BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF STEVENS POINT	Case 82 No. 46122
and	MA-6877
STEVENS POINT CITY TRANSIT EMPLOYEES LOCAL 309, AFSCME, AFL-CIO	

Appearances:

Mr. Bruce K. Patterson, Employee Relations Consultant, appearing on behalf of the City.

Mr. Guido Cecchini, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

ARBITRATION AWARD

Stevens Point City Transit Employees, Local 309, AFSCME, AFL-CIO, hereinafter Union, and the City of Stevens Point, hereinafter City, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to said agreement, the Union requested the Wisconsin Employment Relations Commission to appoint a member of its staff as arbitrator in the captioned matter. The City concurred in the Union's request and a hearing was held in Stevens Point, Wisconsin, on November 11, 1991. A stenographic transcript of that hearing was made and following receipt of the transcript the parties filed posthearing briefs by January 3, 1992.

ISSUE:

At hearing, the parties were unable to stipulate to a statement of the issue and the undersigned believes the issue is most appropriately stated as:

> Did the City have just cause to discharge the grievant on June 14, 1991 for not reporting to work on time as scheduled on June 6, in violation of the City of Stevens Point Transit Department Work Rules? If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

Article 2 - Management Rights

> A. The City possesses the sole right to operate City government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:
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> 2. To establish reasonable work rules and schedules of work;
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> 4. To suspend, demote, discharge and take other disciplinary action against employees for

just cause;

. . .

CITY OF STEVENS POINT TRANSIT DEPARTMENT WORK RULES

The department reserves the right under article two of the labor agreement to alter or add to these work rules as needed. Exclusion of a posted work rule from this collection does not in any way negate the right of the department to enforce that work rule in accordance with the labor agreement.

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MEMORANDUM

TO: All Coach Operators

FROM: Rex Cass, Transit Manager

DATE: Monday, February 1, 1988

SUBJECT: Late-Out Policy

In response to two recent incidents concerning attendance policy at Point Transit, the following is mean to clarify the City's current policy and to end any further reference to past practice in this regard:

1. A "Late-Out" is defined as failing to "physically report to the Transit Garage at or before the established report time for all assigned work." (Memo of 1/25/88)

2. Determination of correct time is established at the time announced at (715) 341-0123. Our new time clock will be set according to this standard. We will reset that time clock as needed at the end of the service day.

3. When the time clock is operating, Coach Operators MUST punch-in before the clock registers one minute past the established report time for the assigned work. (Example: A clock reading of 6:31 a.m. is a late-out.)

4. In all circumstances but one, punching-in late will be a late-out. ONLY ONE circumstance will be considered grounds for dismissing a late-out. This single circumstance is one where it can be inarguably shown that the Transit Management or Clerical staff has been unclear in communicating the work assignment to a Coach Operator or have failed to contact the Coach Operator according to the established procedures.

NO OTHER extenuating circumstances must be recognized in an appeal to dismiss a late-out.

TO: All Coach Operators

FROM: Rex Cass, Transit Manager

DATE: February 3, 1988

SUBJECT: Use of Time Clock

We will institute use of the time clock on THURSDAY, FEBRUARY 4, 1988. From this date forward each operator will punch in AT or BEFORE regularly assigned time to establish on-time performance. Failure to punch-in will result in a late-out. This must be clearly readable or it is also a late-out.

Unless we go to different time cards, please use the bottom of our current card to imprint your arrival time. Use of the clock will only be required for arrival time. Punching out will not be required.

Punching-in another employee will be grounds for discipline up to and including discharge.

To: All Coach Operators
From: Rex Cass, Transit Manager
Date: January 30, 1990
Re: Update: Lateout Workrule

So that our department work rules can be consistent with the New Administrative Policies (effective 15, (sic) 1990), the penalty provisions of:

Work Rule - Lateouts (effective November 13, 1984)

are changed as follows:

1st Occurence (sic) within twelve months - Verbal Warning

2nd Occurence (sic) within twelve months - Warning Letter

3rd Occurence (sic) within twelve months - Warning Letter and one (1) two (2) three (3) days off discipline without pay

4th Occurence (sic) within twelve months - Warning Letter and five (5) days off discipline without pay

5th Occurence (sic) within twelve months - Discharge

February 15, 1990 is the effective date of change.

A copy of the suspended memo which established the work rules is attached for a reference.

If you have any questions or comments about this please see me at your earliest convenience.

BACKGROUND

The City of Stevens Point operates a municipal bus system. The grievant, in this case, had been employed by the City Transit Department since September, 1983, and at the time of his discharge was a bus driver. The grievant last worked on June 6, 1991, when he was suspended pending an investigation of his 6th late-out within the preceding 12 months. On June 14, 1991, Transit Manager, Cass, advised the grievant that he was discharged.

The record evidence establishes that pursuant to the City's late-out policy the grievant was disciplined on June 11, 1990, August 2, 1990, January 14, 1991, March 7, 1991, and April 22, 1991, for violations of the City's late-out policy. That policy, which was first adopted in 1984 defined a "late-out" as "failing to physically report to the transit garage at or before the established report time for all assigned work." Prior to this arbitration proceeding, none of the grievant's earlier late-out violations and accompanying discipline were grieved.

The City contends that the transit system functions on providing timely service to its riders. The rule with respect to late-out is a longstanding rule which is designed to ensure that the City can provide prompt bus service. The rule provides for established penalties such that the employes are aware of the consequences of failure to comply with the rule. In this case, the grievant incurred six late-outs and was progressively disciplined for those incidents leading up to the June 6 violation which culminated in his discharge. None of the prior incidents were contested through the grievance procedure and all of the discipline imposed had been served by the grievant. Consequently, the City contends the grievant's discharge was based on the principles of progressive discipline for continued violation of a rule of which the grievant was knowledgeable. For these reasons the City believes the grievance should be denied and the discharge sustained.

The Union contends that the City failed to appropriately investigate the circumstances surrounding the grievant's alleged violation of the late-out policy on June 6, 1991, prior to imposing the discharge. The Union points to the failure of the City to confront the grievant concerning the incident of June 6 and thus afford him an opportunity to explain the circumstances surrounding his late-out. Also, the City did not afford the grievant an opportunity to explain the circumstances surrounding his previous late-outs in an attempt to establish why the earlier discipline was inappropriate and should not be relied upon to support discharge in this case. Also, the Union contends that the late-out rules are unfair and excessive; and for that matter are not in evidence in this case. The Union points to the title page of the work rules and table of contents referencing certain page numbers wherein the late-out rules appear, but asserts the City never introduced those pages at the hearing. Rather, a set of memorandums were introduced, but those memorandums clearly are not a part of the City's official work rules. Further, the Union argues that the rule is excessive and/or unreasonable when it provides that there can only be one circumstance considered as a valid extenuating circumstance for a late-out - if it can be irrevocably shown that the Transit Manger or clerical staff were unclear in communicating work assignments to employes. This ignores many potential legitimate explanations for dismissing a late-out.

Finally, the Union insists there are legitimate explanations excusing all of the grievants' late-outs, but the one on June 11, 1990, which the grievant admits was not excusable. Further, the Union asserts that the testimony establishes that the grievant could have made it to work on time on June 6; but was told not to report by the Transit Manager when he called in some seven or eight minutes prior to the start of his scheduled bus run and said he had overslept. For all of the above reasons the Union concludes that the disciplinary procedure involving the grievant's discharge was unfair, the rules are unfair, and therefore the grievance should be sustained and the grievant's discharge overturned. As a part of the remedy, if the undersigned finds that the grievance should be sustained, the Union also asks that attorney's fees be awarded to compensate the grievant for expenses incurred in hiring an attorney to represent him at his unemployment compensation hearing.

There are several relevant facts in this case which are not disputed. The grievant, on June 6, 1991, did not report for work 15 minutes prior to his scheduled starting time of 3:30 p.m. He did call in at or about 3:21 p.m. and was told not to report for work. This was the grievant's 6th late-out in a 12 month period. The progressive discipline scheme under the City's late-out work rule provided that an employe could be discharged after his 5th late-out in a 12 month period. The grievant was knowledgeable of the work rule, and had not grieved any of the prior progressive disciplinary actions taken by the City for his previous five late-outs.

The Union would have the undersigned review the circumstances surrounding the grievant's prior late-outs to determine if disciplinary action taken in those cases was appropriate. The Union believes that several of those incidents should have been excused and no disciplinary action imposed. However, the correctness of the Union's position with regard to the prior disciplinary actions is beyond the reach of this Arbitrator. It is a well established arbitrable principle that it is inappropriate to put on trial prior disciplinary actions which were not grieved. 1/ In this case, it is undisputed that grievances were not filed regarding discipline taken against the grievant for prior late-outs which form the pattern of progressive discipline which the City relies on to sustain its decision to discharge. The Union explains the failure to grieve by stating that the grievant was under the impression, based on information he had been told by other Union representatives, that he could not file grievances because of an agreement between the Union and the City in resolution of a prior grievance concerning a late-out. Further, the Union contends that the rule itself which it believes is unreasonable, precludes the filing of grievances over the work rule and/or violations of it.

The undersigned has analyzed the memo of February 1, 1988, which restates the City's late-out policy as well as the March 10, 1989 grievance resolution. The rule itself does not state that grievances are prohibited, however, it does state that the only excuse that will be accepted for dismissing a late-out is to establish that City staff was unclear in communicating the work assignment to an operator or failed to contact an operator by the established procedures. Thus, while it might be fruitless to file grievances wherein an employe believes he/she has an arguable excused late-out, that in and of itself does not preclude the filing of grievances. However, the March 10, 1989, grievance resolution does bind the Union to "withdraw any current and/or future grievance of the work rule concerning late-out and proper punch-in procedures outlined in the memo of February 3, 1988." It goes on to state further that the Union in essence agrees that failure on the part of any driver to properly

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1/ McDonnell Douglas Corp., 51 LA 1076 (1968); United Engineering and Foundry Company, 50 LA 1118 (1968).

punch-in will result in a late-out. While the Union may now believe that its representatives who entered into the March 10, 1989, grievance resolution were ill advised in doing so, the fact remains that none of the grievant's late-outs prior to the June 6, 1991, incident were ever challenged. Thus, his disciplinary record stands and I cannot now go back and reopen that record.

Furthermore, and just as importantly, the grievance resolution also precludes challenge of the reasonableness of the rule on its face at this time as well. Again, even though the Union will argue its representatives were ill advised to affirm the reasonableness of the City late-out policy, the Arbitrator is not at liberty to now commence a de novo review of that policy where both parties have already agreed to its reasonableness.

Thus, the only remaining aspect of the City's decision to discharge the grievant concerns whether the grievant failed to report, as required, 15 minutes prior to the start of his scheduled shift on June 6, and if not, can his failure to do so be excused under the late-out work rule. It is undisputed that the grievant did not report in 15 minutes prior to his scheduled start time. He admits that he called in at 3:21 or 3:22 p.m. to advise the City that he had overslept. The Union insists that he could have gotten to the transit facility in time to commence his run at 3:30 p.m. inasmuch as he only lived a few blocks away, but that he was thwarted in his attempt to do so by the Transit Manager who advised him not to report. Whether he could or couldn't have gotten to the transit facility in time to commence his run at 3:30 p.m. is irrelevant to the inquiry as to whether he violated the City's late-out policy. The late-out policy requires that he report 15 minutes prior to the start of his scheduled run. In this instance, there is no dispute that he did not, and therefore was in violation of the work rule. Furthermore, the work rule only contemplates miscommunication between the driver and transit management over the scheduling of routes as a basis for excusing a late-out. There is no contention in this case that the grievant was confused as to when he should report to work. Rather, his explanation was that he had overslept after having completed his morning run and that he attributed his oversleeping to having to care for his terminally ill mother. While the undersigned can appreciate that his personal circumstances might have caused him considerable fatigue which could ultimately have led to his oversleeping, under this work rule an inquiry into whether mitigating circumstances should be considered is outside of the Arbitrator's authority.

Finally, the grievant may be confused as to why the unemployment compensation proceedings found that he was entitled to unemployment compensation whereas in this proceeding his discharge is being upheld. The answer lies in the foregoing analysis as well as the standards being applied by the unemployment compensation examiners in their determination as to the grievant's eligibility for unemployment compensation. Under their analysis, in order to disqualify an employe from benefits his/her conduct must evince willful or want on disregard of an employer's interest as is found in "deliberate violations or disregard of standards of behavior which the Employer has the right to expect of his employes." The unemployment compensation examiner, found "the employe's conduct was not sufficiently blameworthy with respect to his incidents of tardiness in 1991, to conclude that "his actions evinced a wilful disregard of the employer's interest." For those reasons, the grievant was not denied unemployment compensation.

Based upon the foregoing and the record as a whole, the undersigned enters the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 15th day of April, 1992.

By _____
Thomas L. Yaeger, Arbitrator