BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**TEAMSTERS, CHAUFFEURS AND HELPERS UNION,
LOCAL UNION NO. 43, Racine, Wisconsin,
affiliated with the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

and

**TRANSIT MANAGEMENT OF RACINE, INC.,
a Wisconsin Corporation**

Case 4
No. 57062
A-5732

*(Grievance of Bernard Little)*

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Appearances:

**Mr. Jonathan M. Conti,** Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters, Chauffeurs and Helpers Union, Local Union No. 43, Racine, Wisconsin, affiliated with the International Brotherhood of Teamsters, which is referred to below as the Union.

**Mr. Thomas A. Secrest,** Labor Relations Counsel, Ryder Public Transportation Services, Inc., 705 Central Avenue, Suite 500, Cincinnati, Ohio 45202, appearing on behalf of Transit Management of Racine, Inc., a Wisconsin Corporation, which is referred to below as the Employer, or as the Company.

## ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Bernard Little, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a

member of its staff. Hearing on the matter was conducted on April 15, 1999, in Racine, Wisconsin. No transcript was prepared of the hearing. The parties filed briefs by May 19, 1999.

## ISSUES

The parties stipulated the following issues for decision:

Did the Employer have just cause to discharge the Grievant?

If not, what is the appropriate remedy?

## RELEVANT CONTRACT PROVISIONS

**ARTICLE 9. POSTED RULES**

It is agreed between the parties hereto that any Employer posted rules that have been approved by the Union must be observed by the employees. . . .

The following rules and regulations as set forth and the penalties to be charged for the violations of these rules are placed into effect so that all employees may know what duties are required of them in the general conduct of the Employer's business. . . .

**3. CONDUCT**

. . .

| | | |
|---|---|---|
| (c) | Drinking or use of drugs at anytime prior to reporting for work where employees' condition is such that it may affect the proper performance of duties | Penalties—See Appendix "A" Alcohol & Substance Abuse Policy |

. . .

**ARTICLE 14. MANAGEMENT RIGHTS**

The Employer possesses the sole right to operate the mass transit system and all management rights repose in it, but such rights must be exercised consistently with



the other provisions of this agreement and the past practices in the departments covered by the terms of this agreement, unless such practices are modified by this agreement or by the Employer under rights conferred upon it by this agreement or the work rules established by the Employer. These rights which are normally exercised by the Employer include but are not limited to the following:

. . .

2. To . . . discharge and take other disciplinary action against employees for just cause . . .

In addition to the management rights listed above, the powers of authority which the Employer has not officially abridged, delegated or modified by this agreement are retained by the Employer. The Union recognizes the exclusive right of the Employer to establish reasonable work rules.

The Union and the employees agree that they will not attempt to abridge these management rights and the Employer agrees that he will not use these management rights to interfere with rights established under this agreement. . . .

**APPENDIX A**
**Transit Management of Racine, Inc.**
**Alcohol & Substance Abuse Policy**

## I. STATEMENT OF POLICY

Transit Management of Racine, Inc. recognizes that the use and/or abuse of alcohol or controlled substances by drivers of commercial vehicles presents a serious threat to the safety and health of driver and the general public. It is the policy of Transit Management of Racine, Inc. that its employees who perform safety sensitive functions should be free of alcohol and drugs. In order to further Transit Management of Racine's goal of obtaining an alcohol-free and drug free transportation system, and to comply with the Omnibus Transportation Employee Testing Act of 1991, Transit Management of Racine, Inc. has implemented a drug and alcohol testing program which is designed to help reduce and avoid traffic accidents and injuries to our employees and the general public, to discourage alcohol and substance abuse, and to reduce absenteeism, accidents, health care costs, and other alcohol and drug-related problems.

. . .

**VI. PROHIBITED USE OF CONTROLLED SUBSTANCES**

The unauthorzied use of any controlled substance is strictly prohibited in all situations.

**VII. REQUIRED TESTS**

. . .

1. **Pre-employment** . . .
2. **Reasonable Suspicion Testing** . . .
3. **Random Testing** . . .
4. **Post-Accident Testing** . . .
5. **Return-to-Duty/Follow-Up Testing** . . .
6. **Voluntary Testing** . . .

**VIII. Test Procedures**

. . .

**B.) CONTROLLED SUBSTANCES**

. . .

**2. Results Of A Positive Test**

Any employee who test (sic) positive for controlled substances shall be sujbject (sic) to discipline, up to an (sic) including termination. As with an alcohol misuse violation, Transit Management of Racine, Inc. is required to act upon a positive drug test result in the following manner:

**3. Disciplinary Action**

**FIRST OFFENSE**

a) Remove the employee from the safety-sensitive position. . . .
b) Refer the employee to An EAP for assessment and subsequent compliance

with recommended rehabilitation after a determination of a drug problem has been made;



c) Employee must be evaluated by a substance abuse professional or MRO and determined to be fit to return to work prior to their release of the employee;
d) Employee must have a negative result on a return-to-duty drug test. Follow-up testing to monitor the employee's continued abstinence from drug use will be required for 36 months.

**SECOND OFFENSE** (within 36 months)

a) Immediate termination.

## IX. EMPLOYMENT ASSESSMENT

Any safety-sensitive employee who test (sic) positive for the presence of illegal drugs or alcohol above the minimum thresholds set forth in the policy, shall be referred for evaluation by Transit Managment of Racine, Inc's EAP provider . . .

Assessment by a substance abuse professional or participation in Transit Management of Racine Inc's Employee Assistance Program does no (sic) shield an employee from disciplinary action or guarantee employment or reinstatement with Transit Management of Racine, Inc. . . .

## MEMORANDUM OF UNDERSTANDING

It is hereby agreed by the undersigned parties . . . that the Employer's Drug and Alcohol Policy shall be enforced as a work rule to applicable members of the Union, as modified only as follows:

1.) The Employer shall not discharge an employee for testing "positive" the first time under the new policy unless a dischargeable offense occurs which is directly related to a positive drug or alcohol test. . . . .

5.) Transit Management of Racine, Inc. recognizes the right of the Union to grieve any and all disciplinary actions taken subject to the just cause standard. . . .

## BACKGROUND

The grievance form, filed on September 1, 1998, states the "COMPLAINT IN DETAIL" thus:

> I was unable to attend my Drug Rehabilitation Class on 8-19-98 because of a medical Problem, and as a result I was unfairly terminated. To resolve this Grievance I am requesting that I be reinstated immediately with all Back Wages and Benefits.

Steven K. Rogstad, the Employer's Operations Manager, issued a letter of termination, dated August 26, 1998, to the Grievant. That letter states:

> On October 6, 1997 you were admitted to the Outpatient Program at Behavioral Health Services with All Saints . . . as a result of testing positive at work for cocaine. A letter was sent to the company on October 27, stating that you were chemically free as a result of your last UA and could return to work. However, you failed to comply with continued participation in the treatment program, and were discharged from the program for noncompliance on December 4, 1997. All Saints, however, did not notify the company of your disqualification from the program.
>
> On July 2, 1998 you tested positive again for cocaine as part of a standard Department of Transportation (D.O.T.) physical examination from All Saints Medical Group. The physical examination was determined to be necessary because of job-related performance, and your voluntarily informing us of an incident in which you were found to be wandering incoherently in a Racine park on the evening of June 23.
>
> The company was subsequently notified by yourself and St. Luke's Hospital that you were transported to St. Luke's Hospital and admitted into the hospital's crisis center after being examined by emergency room personnel. You were advised by a psychologist that evening to enroll yourself into the hospital's drug rehabilitation program. You were subsequently referred to the Outpatient Program in the Behavioral Health Services department at All Saints Healthcare System for rehabilitation treatment, under the direction of James E. Mason, M.A., CADC III, Psychotherapist.
>
> On July 7, 1998, at 10:00 a.m., a telephone conference call took place between John Diers, General Manager, Steven Rogstad, Operations Manager, and yourself about your enrollment in the treatment program. During that discussion you agreed to (1) complete the requirements of the program as set forth by Mr. Mason, (2) submit to frequent drug testing by both All Saints

your fitness to operate a mass transit coach. It was agreed that your participation in the treatment program was a "last chance" agreement between yourself and TMR to retain your employment, and that management's actions are consistent with the Alcohol & Substance Abuse Policy contained in the current Labor Agreement. You were given a letter summarzing the telephone conversation later that day.

On July 27, 1998, at 4:00 p.m., a meeting was held at St. Luke's Hospital to discuss your participation in the All Saints program. Present were Mr. Diers, Mr. Mason, and Walter Coney, Steward for Teamsters Local #43, and yourself. During that discussion you were informed of your noncompliance with the requirements of the treatment program. You were directed to fully cooperate with the terms of the program to satisfy its requirements, and retain your employment. You agreed to do so.

On August 21, 1998, you were discharged from the Outpatient Program at All Saints for failure to comply with your personalized treatment plan. In a letter to you from James Mason on August 21, 1998, he informed you that your participation was thoroughly discussed by the entire staff in the Outpatient Program. It was a unanimous decision, with Dr. James Miller concurring, that you be disqualified for non-compliance.

On August 26, 1998, from 10:00 - 10:30 a.m., a meeting was held in the office of John Diers to discuss your employment status with the company. Present at the meeting were Mr. Diers, Mr. Rogstad, Mr. Coney, George Nicks, Associate Steward, Carol Davis, Secretary, and yourself. Mr. Diers explained to you that your discharge from the treatment program for non-compliance was a violation of the corporate Alcohol & Substance Abuse Policy, and disqualified you from retaining your employment with Transit Management of Racine, Inc.

Therefore, effective immediately, we are terminating your employment with the company.

The decision to terminate your employment is based upon your failure to conform to the Alcohol & Substance Abuse Policy, which is part of the Labor Agreement between TMR and Teamsters Local #43.

We recommend that you follow the advice of James Mason and contact

St. Clair House . . . for continued rehabilitation.



Because the testimony poses disputed facts, the background which follows will first sketch the core of undisputed facts, then give an overview of witness testimony.

In early October of 1997, the Employer, as part of a round of random testing, directed the Grievant to submit to a drug test. He did so, and tested positive for cocaine. This was the Grievant's first positive test. As a result of testing positive for cocaine, the Grievant was suspended from work, and admitted to a thirty-day outpatient rehabilitation program at All Saints Medical Center. All Saints is the Employer's EAP provider.

After completing the thirty-day outpatient program, the Grievant returned to his position as a bus driver for the Employer. Prior to his discharge, he had been so employed by the Company for roughly twenty years.

Sometime in late June of 1998, the Grievant, used sufficient cocaine at a party that he wandered from the party into a Racine City park, sufficiently disoriented that he had to be assisted to a hospital emergency room. Sometime after that he voluntarily re-entered a rehabilitation program at All Saints. One of his care providers was James Mason, a Psychotherapist.

In a letter to Diers dated June 29, 1998, Mason summarized the Grievant's care status thus:

> Per our recent phone conversations, this is to verify that (the Grievant) did not attend his scheduled appointment in the intensive Outpatient Program on June 25, 1998.
>
> On June 26, 1998, he did arrive for the IOP sessions, but was assessed as intoxicated by the counselor conducting IOP. (The Grievant) admitted to using cocaine earlier that same afternoon. He was referred to the Emergency Room who made arrangements for him to live at the Crisis Center over the weekend.
>
> Today, (the Grievant) contacted me by phone. I expressed to him my grave concerns over his motivation for treatment, which he appears to be using primarily as a vehicle to maintain his employment, as opposed to seeking treatment in order to remain chemically free. (The Grievant) did not dispute my observations.
>
> I informed him that we were willing to help him, but any further use of chemicals or non-compliance with attendance will result in his discharge from Outpatient with a referral to a higher level of care.

(The Grievant) said he understood me quite clearly.



Sometime on July 1, the Grievant phoned the Employer to discuss his situation. The following day, the Grievant submitted to a physical examination, which revealed, among other things, an abnormal ECG. As a result, the Grievant made an appointment to see his personal physician, Dr. Jose Reyes.

In a letter to the Grievant dated July 7, 1998, Rogstad stated the Employer's view of the events of the first week of July thus:

> This letter serves as confirmation of a conference telephone call on July 1, 1998, at 10:00 a.m., in which you, John Diers, and myself discussed your current enrollment in a rehabilitation program through All Saints Medical Group.
>
> During the discussion you agreed to (1) complete the requirements of the program as set forth by Mr. James E. Mason, (2) submit to frequent drug testing by both All Saints Medical Group and Transit Management of Racine, Inc., and (3) submit to a standard Department of Transportation (D.O.T.) physical in order to determine your fitness to operate a mass transit coach.
>
> Dr. Donald N. Garland performed a D.O.T. physical for you on July 2, 1998, and has informed me that he will not release you to return to work until you have satisfactorily completed the rehabilitation program.
>
> Therefore, you will not be returning to work until both Mr. Mason and Dr. Garland are satisfied that you are free of substance abuse, satisfactorily completed the program, and fit to drive.
>
> Your enrollment into the rehabilitation program is a "last chance" agreement between you and TMR to retain your employment. Any positive test results for drugs and/or alcohol within the ensuing 36 months will result in your immediate dismissal from employment with the company. Moreover, management's actions are consistent with the Alcohol & Substance Abuse Policy contained in the current Labor Agreement.
>
> You are instructed to communicate with me on a weekly basis, providing an update on your activities connected with your rehabilitation program.

> I wish you the best of health as you proceed with your program's requirements, and look forward to hearing from you.



The Grievant did not seek and was not offered Union representation for this phone conference. No Union representative was aware of it until well after the "last chance agreement" had been agreed to. Rogstad did not "cc" a Union representative on the July 7 letter.

The Grievant was enrolled in the rehabilitation program throughout July, but as the month progressed, issues concerning his satisfactory completion of the program arose. These issues became the subject of a meeting involving Diers, Mason, a Union representative and the Grievant. The meeting took place on July 27, 1998.

On August 18, 1998, the Grievant consulted with Dr. Reyes, who determined the Grievant was suffering from high blood pressure. He prescribed medication for the condition, and provided the Grievant with samples of the prescription to take until he could fill the prescription. The Grievant did not inform Reyes he was taking an over-the-counter medication for a cold. The following day, he felt ill.

The Grievant had a therapy session scheduled for August 19, 1998. Sometime shortly before the session, he phoned All Saints to advise Mason that he would not attend the session. Mason hung up before the Grievant felt he could adequately explain the basis for the absence.

In a letter to the Grievant dated August 21, 1998, Mason stated the following:

> With this letter I am informing you that you are discharged from the Outpatient Program of All Saints, due to your failure to attend the required Aftercare Group session on August 19, 1998. This matter was thoroughly discussed by our entire staff and was a unanimous decision, with Dr. James Miller concurring.
>
> During the Employer Conference of 7/27/98 and during our last individualized session of 8/18/98, your treatment plan was thoroughly reviewed, including the stipulation that if you were non-compliant, you would be discharged. You agreed to those terms on both occasions.
>
> I would recommend you contact St. Clair House for residential treatment . . . and continue attending 12-Step Meetings.

Mason issued a copy of this letter to Diers, who summoned the Grievant to the August 26, 1998 meeting noted above. When the Grievant received Mason's letter, he returned to Reyes. After a consultation which included rechecking the Grievant's blood pressure, Reyes gave the Grievant a

memo addressed "TO Whom It May Concern," dated August 25, 1998. That memo states:



> Please excuse the above named patient from his after care group session that was held on August 19, 1998. Due to Severe gastroenteritis, and dehydration and bronchitis. IF you have any questions please feel free to contact me at my office.

The Grievant supplied this memo to the Company on August 25.

The balance of the background is best set forth as an overview of witness testimony.

**Steven Rogstad**

Rogstad noted that the Drug and Alcohol Testing program has been included in the labor agreement since 1996, and was the result of collective bargaining. Mason notified the Employer in the final week of June, 1998, that the Grievant's release to work the prior November had been conditioned on his attendance at after-care sessions. The Grievant had not attended such sessions. This was the Employer's first notice that the release to return to work was conditional and the condition had not been met.

Sometime around 6:00 a.m. on June 24, the Grievant phoned Rogstad. He advised Rogstad that he was home, but had been found wandering, totally disoriented, through a City park. Friends at the party he had attended called the police after the Grievant wandered from the party. The police found the Grievant and took him to an emergency room. Two psychiatrists examined him when he regained consciousness, and advised him to stay and enter rehab. The Grievant declined, and returned home. The Hospital phoned him at home to again urge him to enter rehab. The Grievant then decided to phone Rogstad and ask his advice.

Rogstad informed the Grievant he would not contradict the doctors, and advised him to seriously consider their recommendation. He characterized his advice to be that he "strongly suggested" but did not order the Grievant to enroll in a rehab program. The Grievant responded that he would call the hospital again. When Rogstad phoned the Grievant later that morning, he learned that the Grievant had voluntarily entered a rehab program. Rogstad believed he could have asked the Grievant to report for work, then tested the Grievant to yield a mandatory discharge. He noted the Grievant's willingness to enter rehab made this course of action inapprorpriate. He acknowledged that in the absence of this phone call, he would not have had reasonable suspicion to test the Grievant.

Rogstad's next direct contact with the Grievant came on July 1, when he was asked by Diers to join on a telephone conference call with the Grievant. That conference started

sometime before Rogstad was asked to join. During that call, Rogstad and Diers informed the Grievant that he could return to work only if he successfully completed a full rehabilitation program. Rogstad acknowledged that the phone conversation did not include all of the detail



of the July 7, 1998 letter, but stated that the Employer clearly informed the Grievant that a failure to successfully complete the rehab program meant discharge.

Rogstad did not attend the July 27, 1998 meeting, and next heard directly from the Grievant on August 21, 1998. On that date, the Grievant phoned Rogstad to state that he had completed the All Saints program and wished to return to work. Mason's letter of August 21 precluded this, and prompted the August 26 meeting, which confirmed the Grievant's discharge. Rogstad acknowledged that the Grievant supplied the Employer with Reyes' August 25 memo. He noted, however, that the Employer did not know specifically why Mason had expelled the Grievant from the rehab program. He viewed the August 19 absence as the "straw that broke the camel's back," but felt that Mason had longstanding questions concerning the Grievant's comittment to rehabilitation. From his perspective, Reyes' memo was dated and did not address the fundamental issue of compliance with the rehab program.

Rogstad acknowledged that the Grievant was a long-term employe and that the decision to discharge came "much to our dismay." He did not, however, see the Grievant's work record as spotless, noting prior discipline for tardiness and absenteeism.

**John Diers**

Diers testified that from early in the Grievant's 1998 rehabilitation, Mason voiced concern regarding the Grievant's desire to get and to stay clean. Mason noted the Grievant continued to test positive and was missing sessions. He noted his "rather grave concerns" that the Grievant would not complete the program. Diers, in at least one phone conversation, passed these concerns on to the Grievant, warning him that he was putting his long years of service at risk.

Diers and Rogstad communicated the last chance agreement summarized in the July 7 letter in the hope that the Grievant would take the warning and commit to rehab. Later in July, however, Mason again phoned Diers to inform him that he believed the Grievant would end up expelled from the program. At that point, it was decided that a meeting would be held to highlight for the Grievant the dire situation he was in. That meeting took place on July 27 at a hospital with which All Saints is affiliated. The Grievant, a Union representative, Mason and Diers met to discuss with the Grievant the compelling need for him to get and to stay clean. Mason informed the Grievant that if he did not start to test clean and to attend each care session, he would be expelled from the program. Diers underscored this by pointing out that if the Grievant did not successfully complete the program, he would give up his seniority and all his benefits.

This effort, in Diers' view, failed. With the Grievant's expulsion from the rehab program, his discharge was inevitable. The August 26, 1998, meeting confirmed this. The Grievant was, in Diers' view, in denial and argumentative throughout that meeting.

Diers acknowledged he could not remember who initiated the July 1, 1998 phone conference, and that the conference did not address all the specifics of the All Saints program. Rather, he and Rogstad impressed on the Grievant how important it was for him to successfully complete that program. Diers further acknowledged no Employer representative ever informed the Grievant that a failure to attend any specific therapy session would result in discharge.

**The Grievant**

The Grievant noted that no one from All Saints informed him that his October, 1997 release to return to work was conditioned on attending after-care therapy. He did not learn that Mason believed this until the discharge meeting of August 26, 1998.

Family problems, including a death, brought him back to cocaine in June of 1998. He noted he did not phone the Employer until July 1 to advise them of his relapse. He phoned the Employer, which routes calls through Rogstad. Rogstad then added Diers to the conversation. He had, by the time of this call, voluntarily entered a rehab program at All Saints. He called the Employer because someone had informed him that he risked being terminated if he did not obtain some leave from the Employer. He did not seek Union representation.

During the July 1 conversation, Rogstad and Diers informed the Grievant that he had to successfully complete the rehabilitation program. They did not, however, inform him that missing a single meeting could bring about his discharge.

The meeting of July 27 included, besides himself, a Union representative, Mason and Diers. The meeting was to highlight that the program was nearing its completion, but that he did not yet have enough clean time to be released to work. Mason highlighted the classes he would have to attend and informed him that he needed perhaps two weeks of clean time to be released from the program. If he attended the classes and stayed clean, he would be graduated from the program. He acknowledged he was testing positive for cocaine throughout July of 1998.

The August 18 visit to Reyes caused the illness which kept him from attending the August 19 meeting. He did not realize his cold medication would conflict with his blood

pressure prescription. They did, however, and on August 19 he experienced nausea, diarrhea and dizziness. He waited until shortly before the therapy session to call in his absence



because he hoped his symptoms would ease so that he could make the session. When he called in, Mason had no interest in listening to him, simply hanging up before he could explain the absence.

Mason's letter of August 21 came as a shock to him, and he went to Reyes as soon as he could after receiving it. He mailed a copy of Reyes' August 25 memo to Mason and hand delivered a copy to the Employer. The following day none of the meeting participants seemed to care about Reyes' memo.

After his discharge, he called friends and family members. A cousin told him that he should get into rehab as soon as possible. The Grievant voluntarily entered a forty-five day in-house rehab program at St. Clair House. He was, at the time he entered, "really down." The program proved to be very difficult and intense, but he completed it successfully. Upon his completion of the program, he received the following memo from Steven Essiembre, a Counselor/Manager at St. Clair House.

> (The Grievant) voluntarily admitted himself into the Genesis St.Clair House, a men's 45-day residential treatment facility of AODA issues on 09-23-98. During (his) course in rehabilitation, it was determined that his motivation for being in treatment was to save his employment as a bus driver for the city. However, as treatment progress(ed), (he) began seeking sobriety for himself. During his stay, (he) appeared reluctant to put in all of his efforts in participation and assignments, (he) used excuses such as his age and lack of education. With (the Grievant) behind by several assignments, his stay at the St.C(l)air House was extended for an additional week. With staff encouragement, (he) was able to complete all of his assignments on time, and was discharged on 11-09-98 with a status of completed rehabiliation program.
>
> If you have any further questions about (his) course in rehabilitation, please feel free to contact me . . .

He attributed the success of his stay at St. Clair House to the more intense nature of the program. At St. Clair, he had greater contact with care-givers, prayer sessions and a wider variety of counseling. He has been clean since the end of July, 1998. He regularly attends after-care sessions. At the time of hearing, he was attending between two to five such meetings a week. He characterized himself as a good worker, with no history of disciplinary suspension.

The Grievant specifically denied phoning Rogstad on June 24. He noted he did not phone the Employer until July 1, after he had entered rehab. He thought he was on active

status as a driver between June 23 and July 1. He stated that the July 27 meeting was to clarify how he could return to work. The August 19, 1998 therapy session was the only



session he missed. He specifically denied Mason ever informed him that a failure to attend meetings would result in his expulsion from the rehabilitation program. He also denied that Mason ever questioned his motivation for entering rehab.

Further facts will be set forth in the **DISCUSSION** section below.

## THE PARTIES' POSITIONS

### The Employer's Brief

After a review of the evidence, the Employer notes that "evidence and testimony . . . clearly established that the Grievant, on at least two occasions in less than one year, engaged in illegal drug use." Significantly, one of those occasions followed an offer of rehabilitation from the Employer.

The Employer contends that "(o)verwhelming public policy supports the proposition that transit systems require that their bus drivers remain drug free." That policy is codified in the regulations of the United States Department of Transportation, and is underscored by a long line of decisions from federal courts. Beyond this, "Arbitrators have likewise upheld an employer's right to discharge an employee for testing positive for illegal drugs."

The facts posed here clearly fall within this public policy mandate. The Employer "could have simply drug tested the Grievant after his conversation with Mr. Rogstad on June 24, 1998," but chose instead to give "the Grievant the benefit of the doubt" by permitting him "to be away from work for an indefinite period and enter into a rehabilitation program." This leniency presumed, however, that the Grievant would complete the rehabilitation program. Since the Grievant failed to do so, "the Company was forced to discharge him from his position as a bus driver."

The Union's contention that the Grievant "never should have been taken out of service, regardless of his admitted cocaine use," seeks a "totally irresponsible, if not reprehensible" result. The Union effectively punishes the Employer for not immediately compelling a second drug test, which would have produced the second offense resulting in mandatory discharge. The Employer cannot reasonably be held accountable for the Grievant's failure to complete the rehabilitation program. Evidence adduced at hearing underscores this, since "the Grievant showed no remorse for his illegal drug use"; since he "refused to admit any wrongdoing"; and since he "placed the blame on others and denied most aspects of his attempt at rehabilitation." In sum, he "presented the classic case of denial."

Nor can the Union's evidence of "post discharge conduct" support a finding that the Employer lacked cause to discharge the Grievant. To find the Employer lacked cause to discharge based on conduct occurring well after the Grievant's failure to complete rehab "would be a reprehensible breach of public trust and an unfathomable safety risk." The Employer concludes the grievance must be denied in its entirety.

**The Union's Brief**

After a review of the evidence, the Union contends that the Employer has failed to bear its burden of proving that "the greievant committed the offense for which he was disciplined, that the offense is one for which discharge is an appropriate penalty and that the grievant knew or should have known that his conduct would subject him to discharge." That the Grievant "voluntarily disclosed to the Company that he was again using drugs and needed further help" and that "the Company would not have had reasonable suspicion to discharge him" in the absence of this disclosure are significant mitigating criteria under relevant arbitral precedent. Beyond this, the absence of Union representation during the "negotiation" of the Grievant's last chance agreement precludes a strict application of that agreement. That he was unaware "that a missed meeting due to illness results in discharge from the program and employment," makes discharge an "unduly harsh" penalty.

The Grievant's absence from the August 19, 1998 meeting is traceable not to "his unwillingness to abide by the terms of the agreement," but to illness brought on by the Grievant's combining of high blood pressure medication with an over-the-counter sinus medication. As certified by his physician, he "missed a group meeting session meeting because he was sick." The Grievant tried to attend the meeting, and waited until before the meeting to call in his absence only because he waited as long as possible for his symptoms to subside. His absence and his counselor's unwillingness to listen to his explanation are factors beyond the Grievant's control. Under relevant arbitral precedent these factors cannot warrant discharge. That the Grievant was unaware he could be discharged for this single absence affords further reason to conclude the Employer lacked cause for terminating his employment.

The Employer's justifications for the discharge will not withstand scrutiny. The asserted noncompliance with the October, 1997 rehabilitation ignores that neither the Employer nor the Grievant "were aware of (the Grievant's) 'noncompliance' until late June or early July, 1998." That All Saints "cleared (the Grievant) to return to work in October, 1997, and did not inform him that he was required to attend follow-up sessions once he returned to work" cannot be held against the Grievant. Similar considerations govern his subsequent dismissal from the program. The alleged missed meeting on June 25, 1998 and the alleged intoxication on June

26, 1998, predate the last chance agreement, and thus "should not have been part of the Company's decision to terminate (the Grievant)."



The evidence establishes that even though the Grievant "continued to test positive for cocaine into approximately mid-July, 1998" he "began the road to rehabilitation following his meeting with Diers and Mason on July 27." As directed at that meeting, he "immediately obtained a sponsor" and "stayed clean." A review of these facts in light of relevant arbitral precedent will not support a discharge based on an absence from a single group meeting in August of 1998.

Even if it is assumed that some discipline must be imposed for the Grievant's conduct, "discharge was too severe a penalty in this case considering the evidence of (his) post-discharge rehabilitation." More specifically, the Union points to the Grievant's self-enrollment and successful completion of "an intense, forty-five day, in-patient program at the St. Clair House." He regularly participates in ongoing after-care therapy meetings and "has been clean for approximately ten months and still has the same sponsor that he obtained on July 27, 1998." That he maintained a solid work record over his "approximately twenty years as a bus driver" further mitigates against discharge under relevant arbitral precedent.

The unique nature of addiction may require an addict to face a catastrophe before working back to sobriety. Whether the Grievant started on the road to recovery prior to or because of the discharge can not obscure the significance of his post-discharge effort to stay clean. Because arbitral precedent establishes that the "primary purpose of industrial discipline is to correct individual faults and to prevent future infractions, not to inflict punishment for wrongdoing," and that "it is generally thought that a return to employment is a necessary part of the total rehabilitation of an employee," it is necessary to return the Grievant to his livelihood. The Union concludes that "the Arbitrator should order the Company to reinstate (the Grievant) and make him whole."

## DISCUSSION

The stipulated issue questions whether the Employer had just cause to discharge the Grievant. Article 14, Section 2 states the just cause standard, which is made applicable to the Alcohol and Substance Abuse Policy, (the Policy) in Section 5 of the Memorandum of Understanding.

Because the parties have not stipulated the standards defining just cause, the analysis must, in my opinion, address two elements. First, the Company must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the Company must establish that the discipline imposed reasonably reflects that interest. This does not state a definitive analysis to be imposed on contracting parties. It does state a skeletal outline of the elements to be addressed and relies on the parties' arguments to flesh out that outline.

Application of the first element highlights the fundamental difference in the parties' factual views of the grievance. From the Employer's perspective, its disciplinary interest centers on the Grievant's inability to successfully complete a rehabilitation program. From the Union's perspective, the Employer's disciplinary interest centers on the Grievant's failure to attend a single therapy session.

That the Employer has a disciplinary interest in the Grievant's successful completion of the rehabilitation program is apparent. The second paragraph of Article IX of the Policy states the Employer's general disciplinary interest in this area. More specifically, the Policy is stated, at Article 9, Section 3, c, as a work rule. Under the first paragraph of the Memorandum of Understanding, the parties have agreed that the Policy "shall be enforced as a work rule." The specific dispute regarding the application of the first element is whether the work rule violation posed by the grievance is the Grievant's absence from a single therapy session or his inability to successfully complete the All Saints rehabilitation program.

Although the force of the Union's arguments must be noted, the evidence supports the Employer's contention that the Grievant's expulsion from the program rests on more than a single absence. From the Employer's perspective, the reasons for the expulsion are irrelevant, since the discharge can be rooted in the expulsion itself. This view is not, however, reconcilable to a just cause analysis. For example, an expulsion based on non-clinical reasons, such as personal dislike between counselor and client, can not be considered to withstand scrutiny under a just cause analysis. A single excusable absence arguably forms no more persuasive a basis to justify discipline.

The record establishes, however, that the Grievant was expelled from the rehabilitation program because he failed to commit to becoming and staying drug-free as required by the Policy. As the Union persuasively points out, the Grievant's failure to attend after-care following his October, 1997 rehabilitation cannot be held against him here since it is unproven that All Saints communicated this as a condition of his release to work. It forms, however, a troublesome background to his June, 1998 relapse. Whether the need for after-care had been clearly communicated or not, it is apparent the Grievant lacked the commitment to attend after-care in the absence of compulsion.

The evidence establishes the Grievant entered rehabilitation in June of 1998 reluctantly, and demonstrated a dubious commitment from the start of the program. Rogstad's credible testimony indicates the Grievant had difficulty accepting the recommendation of clinicians that he enter rehab. Mason's June 29, 1998 letter establishes that he was not clean, and was not attending scheduled meetings. This pattern proved sufficiently troubling that by late July, Diers and Mason agreed that something had to be done to put the "fear of God" into the

Grievant. This resulted in the meeting of July 27, but that meeting had a less than convincing impact. Mason's letter of August 21, 1998, highlights the Grievant's absence from the



August 19 meeting as the factor precipitating the expulsion, but the letter notes it was "a unanimous decision, with Dr. James Miller concurring." This points not to a single incident, but to a breakdown in the therapeutic process. Mason's letter recommends more intensive treatment at St. Clair House. Significantly, Essiembre's memo highlights the initially shallow nature of the Grievant's commitment to rehabilitation and the extension necessary for the Grievant to complete the program. Essiembre's memo also highlights that, to the Grievant's credit, his commitment grew in strength as the program progressed. This cannot, however, obscure that as of August 26, 1998, the Employer confronted an employe who failed to commit to rehabilitation. Significantly, on August 21, 1998, the Grievant phoned Rogstad, asserting that he had completed the program and wished to return to work.

Against this background, it is impossible to restrict the Employer's disciplinary interest in the Grievant's conduct to his absence from the August 19 meeting. Rather, the evidence establishes a course of conduct from June of 1998, which caused the Grievant's expulsion from the All Saints rehabilitation program. The Employer has a demonstrated disciplinary interest, under the Policy, in requiring the Grievant's successful completion of a rehabilitation program. Thus, the first element to the just cause analysis has been met.

This poses the second element of the just cause determination. The issue is whether the Employer's demonstrated disciplinary interest warranted the Grievant's discharge. The contractual basis for discharge is solid. The Policy represents a significant collective bargaining effort. It covers roughly thirteen pages of the labor agreement. Had the positive tests in June and July of 1998 come while the Grievant was in work status, there is no dispute that his discharge could have been based on Section VIII, B, 3, a (Second Offense) of the Policy, which requires "(i)mmediate termination" for a second positive test "(w)ithin 36 months." The strength of the Employer's position, however, flows from Section VIII, B, 3, b, (First Offense), which requires an employee referral to an EAP, "for assessment and subsequent compliance with recommended rehabilitation." The reference to "subsequent compliance" supports the Employer's conditioning the Grievant's return to work on a successful rehabilitation.

The Union persuasively contends that this solid contractual support cannot be considered unquestionable, and must be tempered by consideration of the Grievant's conduct and longevity. The positive tests of June and July, 1998, did not come while the Grievant was on work status, but as a result of his voluntary submission for treatment. That this can be relevant to determining the level of discipline has support in the first sentence of Section VIII, B, 2 and in the second paragraph of Article IX of the Policy, which imply there can be discretion in the level of discipline imposed for a positive test. The Union also cites arbitral

precedent permitting a reduction of discharge in cases of drug and alcohol abuse.



The persuasiveness of the Union's position ultimately turns on the Grievant's post-discharge effort at St. Clair House. The Employer's conditioning of his return to work on successful rehabilitation has contractual support in the specific terms of Section VIII, B, 3 of the Policy, which must be considered superior authority to the general terms of Section VIII, B, 2. The second sentence of Section VIII, B, 2 underscores this. The Grievant's long record of service must be acknowledged. The persuasive force of that service, however, turns on his successful rehabilitation at St. Clair House. Long service is not, under the Policy, a defense to a positive drug test.

Apart from the Grievant's post-discharge conduct, the Employer's decision to discharge the Grievant cannot be faulted under the labor agreement. The Policy affords employes who fail a drug test, but do not commit an offense otherwise warranting discharge, the chance to save their job by successfully completing rehabilitation. A second positive test within thirty-six months brings termination. The Employer afforded this opportunity to the Grievant in 1997 and effectively afforded it in 1998. As noted above, the Employer has the authority to condition a return to work on the successful completion of a rehabilitation program. The evidence establishes that Diers and Rogstad weighed the Grievant's length of service against his failure to complete rehabilitation. The decision to discharge was, in their views, regrettable but necessary. The evidence supports the reasonableness of their view as well as the contractual support for it.

From the Union's perspective, the application of the second element turns on whether the Employer can be compelled to honor the Grievant's post-discharge rehabilitation by reinstating him to work. The beneficial clinical and personal elements to this contention have force, but cannot on this record, supply the contractual basis required for an arbitrator to compel the result.

The basis for this conclusion is perhaps best explained by tying it more closely to the Union's arguments. The Union's citation of arbitral precedent, particularly EXXON COMPANY, U.S.A, 101 LA 997 (SERGENT, 1993) has persuasive force. The evidence, however, falls short of supporting the strength of the Union's post-hearing argument. Sergent characterized the record before him in EXXON thus:

> It is reasonable for the Company to demand compliance with the terms of the recovery program as a condition of employment and to enforce that requirement with discipline including discharge. However, where the lapses are minor, quickly made up and the result not of an unwillingness to comply but of good faith mistakes, discharge for the first such problem seems too harsh. 101 LA AT 1005.

Some parallel with this grievance is apparent. However, as noted above, the evidence falls short of establishing that the Grievant missed only one session due to illness. His lack of commitment to the process was stated by Mason in late June, prompted the July 27 meeting, and was noted by Essiembre in late September. Each person directly involved in the Grievant's care or who observed the results of that care noted a similar pattern.

Nor does the Grievant's testimony overcome this evidence. His assertion that he was in active work status until July 2 is unsupported by any other evidence. If true, the assertion weakens the grievance by establishing his working during a period he was using cocaine. His assertion that the July 27 meeting turned on no more than Mason's recommendation that he needed to have some more clean time before returning to work is dubious standing alone. Not surprisingly, it is not supported by any other evidence. Rogstad's testimony that the Grievant sought to return to work after being expelled from the All Saints rehabilitation program stands unrefuted.

The Grievant's testimony cannot be summarily dismissed as a simple credibility dispute between himself and others. The evidence affords no basis to dismiss the testimony of any of the witnesses as incredible. The Grievant's testimony manifests less a conscious misrepresentation of fact than a pattern of denial. That pattern led to and continued through the meeting of August 26. The Grievant's recounting of the events of June through August of 1998 notably omitted any frank recognition of personal responsibility for those events.

In sum, minor lapses in a conscientiously followed rehabilitation program were present in EXXON, but are not present here. As in EXXON, a last chance agreement was implemented without the union's direct input. Evidence of waiver is present here, which was not present in EXXON. The more significant point here, however, is that it is not necessary to strictly interpret the last chance agreement to note that the Grievant failed to successfully complete a rehabilitation program due to his own conduct up to the missed session of August 19. If his expulsion rested on that single absence, the parallel to EXXON could be more persuasive here. His expulsion, however, turned on the unanimous decision of his counselors, which is traceable to events beyond the August 19 absence.

The Union notes that the expulsion from the All Saints rehabilitation program may have been the catastrophe needed to spark the Grievant's desire to rehabilitate, and that in any event the purpose of contractual discipline is to rehabilitate improper behavior, not merely punish it. This force of this argument as a matter of rehabilitation therapy or as a matter of arbitral precedent cannot obscure that it must be given a contractual and factual basis. As noted above, however, the Policy is a detailed, collectively bargained procedure. Beyond this, the Policy has a basis in federal law. The presence of statutorily noted public safety issues, coupled with the

detailed, collectively bargained nature of the Policy afford little room for

arbitral inference beyond its stated provisions. Since the Employer followed its provisions, it is difficult to find a contractual basis for the result the Union seeks.

The evidence also poses factual difficulties with the result sought by the Union. The contention that the discharge motivated post-discharge rehabilitation warranting reinstatement is difficult to reconcile with the grievance's request for "all back wages and benefits." If the discharge of August 26 produced a level of commitment from the Grievant which the July 27 meeting failed to, the difference would appear to lie in the dire effects of termination. How rescinding the financial effect of the termination serves the therapeutic model is not immediately apparent. Beyond this, it is not apparent why the Grievant lapsed into drug abuse in 1997 and then relapsed in 1998, beyond his general statement that family problems prompted the relapse. The absence of detail on the events prompting the drug abuse makes it difficult to conclude that the abuse was a treatable, singular effect of a non-recurring cause.

None of the considerations noted above should be read to obscure that the Grievant's commitment to rehabilitation through the St. Clair House was significant and praiseworthy. The personal and moral dimensions of the grievance dwarf the contractual, but this must not obscure that an arbitrator has authority only over the contract. As of August 26, 1998, the Employer confronted the Grievant's expulsion from a rehabilitation program. In applying the Policy, Diers and Rogstad considered the significance of his service record and the risk of continuing him as a bus driver. They concluded that the Policy called for his discharge. The decision posed here is not whether any counselor or I would like to return the Grievant to work. Rather, the issue is whether the Employer's decision to discharge can be characterized as unreasonable under the labor agreement. It cannot, and thus the Employer has met the second element of the just cause determination.

## AWARD

The Employer did have just cause to discharge the Grievant.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 3rd day of June, 1999.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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