]	12/15/2009	LATE FOR WORK	Late < 15 Minutes
[03]	01/15/2010	SICK F/T EMPLOYEE	
[03]	01/18/2010	UNPAID SICK	
[04]	01/27/2010	NO SHOW	
[05]	05/12/2010	SICK F/T EMPLOYEE	
[06]	05/14/2010	UNPAID SICK	
[07]	05/19/2010	SICK F/T EMPLOYEE	
[07]	05/20/2010	UNPAID SICK	
[07]	05/20/2010	LATE FOR WORK	Late < 15 Minutes
[08]	05/26/2010	UNPAID SICK	
[09]	06/03/2010	SICK F/T EMPLOYEE	
[10]	07/29/2010	SICK F/T EMPLOYEE	

This FRW also contained the following legend: “IT IS THE INTENT TO DISCHARGE YOU AT THE THIRTEENTH (13) OCCURRENCE.” (Jt. Exh. 10.)

On August 5, 2010, MT placed Smith on paid administrative leave and advised her and the Union that Smith would be receiving a Notice of Discharge showing that she had amassed thirteen chargeable occurrences between November 2, 2009, and August 4, 2010. As provided in the Absenteeism Program, MT arranged a Loudermill hearing for Smith on August 11th which Union President Sommers and Steward David Hopwood attended. At this meeting, Kolnik gave Smith and the Union the following Notice of Discharge:

<i>NO.</i>	<i>DATE</i>	<i>PAYCODE</i>
01	11/02/2009	UNPAID SICK
02	12/13/2009	LATE FOR WORK
02	12/15/2009	LATE FOR WORK < 15 MINUTES
03	01/15/2010	SICK F/T EMPLOYEE
04	01/27/2010	NO SHOW
05	02/15/2010	SICK F/T EMPLOYEE
06	05/12/2010	SICK F/T EMPLOYEE
07	05/14/2010	UNPAID SICK
08	05/19/2010	SICK F/T EMPLOYEE
08	05/20/2010	LATE FOR WORK < 15 MINUTES
09	05/26/2010	UNPAID SICK
10	06/03/2010	SICK F/T EMPLOYEE
11	07/29/2010	SICK F/T EMPLOYEE

¹¹ Kolnik stated herein that Smith filed a Workers’ Compensation claim in April, 2010, which MT denied and that as of the date of hearing Smith had filed on appeal of MT’s denial.

12 08/02/2010 SICK F/T EMPLOYEE
13 08/04/2010 SICK F/T EMPLOYEE

Also at the Loudermill hearing, Smith stated that she had retained a Workers' Compensation attorney to file a petition for her. The Union explained that Smith had pain in her hands and arms due to carpal tunnel syndrome and this was the reason she called in sick on May 12, 14, 19 and 26 (occurrences 6-9); that occurrences 10 was for her June 4th surgery/recovery for carpal tunnel; that occurrences 11 through 13 were for a stomach ailment caused by medication from Smith's surgery. The Union urged MT to take these facts into consideration and withdraw the Notice of Discharge (Jt. Exh. 12).

Kolnik then met with H.R. and Maintenance Managers; he spoke to Risk Management and he reviewed Smith's assertions and work record with them. As a result, Kolnik wrote Smith a letter dated August 13th in which he explained that only one absence occurrence, February 15th, would be removed from her record, as follows:

. . .

Human Resources personnel also re-reviewed of all thirteen occurrences listed. As part of the process they reviewed a Report of Injury dated March 24, 2010 for which you reported the first day missed as February 15, 2010. The symptoms noted on the Report were found to be the same or closely related to the symptoms for which you received full-time FMLA designation for the period March 10, 2010 to May 6, 2010. Human Resources also reviewed documents recently provided by your physician that indicate you were being treated for the same symptoms on or before February 15, 2010.

After careful consideration of the circumstances and findings of the review noted above, it has been determined that it is reasonable to consider the February 15, 2010 absence, currently one of the thirteen occurrences, as part of the absence for which FMLA was applied beginning in March, 2010. This means that the February 15 occurrence will no longer be chargeable and you will have 12.66 occurrences remaining on your attendance record.

Since this drops your occurrences below thirteen, you are no longer in discharge status and may return to work effective August 13, 2010. You must understand, however, that any absence or late of any duration prior to November 2, 2010 (at the earliest) will result in thirteen or more occurrences. I want you to clearly understand that I intend to discharge you if you do reach thirteen (13) occurrences.

. . .

Kolnik delivered the above letter to Smith on her next workday, August 13th.¹² Kolnik explained the letter to her with Steward Hopwood present. Kolnik impressed upon Smith that she could not be absent or late again until after November 2, 2010, or she would be terminated (Jt. Exh. 14). Smith stated she understood.

Smith's next work day was August 16, 2010. She was scheduled to work third shift at MJR. Smith left her house in Hopkins by 5:00 p.m. and took four buses and walked the last three blocks to MJR. The last bus she took was the #722, from Brooklyn

¹² That evening, Smith had reported to the wrong garage for work, and Hopwood was sent to bring her to MJR.

Center, which (as usual) dropped Smith off three blocks from MJR. On August 16th, however, the #722 bus was nine minutes late arriving at Shingle Creek and Freeway Boulevard.¹³ Smith, fearing she would be late to work, tried to run the three blocks to MJR but she became dizzy and could not do it. As a result of the #722 bus being late, Smith was three minutes late to work. It is undisputed that Smith would have arrived at work two minutes early if the #722 bus had not been late.

Because Smith was late getting to work on August 16th, MT issued her a Notice of Discharge on August 18th (at her second Loudermill hearing) showing she had thirteen absence occurrences as follows:

NO.	DATE	PAYCODE
01	11/02/2009	UNPAID SICK
02	12/13/2009	LATE FOR WORK
02	12/15/2009	LATE FOR WORK < 15 MINUTES
03	01/15/2010	SICK F/T EMPLOYEE
04	01/27/2010	NO SHOW
05	05/12/2010	SICK F/T EMPLOYEE
06	05/14/2010	UNPAID SICK
07	05/19/2010	SICK F/T EMPLOYEE
07	05/20/2010	LATE FOR WORK < 15 MINUTES
08	05/26/2010	UNPAID SICK
09	06/03/2010	SICK F/T EMPLOYEE
10	07/29/2010	SICK F/T EMPLOYEE
11	08/02/2010	SICK F/T EMPLOYEE
12	08/04/2010	SICK F/T EMPLOYEE
13	08/16/2010	LATE FOR WORK < 15 MINUTES

Prior to this second Loudermill hearing held on August 18th, Union representatives Maki¹⁴ and Hopwood met with Kolnik. Maki asked whether MT had made reasonable accommodation for Smith's inability to advocate for herself, saying that Smith had difficulty organizing her thoughts and remembering dates. Hopwood suggested doing a mental evaluation of Smith to determine her fitness for duty. Thereafter, at Smith's Loudermill hearing, the Union made essentially the same arguments it had made at her first Loudermill hearing. Maki also suggested that Smith be schooled on how to flag down/request buses on pull-in to take her to MJR at the end of their routes.¹⁵

Kolnik, after reviewing the evidence he had, felt the discharge was warranted, and he issued Smith a Notice of Discharge effective August 20, 2010 (Jt. Exh. 17). The Union filed a grievance for Smith on August 23, 2010 (Jt. Exh. 18).

¹³ At an August 18, 2010 Loudermill hearing, Smith asserted her bus had been delayed by "forecasters" on August 16th; that they got off and gave something to someone on the street and got back on the bus and held it up (Jt. Exh. 16).

¹⁴ Maki, when shown Joint Exhibit 24, stated herein that during meetings concerning Smith's up-coming surgery she (Maki) only saw official documents indicating Smith's FMLA certification was effective from 3/10/10 through 7/16/10, with no gap in coverage, as shown on Joint Exhibit 24.

¹⁵ Any passenger can wave down a bus at any time and the bus must stop for them. Any passenger can ride a "pull-in" bus, that is, a bus at the end of its route returning directly to an MT Garage, if they pay the fare or have a bus pass. All MT employees get a free bus pass (Jt. Exh. 23). Maki asked Smith why she had not flagged down a bus or taken a pull-in. Smith told Maki that the drivers she flagged down would not pick her up. Smith did not know she could ask a coordinator at MJR to request that it be noted on drivers' paddleboards to look for a pull-in passenger out of Brooklyn Center.

The Union presented evidence it argued showed Smith was treated less favorably than other MT employees in similar circumstances. They gave five examples. Employee Roger Federly called Union Steward Hopwood from the Philippines while he was on vacation to request a two-week extension of his vacation in order to get married. Hopwood requested a leave of absence for Federly and MT granted the request, so Federly received no absence occurrences. Another employee, Craig Oliver, was very ill and MT managers sat down with him prior to his taking any leave, to map out a plan so Oliver did not receive any absence occurrences. Prior to his death, Oliver was granted a leave of absence and he received donated leave from employees after his FMLA leave ran out; he suffered no absence occurrences during his final illness.

It is also clear that employees who punch in and are not in uniform may or may not be given an occurrence if they are late reporting to their work stations. Deputy Director of Bus Maintenance Milleston also stated that he is aware some of his supervisors use their discretion to grant employees time off retroactively even though Milleston has told them not to do this. Finally, during the Winter of 2010-2011, upper-level MT managers granted employees one system-wide snow day for bad weather so that employees did not amass any occurrences for that day.

Positions of the Parties:

Employer:

The Employer argued that this case is a simple one. In December, 2007, when the prior absenteeism policy was replaced by the Program in Joint Exhibit 2, MT expunged all absence occurrences for unit employees. The new Program is a no-fault policy, under which the reason for absence is irrelevant; it employs a rolling calendar year during which amassing seven chargeable occurrences of lateness, no-show, denied requests for leave time, and illness (not covered by FMLA certification and FMLA leave time) will draw a Record of Warning; three more (or ten in total) will draw a Final Record of Warning, and thirteen chargeable absence occurrences will cause a Notice of Discharge to be issued. In each case, if management decides, in its discretion, that all seven or ten or thirteen occurrences are valid and that the employee's work and performance history warrant it, the discipline will stand.

MT and the Union agreed to this Program because the prior policy did not work well to curb absenteeism. MT needs employees to be at work and on time in order to fulfill its contract with the public, to provide safe, efficient and reliable and on-time public transportation to and from work and wherever the public need to go.

After the implementation of the effective Absenteeism Program, on December 1, 2007, Marsha Smith's absence record was expunged. Six months thereafter, Smith had amassed ten occurrences and received a Final Record of Warning. Her record really never improved despite the imposition of Warnings and Final Warnings because Smith was absent on vacation, on unpaid leave for sickness and on FMLA leave. In August, 2010, Smith received a Notice of Discharge for thirteen occurrences. At this point, after Smith's Loudermill hearing, Smith's supervisor, Anton Kolnik, looked closely at Smith's record and decided that one occurrence of lateness less than fifteen minutes was unjustified, so he removed it. On August 13th, Kolnik gave Smith a memo indicating she had 12 2/3

occurrences and would be discharged for any lateness of less than fifteen minutes incurred prior to November 2, 2010.

On her next workday, August 16th, Smith was three minutes late and she received a final Notice of Discharge. Kolnik, after reviewing Smith's record once again and holding another Loudermill hearing, decided that there were no mitigating or extenuating circumstances to support Smith's continued employment, so he discharged her.

Here, MT argued that Kolnik was fair and gave Smith the benefit of the doubt on several occasions; that Kolnik thoroughly investigated each occurrence and gave Smith many chances to improve her attendance, but she failed to do so. Smith was well aware of the consequences of her continued misconduct. Kolnik was correct—there were no mitigating circumstances to support Smith's continued employment at MT. She had no on-going Workers' Compensation claim; although Smith had an FMLA certification, she could not use more FMLA leave than she had for her June 4th surgery, so her absence was properly denied and counted as an occurrence.

In this case, Smith failed to file any grievances over any of the occurrences charged against her until she filed the instant grievance over her discharge. The Union has asked the Arbitrator to disregard the grievance filing timelines and to go back and review the occurrence Smith received for June 3, 2010. The Employer urged that if the Arbitrator did this, she would exceed her authority.

Also, MT urged that its management was not responsible to make sure Smith got to work on time. It was the Union that should have acted to help Smith. It should have requested a leave of absence for Smith, or special transportation due to her special needs, or assistance to get pull-ins to take her to MJR. MT noted that Smith chose to take a bus that would get her to MJR at the last moment. The Union has not argued and cannot argue MT failed to accommodate Smith's disability. MT wanted to look into Smith's mental health issues but could not do so because she refused to allow it.

Finally, MT argued that two prior awards, Peters and Watkins, given to the Arbitrator, involved sympathetic grievants (like Smith) who were nevertheless not returned to work. It is significant that Smith had an occurrence two days after the Program was implemented in 2007, and during her last year of employment she had 168 days of chargeable and non-chargeable absences, 48 absence days connected to chargeable occurrences. MT asserted the fact that the last bus Smith took was late is irrelevant, as is the Union's argument about MT's contract with the public. MT argued that Smith should not be given one last chance and it urged the Arbitrator to deny the grievance.

Union:

The Union urged that Smith unfortunately has had medical and mental health issues and she ran afoul of MT's Absenteeism Program. The Union asserted it does not quarrel with MT's right to make reasonable rules and expect its employees to come to work regularly and be on time, but it argued that MT's Absenteeism Program is not a true no-fault policy and cannot be treated as such. Also, the Union noted that MT has a contract with its customers, including Smith, to provide safe, efficient, clean, and timely transportation that customers can rely on to get them to work on time.

On August 16, 2010, MT breached its contract with Smith when her bus was nine minutes late, which made Smith three minutes late for work. Put another way, if Smith's last bus had been on time, she would have been two minutes early and would not have been discharged. Therefore, the Arbitrator should reinstate Smith.

The Union strongly rejected MT's argument that the Arbitrator lacks authority/jurisdiction to consider any occurrence other than that on August 16th, because Smith did not file any grievances regarding the occurrences Smith received prior to the one on August 16, 2010. In this regard, the Union noted that the Union and MT could not afford to process the grievances if employees filed same over every occurrence. In addition, the effective Program states that MT "may" (not "will") terminate the employee who amasses thirteen occurrences and it lists factors that MT "should" take into consideration before deciding to terminate the employee. In fact, Kolnik stated that he reviewed the last three years of her conduct and he went back and looked at each of Smith's occurrences in the past year before he decided to discharge her. Thus, the Union urged, this Arbitrator has the right and the duty to make the very same in-depth inquiry in judging Kolnik's exercise of management discretion before issuing this Award.

The past occurrence the Union urged the Arbitrator to look at is the occurrence charged Smith for June 3, 2010, her first day of absence due to carpal tunnel surgery. On this point, MT argued that although Smith had an FMLA certification covering her surgery and recuperation, because Smith did not have enough FMLA leave time on the books, Smith was charged one occurrence for June 3rd. The Union urged that the Program only requires an FMLA certification and does not require FMLA leave be on the books. Also, the Union noted that no one in management told Smith she did not have sufficient FMLA leave. Rather, they told her and the Union that her FMLA certification would cover her absence. Therefore, neither the Union nor Smith inquired further. Had the Union known that Smith had no FMLA leave, the Union would have requested a leave of absence for Smith. This is a mitigating circumstance that the Program required Kolnik to take into consideration. Even if the Arbitrator finds that she cannot look at the June 3rd occurrence, MT's unfair treatment of Smith regarding the August 16th occurrence is enough to set aside the discharge.

If the Arbitrator were to reinstate Smith, the Union pointed out that she will go back with essentially one last chance to show that she can be a regular, reliable and productive employee and work without any absence occurrences. Smith is a nice woman who has limitations which do not affect her work. Her coworkers have donated their leave to assist her. Smith's physical problems have been successfully dealt with through surgery and she now lives closer to MJR. The Union and her family are committed to assisting Smith to succeed at MT in the future. And Smith is being medicated for her mental health issues. She wants to and is ready to return to work and she should be reinstated, the Union hoped, with full or partial backpay. In any event, in these circumstances, the Union urged that above all, Smith should be reinstated and given one last chance to succeed at MT.

Discussion:

Several observations must be made before the major issues herein can be dealt with. The reason unions and management agree to no-fault absenteeism policies is to

remove discretion and ambiguity and from judging absences and to provide regular uniform and consistent penalties for stated types of absences so that both employees and managers know with ease and clarity what conduct is proscribed and the level of discipline that will be assessed for each occurrence. Most of these policies are designed to avoid different supervisors imposing their own (lenient or strict) approach in assessing points for lateness, no shows, early quits and unapproved absences. These policies also normally list specific types of absences that will be automatically excluded from the assessment of occurrences to limit managerial discretion. These policies also normally require the application of stated progressive discipline including oral and written warnings, lesser and greater suspensions, followed by discharge, for having amassed specific numbers of occurrences across a rolling one-year period, again, to limit discretion and put employees on notice of the consequences of their actions.

The Absenteeism Program before this Arbitrator is different from the normal such policy in significant ways. In all the circumstances here, the Arbitrator agrees with the Union's argument, that the Program in this case is not a true no-fault policy. Rather, although the Program states it is no-fault, it contains provisions that are at odds with this label.

Here, there is only one specific stated exclusion from the assessment of occurrences: an FMLA-certified leave. Also, unlike the ordinary absenteeism policy, the Program places enormous responsibilities on MT management to "accurately" maintain absence records, "to closely monitor absenteeism and review each Employee Work History every time an entry is made" to assure that "no employee is unjustly disciplined due to improper, incomplete or inaccurate records. Finally, although factors are listed in the Program which supervisors "should" take into consideration, these factors are vague and overbroad, and they leave great room for the individual supervisor's interpretation, and their personal judgment of each employee and each occurrence.

Thus, Section VI B lists expectations of improvement, the employee's past record and performance in other areas, the cause of the excessive absences and "mitigating circumstances, such as emergencies or personal problems" and "other relevant considerations" as factors MT supervisors should consider before charging an employee with an occurrence. These factors leave MT supervisors with little real guidance in exercising their discretion and weighing the factors, other than their own judgment and prior experiences administering the Program, to assist them in applying the Program.

And yet, Section V A of the Program demands that "[m]anagement must always administer discipline in a progressive and timely manner." This Section goes on to define progressive discipline as including oral and written warnings before "a suspension or termination, is administered." It is significant that this is the only reference to suspensions in the entire document. This record shows that MT managers do not impose suspensions under the Program, but follow the language of Section V B which calls for the imposition of a Record of Warning at seven occurrences, a Final Record of Warning at ten occurrences. Furthermore, the Program states that termination "may" follow at thirteen occurrences. Again, significantly, this Program does not mandate termination at the thirteenth occurrence, but allows MT supervisors discretion to refuse to terminate a particular employee based on their judgment of all the circumstances of the employee's situation.

Clearly, this Program is extraordinary for the heavy burdens of attentiveness, judgment and discretion it places on MT supervisors. It is therefore, not, in the view of the Arbitrator, a true no-fault policy. Rather, this Program essentially shifts the burden of judging whether there is just cause for an absence discharge from the Arbitrator to the MT supervisor.

This Arbitrator is very impressed with how hard Manager Kolnik worked to administer the Program in Smith's case.¹⁶ This was far from easy as Smith has had difficulty communicating with both management and Union representatives due to her mental illness and her special needs. And there is no denying that during her tenure, Smith had significant and extensive absences for a variety of problems, including on-the-job injuries, FMLA leaves, and illnesses not covered by sick leave and some lateness incidents.

On the other hand, it is worth noting that despite Kolnik's vigilance, the evidence herein revealed several unexplained errors in Smith's occurrence accumulations over her tenure (detailed above). This Arbitrator is troubled by these errors, because they tend to undermine confidence in the Program. Also, as the language of Section III of the Program requires strict accuracy, close monitoring and review of records, and Section III clearly prohibits unjust discipline due to "improper, incomplete or inaccurate records," it is this Arbitrator's view, that Section III of the Program requires the Arbitrator to assess whether Smith was "unjustly disciplined" for improper reasons by Kolnik when he decided to terminate her for her August 16th tardy.

Nonetheless, this Arbitrator finds the Absenteeism Program in this case is a reasonable one. The record facts showed that the parties met and conferred prior to the implementation of the Program, following Article 11 procedures and at least one arbitrator before this Arbitrator (R.J. Miller) found the Program reasonable.¹⁷ The record failed to support a contrary conclusion herein.

However, the fact that a no-fault absenteeism policy is found to be reasonable does not end the inquiry for the majority of arbitrators. As masterfully discussed in-depth by Mittenthal and Block in their paper given at the 1984 Annual NAA meeting, "...arbitrators who have declared a(n) (absenteeism) plan reasonable have not hesitated to reject a perverse application" thereof."¹⁸ This is so because no-fault absenteeism rules/policies like this Program expressly make the reasons for employee absences irrelevant, leaving open only two questions: whether the employee was absent and whether the absence is covered by an exclusion. In contrast, the just cause inquiry arbitrators must normally make involves deciding whether an employee was guilty of

¹⁶ It should be noted that Kolnik had never before terminated an employee for absenteeism so he lacked this kind of personal experience. Also, he admitted a lack of knowledge of the contractual leave of absence provision.

¹⁷ MT provided the Arbitrator with two prior MT arbitration awards. Both involved bus driver discharges under the then-effective absenteeism policy at MT applicable to bus drivers. Ms. Smith was a non-operator so the drivers' absenteeism program was never applied to her. Also, the Program in this case was implemented on December 1, 2007, sixteen years after the Ver Ploeg award issued. Therefore, this Arbitrator finds the Ver Ploeg award inapposite. Regarding the 2007 award issued by Arbitrator Miller, although the policy therein appears to be substantively identical to that in this case, this Arbitrator must decide this case based upon its particular facts.

¹⁸ Mittenthal & Block, Arbitration and the Absent Employee, 37th Annual NAA Meeting, The Proceedings, ed. Gershenfeld (BNA Books 1985), p. 101.

misconduct and if guilty, whether the disciplinary penalty assessed was reasonable and appropriate in the circumstances. The need to reconcile or harmonize the application of this no-fault Absenteeism Program with the just cause standard in this contract is this Arbitrator's assignment.

The Union has urged the Arbitrator to go back and review Kolnik's discretion in assessing Smith's discipline for the June 3, 2009, occurrence. This Arbitrator cannot and will not do so. Article 5, Section 4, states that the Union "must begin acting...within seven (7) days after the ATU or its members have knowledge of the facts giving rise to said grievance..." In this Arbitrator's view, the language is clear and unambiguous and it cannot be stretched or bent to allow the Union to untimely grieve the imposition of discipline for the June 3, 2009, occurrence (when no such grievance was ever thought of or filed), no matter how this Arbitrator perceives and might herself have judged the surrounding circumstances of that occurrence.¹⁹

Turning now to the facts surrounding Smith's lateness on August 16th, it is clear that Smith was three minutes late punching in that night. As such, she should have received 1/3 occurrence for her lateness absent an emergency or other mitigating circumstances. It is undisputed on this record that Smith had to take four buses to work on August 16th and that the last bus she took was nine minutes late, undisputedly making Smith three minutes late to work. It is also undisputed that had her last bus been on time, Smith would have been two minutes early. It is significant that Smith left at least three hours early for work on August 16th, showing she had no intention of being late or absent that day.²⁰ In fact, she had been advised by Kolnik on August 13th and she clearly understood that she could not be late or absent again until after November 2, 2010, or she would be discharged.

Evidence provided by the Union shows that other employees were treated more leniently than Smith was treated. Milleston admitted some of his supervisors are more lenient than others regarding absences. Although the Oliver and Federly cases were factually different from Smith's situation, these instances show MT was open to accommodating long-term illnesses as well as short-term purely personal requests for exceptions to the strict application of the Absenteeism Program. Smith's last absence was similar to Federly's situation. And yet MT denied Smith a similar accommodation. Finally, the fact that MT upper management allowed a (free) snow day for all employees this winter, and that it has allowed other employees to use recognition leave (not codified in the Absenteeism Program) to fill in for minor latenesses, show that MT has made accommodations for other employees which it refused to make for Smith.

It is important to note that Kolnik was not required to discharge Smith for her lateness on August 16th—the verb used in the Program is "may", not "will."²¹ To strictly apply the Program to Smith for a three-minute lateness, caused by one of several buses

¹⁹ Although arbitrators try to interpret contract language so as to avoid forfeitures of rights, in this instance, this Arbitrator is bound to enforce the clear timelines contained in Article 5. However, the record facts of this case support a conclusion that, in all the circumstances, MT could have refused to charge Smith with an occurrence for her June 3rd absence.

²⁰ Smith was the only witness who testified regarding her activities prior to her arrival at work on August 16th and her testimony has been fully credited herein.

²¹ This Arbitrator notes that under cross-examination, Kolnik stated that he was unsure of the definition of "mitigating circumstances".

she took to work on August 16th when no evidence was presented to show Smith negligently or intentionally left for work too late to arrive on time, indicates that she was “unjustly disciplined” for “improper” reasons and/or that Kolnik and Milleston failed to properly consider mitigating circumstances/personal problems Smith had. Despite her many absences, this Arbitrator believes that in all the circumstances of this case, a strict application of the Program to Smith for her August 16th tardiness would constitute a perverse application of the Program.

Having said this, however, this Arbitrator wishes to strongly impress upon Smith that this Award in her favor was not easy to reach and that this Award constitutes Smith’s “one last chance”, which the Union sought on her behalf. Smith will be returned to work with 12 2/3 occurrences, which will be effective for ninety calendar days (the same amount of time she would have had between August 4, 2010, and November 2, 2010, during which she can have no countable absence occurrences. If Smith has even one lateness of less than fifteen minutes, from May 2, 2011, through July 30, 2011, she will be terminated automatically.

The final question is whether Smith should receive backpay, and if so, how much. Normally, this Arbitrator, having found that the discharge was not for just cause under the agreement, would award a make whole remedy, including full backpay and benefits. However, this is far from the normal case. Here, mistakes were made on all sides—by Smith, MT and the Union—mainly due on Smith’s inability to communicate and her refusal/inability to give MT and the Union the kind of full information they needed to do their jobs.

Therefore, I will order reinstatement but I will retain jurisdiction of the remedy and request that the Union and management (who have a very open, cooperative relationship) meet and work out a settlement of the issue of backpay. Only if the parties cannot agree on backpay will the Arbitrator issue a short addendum to this Award indicating her order on the issue of backpay.

Smith has moved closer to MJR, she has recovered from her carpal tunnel surgery and is taking medication for her mental health problems. She wants to return to work and the Union and her family are committed to helping Smith succeed at MT.

AWARD

Metro Transit did not have just and merited cause to discharge Marsha Smith for her lateness on August 16, 2010. The grievance is therefore sustained. Metro Transit is ordered to immediately reinstate Smith.

However, Smith is to return to work with 12 2/3 occurrences of absence on her record on a corrected rolling one-year period to expire on July 31, 2011.

The Arbitrator will retain jurisdiction of this case on the remedy.

The parties are requested to meet, and if possible, agree on whether Smith should receive backpay based on this Award. If the parties cannot agree on

the remedy herein, including the issue of what if any backpay Smith should receive, they may request the Arbitrator to issue an addendum on the issue.

Dated and signed at Oshkosh, WI, this 30th day of April, 2011.

Sharon A. Gallagher

[Revised May 27, 2011]

“unjustly disciplined” for “improper” reasons and/or that Kolnik and Milleston failed to properly consider mitigating circumstances/personal problems Smith had. Despite her many absences, this Arbitrator does believe that a strict application of the Program to Smith for her August 16th tardiness would constitute a perverse application of the Program.

Having said this, however, this Arbitrator wishes to strongly impress upon Smith that this Award in her favor was not easy to reach and that this Award constitutes Smith’s “one last chance”, which the Union sought on her behalf. Smith will be returned to work with 12 2/3 occurrences, which will be effective for ninety calendar days (the same amount of time she would have had between August 4, 2010, and November 2, 2010, during which she can have no countable absence occurrences. If Smith has even one lateness of less than fifteen minutes, from the date of her reinstatement through the ninetieth calendar day thereafter, she will be terminated automatically.

The final question is whether Smith should receive backpay, and if so, how much. Normally, this Arbitrator, having found that the discharge was not for just cause under the agreement, would award a make-whole remedy, including full backpay and benefits. However, this is far from the normal case. Here, mistakes were made on all sides—by Smith, MT and the Union—mainly due to Smith’s inability to communicate and her refusal/inability to give MT and the Union the kind of full information they needed to do their jobs.

Therefore, this Arbitrator will order reinstatement, but will retain jurisdiction of the remedy and request that the Union and management (who have a very open, cooperative relationship) meet and work out a settlement of the issue of backpay. Only if the parties cannot agree on backpay will the Arbitrator issue a short addendum to this Award indicating her order on the issue of backpay.

Smith has moved closer to MJR, she has recovered from her carpal tunnel surgery and is taking medication for her mental health problems. She wants to return to work and the Union and her family are committed to helping Smith succeed at MT.

AWARD

Metro Transit did not have just and merited cause to discharge Marsha Smith for her lateness on August 16, 2010. The grievance is therefore sustained. Metro Transit is ordered to immediately reinstate Smith.

However, Smith is to return to work with 12 2/3 occurrences of absence on her record on a corrected rolling on-year period to run from the date of her reinstatement through the ninetieth calendar day thereafter.

The Arbitrator will retain jurisdiction on the remedy.

The parties are requested to meet, and if possible, agree on whether Smith should receive backpay based on this Award. If the parties cannot agree on the remedy herein, including the issue of what if any backpay Smith should receive, they may request the Arbitrator to issue an addendum on the issue.

[Revised May 27, 2011]

Dated and signed at Oshkosh, Wisconsin, this 30th day of April, 2011.

Sharon A. Gallagher