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In the Matter of Arbitration

between

Lift Line Incorporated

and

Amalgamated Transit Union Local 282

Opinion

and

Award

* *

This arbitration was heard on May 19, 2016, at the Company's offices in Rochester, New York. The undersigned was appointed to arbitrate the controversy from a panel maintained by the parties. Upon completion of post-hearing briefs by both sides, the record was closed.

APPEARANCES

For the Employer:

Jules Smith, Attorney
Nolan Lafler, Attorney
Jacques Chapman, President
[redacted] Grievant

For the Union:

Roy Galewski, Attorney
Janet Snyder, Labor Relations Director
Jeff Fay, Manager of RTS Access and Regional Maintenance

THE ISSUE

The parties were unable to agree on a statement of the issue and authorized the Arbitrator to frame it. I do so as follows: Did the Company violate the Collective Bargaining Agreement when it terminated the grievant, [redacted] If so, what shall the remedy be?

BACKGROUND

The facts of this case are not materially in dispute. The grievant, [redacted] was employed by the Company as a Bus Washer from 2013 until his discharge in December 2015. He is a conditional resident of the United States and a citizen of Jamaica. On December 3, 2015, he was arrested by agents of Immigration and Customs Enforcement (ICE) and charged with fraud on his immigration application, specifically with regard to his marital status. He was incarcerated in the federal detention facility in Batavia, New York, until he was released on bond on January 6, 2016.

Because of his incarceration, the grievant did not report for work after December 3, 2015. The Company was aware of his incarceration and knew generally that it had to do with his immigration status. From December 3 through December 11, the grievant was on various kinds of paid-leave status. On December 14, his status was changed to "unapproved absence," and he began accumulating "occurrences" under the parties' agreement on attendance, which was executed on February 3, 2011. He was charged with his 11th occurrence on December 17, which calls for a memorandum of counseling, and subsequently with additional occurrences every work day until the 18th one on December 29, which calls for discharge.

The attendance policy addresses sick-time occurrences and unapproved-absence occurrences. A sick-time occurrence is defined as "one or more consecutive days of sick time absence (whether partial day or full day), whether paid or unpaid." An unapproved-absence occurrence is defined as "any absence from work where the absence is not approved by the Company." For employees other than bus operators (which covers the grievant), each instance of tardiness is counted as an unapproved-absence occurrence.

With the eleventh occurrence within 12 rolling months, the employee enters the attendance disciplinary process, which provides for increasingly severe penalties for each subsequent occurrence. The 18th occurrence within the 12-month period results in discharge

According to the grievant, and not disputed by the Company, while living in Jamaica he had a child with Paulette Ramsay but was not married to her. She moved to Rochester with the child, and he kept in touch with them. In the meantime he married Joan Young, from whom he was subsequently divorced in Jamaica. He came to the United States in 2010 and at some point married Paulette Ramsay. Subsequently their relationship deteriorated, and divorce proceedings are underway. The grievant claims that Ms. Ramsay falsely and maliciously reported to ICE that he was still married to Ms. Young when he came to the United States and when he married Ms. Ramsay, and that he failed to disclose those facts on his immigration application. The record (Union Ex. 2) contains a document attesting to the dissolution of the marriage between the grievant and Ms. Young in August 2010.

While the grievant was incarcerated, he sent several letters to the Company explaining his situation, including the fact that he could not get a hearing on his application for bond until January 6, 2016.

POSITION OF THE COMPANY

The Company notes that the parties' attendance rules are set forth in a Memorandum of Agreement (MOA) attached to the CBA. Under these rules, an unapproved absence occurrence is any absence from work that is not approved by the Company. The MOA further provides specific penalties for various numbers of

occurrences. When an employee reaches 11 occurrences (sick-time, tardiness, or unapproved) within a 12-month period, the disciplinary process is started. In the present case, the Company followed the terms of the Attendance Agreement to the letter.

The Company contends that the grievant was properly discharged pursuant to the terms of the parties' negotiated Attendance Agreement. The plain and unambiguous language of this agreement requires that the discharge be left undisturbed. Notwithstanding any argument the Union might make on the grievant's behalf, the parties are bound by their bargain. Thus this case calls for nothing more than the application of the agreement to the grievant's situation. There is no dispute that the grievant incurred a combination of 18 occurrences over 12 months, and that the Company properly issued each step of discipline set forth in the Attendance Agreement. After 18 occurrences the agreement provides for no other result. It does not provide for an exception when an employee cannot report for work because of an incarceration by a federal agency. Moreover, at the time of the discharge, the Company had no idea of when or whether the grievant would be released, and it had to continue its operations. It could not provide the grievant with an indefinite and ongoing leave while incurring daily overtime to cover his work. In any event, the attendance agreement does not require that. By agreeing that Step 8 of the attendance disciplinary process results in discharge, the Union clearly agreed there is just cause to discharge an employee who has reached this step. Thus the Union's appeal can succeed only if the Arbitrator amends or modifies the agreement by adding an exception that is not there. The parties' agreement is explicit and non-discretionary. It covers "any absence from work where the absence is not approved by the Company." These words cannot be ignored, and they make it clear

that the parties could not have intended that certain types of absences not approved by the Company would be excused.

The Company further argues that there is no support in the record for the Union's theory that some of the grievant's tardiness incidents were due to a faulty time clock. The grievant himself could not recall any problem he had with the time clock, nor did he report any such problem to the Company There is simply no evidence that the grievant's tardiness occurrences resulted from a malfunctioning clock. Also irrelevant is the suggestion that the grievant believed his tardies were excused because he called his supervisor to report them. There is no claim that the Company ever gave the grievant permission to be late. Indeed, the grievant admitted that he was given no such permission.

Other Union arguments are irrelevant to this case as well, asserts the Company. The fact that the Company reduced an earlier suspension of the grievant (unrelated to attendance) does not justify an exception in an attendance case. Such exceptions have never been made under the attendance agreement. Although Company representatives may have authority to reconsider disciplinary decisions, they are not required to do so under the Attendance Agreement. Under the Union's logic, there would be no reason to have negotiated language since it would be subject to change by a single non-precedential settlement.

The legal propriety or status of the grievant's immigration case is likewise irrelevant, insists the Company. Although the Union argues that the grievant was wrongly detained by the federal government, his case is in fact still open, and in any event the merits of the federal case are not relevant in this proceeding. Whether the

charges are ultimately dropped or he is again incarcerated, the fact is that he incurred unapproved-absence occurrences that led to discharge under the parties' agreement. Although the Union may argue that this result is unfair, it is completely consistent with the intent of the agreement – to ensure that employees come to work as scheduled and to remove those who cannot meet that expectation.

For all of the foregoing reasons, the Company urges that the grievance be denied in its entirety.

POSITION OF THE UNION

The Union contends, in summary, that the grievant did not accrue the number of attendance occurrences to warrant termination under the attendance policy, as several of the occurrences it counted were in fact excused. In addition, the Company lacked just cause to terminate the grievant because of the mitigating circumstances of his incarceration. Accordingly, the grievant must be reinstated with full back pay and benefits.

Just cause to terminate requires proper notice, argues the Union. In this case, the grievant was improperly assessed six occurrences for tardiness which he reasonably understood had been excused by the Company. On these occasions, the grievant called his supervisor when he anticipated that he might be late for work (because of another job), and rather than tell him he was being assessed an occurrence, the supervisor told him to come in and work extra time to make up the loss – which he did. The record contains no written confirmation of these alleged attendance occurrences, nor was the grievant advised that practice of staying late to make up the time was unacceptable. This deprived the grievant of the opportunity to adjust his time. Notably, the grievant's

supervisor was at the hearing but was not called to rebut the grievant's testimony. Thus the Company improperly applied the attendance policy by failing to provide notice.

Further, asserts the Union, compliance with a "no-fault" attendance policy does not relieve an employer of needing just cause to impose discipline. Here the grievant provided the Company with timely and effective notice of his absences due to his incarceration. The Company was aware of the incarceration as of December 8, 2015, and he formally requested an unpaid leave of absence to preserve his employment. In addition, the Company was not adversely affected by the grievant's absence; any impact was *de minimis*. The Company was able to insure that work would be performed by other employees, and no customers were denied service. Moreover, the grievant has no history of absenteeism or attendance abuse, nor does he have a disciplinary record.

Finally, contends the Union, the unique mitigating circumstances of this case render the grievant's termination unjust. Most of his occurrences resulted from his imprisonment for a crime he did not commit. The record clearly shows that the grievant was divorced when he remarried and that his permanent resident status was not obtained through misrepresentation. Termination under these circumstances is completely unjust.

For these reasons, the Union urges that the grievance be granted and the grievant reinstated with full back pay and benefits.

FINDINGS AND OPINION

It is necessary at the outset to address the parties' differences in the framing of the issue. The Union sees this controversy as a traditional one of just cause, while the Company asserts that the arbitrator's task is simply one of applying the parties'

Attendance Agreement. On this point the Company has the better of the argument, as just-cause principles cannot be applied independently of the parties' agreement on attendance. The problem with the Union's position is not that just cause is irrelevant to this dispute, but that what the parties have done in their agreement is to *define* just cause in cases involving attendance. Specifically, they have negotiated a policy that says an employee who reaches Step 8 of the process will be discharged, and in so doing they have said that a discharge properly effectuated under the policy is by definition one that has been carried out with just cause. There is no separate standard, especially one grounded in the justice of the negotiated rule or the proportionality of the penalty, that can properly be applied by a neutral who has been engaged as a reader of the contract.

It is also important to appreciate that what the parties have negotiated in their MOA is a no-fault attendance disciplinary process. Thus the bare fact that the grievant may have been a victim of circumstance, or even of malice, does not protect him against the consequences of his absences under the parties' agreement. As the Company persuasively argues, the only issue in this arbitration is whether the Company properly determined that on December 29, 2105, the grievant reached Step 8 of the process and was accordingly subject to discharge. At the same time, however, it must be noted that non-fault policies by their nature carry an especially heavy burden of implementation. If an employee is told that he may be disciplined and eventually discharged for behavior that is not his fault and over which he has no control, then the determination that the proscribed behavior has in fact occurred must be clear and entirely free of ambiguity. This is in fact consistent with the Company's contention that it followed the terms of

the agreement "to the letter." It is against this standard that the facts of the present case must be assessed.

Finally by way of introduction, the Company's assertion that the Attendance Agreement is "explicit and non-discretionary" is at variance with the words of the provision. The Attendance Agreement sets forth two kinds of "occurrences," one of which is labeled "Unapproved Absence Occurrence." The agreement does not simply divide absences into those due to illness and those due to "anything else," but into absences due to illness and absences that are "not approved by the Company." But if there is a category of absences that are not approved by the Company, there must also be such a thing as absences that *are* approved by the Company. Indeed, both the Level I and Level II responses to the grievant state that "Mr. [redacted] did not have an acceptable excuse for his absence from work," a phrasing that surely contradicts the notion that the Company's finding of 18 Unapproved Absence Occurrences was "non-discretionary." If it is relevant that the grievant did not have an acceptable excuse, there is presumably such a thing as an acceptable excuse. None of this is to say that the Company must approve any particular attendance event – this is, after all, a no-fault policy – but it does say that the Company has discretion in how it counts "occurrences."

The occurrences that led to the grievant's discharge fall into two groups: those recorded before his incarceration and those recorded afterward. The first question surrounding the Company's application of the Attendance Agreement to the facts of this case involves the counting of tardies in October and November 2015. The grievant testified, without contradiction, that he was late from time to time because of another job, that he regularly called his supervisor to say he would be late, and that he was told

to make up the time at the end of his shift. The Company asserts that these tardies were never explicitly approved by the supervisor, and that the grievant was never actually told they would not count under the attendance policy. The record does support those assertions, but by the standard that no-fault penalties should be free of ambiguity, they are not enough. These tardies occurred six times over a period of about six weeks. The grievant regularly reported them in advance and complied with his supervisor's instruction to make up the time at the end of the shift. There is every indication that, had the grievant not been incarcerated, there would have been additional tardies which, by the Company's reckoning, would have soon exposed him to formal discipline. Under those circumstances, it was not unreasonable for the grievant to infer that coming in late (often by very small margins) and making up the time would not get him into trouble. Indeed, as the grievant's pattern of tardies (due to another job) was something that might predictably continue, surely he could reasonably expect that if the Company considered such a pattern a basis for future discipline, he would be urged to find a way to avoid the tardies. The fact that he received no such advice was consistent with the reasonable inference – whether it was in fact accurate or not – that the tardies were not "unapproved." There is, in short, enough ambiguity surrounding the charging of these occurrences to render them improper as even a partial basis for discharge under this no-fault policy.

None of this is to deny that, under Section 2.iv of the Attendance Agreement, the Company could have determined that each tardy was the equivalent of an "Unapproved Absence Occurrence." But as noted above the Company also had the discretion to consider tardies occurring under a particular set of circumstances (such as those present

in this case) to be "approved," and it further had the obligation to avoid uncertainty as to whether specific tardies were approved or not. This is especially so when those tardies might be used to justify an eventual termination. Had the Company not counted the six tardies in this case, the grievant's release on bond would have occurred within the six business days following the day he was terminated. In sum, regardless of how the grievant's absences during his incarceration were counted, he should not have been placed at Step 8 of the attendance disciplinary process on December 29, 2015.

Given the foregoing finding, it is not necessary to determine definitively how the absences during incarceration should have been treated. Clearly the Company is not required to approve absences due to incarceration, and given that the parties have negotiated a no-fault policy, it follows that the Company is not required to approve such absences even where the incarceration is due to error or malice. After all, an employee in this situation is no more blameless than one who accumulates occurrences because of a chronic illness, and that latter employee is clearly not exempt from discipline because of his blamelessness. The wrinkle that is raised in the present circumstance is whether *consecutive* absences for a reason other than illness, the cause of which is known to the Company and which evinces no culpability or irresponsibility on the employee's part, were intended to be counted differently from those consecutive absences for illness. In the circumstances of this case (including the fact that the Company was aware of a date certain on which the grievant's incarceration might be resolved), I believe non-frivolous arguments can be made on both sides of this question.

For the foregoing reasons, I find that the Company violated the CBA when it terminated the grievant. As for remedy, the grievant shall be reinstated and compensated

for the salary losses attributable to his termination. Any back pay to which the grievant is entitled shall be reduced by the days on which he could not have worked (occasioned by both his incarceration and an injury that he incurred) and by his earnings at another job, to which there is reference in the record. The Award below will reflect these adjustments.

AWARD

The Company violated the Collective Bargaining Agreement, and specifically the Attendance Agreement, when it terminated [redacted] [redacted] Mr. [redacted] shall be reinstated to his job upon the parties' receipt of this Award. He shall be compensated for his loss of salary, at straight time, from the date of discharge to the date of reinstatement. The back pay shall be reduced by (1) the time Mr. [redacted] was incarcerated; (2) the time he was incapacitated by injury and surgery; and (3) earnings received from another job during the period of termination, for hours worked at times when the grievant would otherwise have been scheduled to work for the Company. The Arbitrator shall retain jurisdiction of this matter for the purpose of resolving any disputes that may arise out of the implementation of this Award.

STATE OF NEW YORK} SS:
COUNTY OF ERIE }

I, Howard G. Foster, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

June 28, 2016
(dated)

Howard G. Foster
(signature)