BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AMALGAMATED TRANSIT UNION
LOCAL DIVISION 1310

and

CITY OF EAU CLAIRE (TRANSIT)

Case 266
No. 64526
MA-12926

Appearances:

Davis, Birnbaum, Marcou, Seymour & Colgan, LLP, 300 Second Street North – Suite 300, PO Box 1297, LaCrosse, WI 54602-1297, by **James G. Birnbaum**, Attorney-at-Law, appearing on behalf of the Union.

Stephen Bohrer, Assistant City Attorney, City of Eau Claire, 203 S. Farwell Street, PO Box 5148, Eau Claire, WI 54702-5148, appearing on behalf of the City.

ARBITRATION AWARD

City of Eau Claire, hereafter City or Employer, and Amalgamated Transit Union, Local Division 1310, hereafter Union, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Following a request by the Union and the concurrence of the City, to appoint a staff member as arbitrator to hear and decide the instant grievance, the Commission appointed Coleen A. Burns. Hearing was held in Eau Claire, Wisconsin on May 3, 2005. The hearing was not transcribed and the record was closed on July 27, 2005, following the submission of written briefs.

ISSUES

The parties were unable to stipulate to a statement of the issues. The Union frames the issues as follows:

1. Did the City violate Article 2, Section 5, by suspending the Grievant without pay on June 12, 2004 for 10.4 hours?

2. If so, what is the appropriate remedy?

The City frames the issues as follows:

1. Did the City violate the 2002-03 collective bargaining agreement by suspending the Grievant without pay on June 12, 2004 for conduct which occurred on June 1, 2004?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

. . .

Article 2 – Union Security and Rights

. . .

Section 5. No member of the Amalgamated shall be disciplined or discharged by the City without just and sufficient cause, and any member suspended or discharged and later, through investigation and/or arbitration, is found not sufficiently guilty to warrant such suspension or discharge, shall be reinstated in his/her former position with continuous seniority rights and paid for all time lost at the regular rate.

. . .

Article 5 – Management Rights

Section 1. The Amalgamated agrees that the right to employ in accordance with the provisions of this agreement, promote, discipline and discharge employees, and the management of the property are reserved by and shall be vested in the City, and in connection therewith the City shall have the right to exercise discipline in the interest of good service and the proper conduct of its business; however, the City recognizes the right of its employees to bargain collectively on employer-employee matters that may arise from time to time.

BACKGROUND

Thomas Werlein, hereafter Grievant, has been employed by the City's transit system as a Part-time Bus Operator since September of 2001. On June 1, 2004, the Grievant was scheduled to drive Tripper Route 10 from 2:21 p.m. to 3:57 pm. At 12:50 p.m., the Grievant telephoned Transit Manager Gwen Van Den Heuvel and asked that she cover his shift because he was feeling lousy and could not drive. Van Den Heuvel replied "all right" and "I'll cover your shift."

Shortly thereafter, Van Den Heuvel notified the day shift Transit Supervisor Chuck Reinecke that the Grievant had reported sick. Reinecke stated that it was the day after a holiday, which caused Van Den Heuvel to think about the Grievant's sick leave report. Van Den Heuvel then recalled that, on days that the Grievant's son participated in high school athletics, the Grievant had made time requests to have the day off, or to protect against drafts, so that the Grievant could attend these games. Van Den Heuvel asked an office clerical to check the athletics schedules and learned that the Grievant's son's baseball team was playing a tournament game in Prescott, Wisconsin, at 5:00 p.m. that day. Based upon her experience that a drive from Eau Claire to Prescott was one and one-half hours, Van Den Heuvel suspected that the Grievant had called in sick to ensure that he would not be late for his son's baseball game.

Thereafter, Van Den Heuvel discussed the Grievant's sick leave report with the Grievant's immediate supervisor, Tom Wagener. Following this conversation, Wagener checked the office records and determined that the Grievant had not asked for time off or draft protection on that day. Van Den Heuvel asked that Wagener telephone the Grievant at home. When Wagener telephoned the Grievant's residence at 3:15 p.m., there was no answer. Suspecting that the Grievant had falsely reported sick, Van Den Heuvel directed Wagener to travel to Prescott to determine if the Grievant was at his son's game. Wagener observed the Grievant at the baseball game in Prescott and engaged the Grievant in conversation.

On June 4, 2004, the City met with Union representatives and the Grievant to discuss the events of June 1, 2004. On June 9, 2004, the Grievant received an "Employee Corrective Action Notice," which notified the Grievant that the City was imposing a "Written warning with Suspension" for conduct occurring on June 1, 2004, *e.g.*, violating Section 2.09, False Sick Report, of the Operator's Manual. Sec. 2.09 states as follows:

> Employees who fake illnesses in order to procure sick leave, avoid a miss, or to avoid working assigned work are subject to discipline up to and including discharge.

The Grievant's "Employee Corrective Action Notice" also stated that "Under conduct in the Discipline and Penalty Code, "Dishonesty of any kind in relations with the company concerning time, property or money" calls for a suspension or dismissal after the first offense." The Grievant's "One day suspension" was imposed on June 12, 2004 and was for 10.4 hours.

On or about June 21, 2004, a grievance was filed over the City's decision to discipline the Grievant. The grievance was denied and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

City

This Arbitrator has previously held that, under the just cause standard, the initial question to be answered is whether or not the Grievant has engaged in the misconduct for which he was disciplined. The record, as a whole, demonstrates that the Grievant's claim that he was sick is not credible.

The Grievant's claim to have experienced deteriorating health is contradicted by the fact that, prior to June 1, 2004, he did not complain of his health or miss any work. Despite his claim of blurred vision, the Grievant drove more than 85 miles to Prescott to watch his son's baseball game.

The City agrees that people often feel better after lying down for a rest. But such rest is suspect if that person has had a marked change in health within a relatively short period of time. If, at 3:20 p.m., the Grievant was well enough to decide that he could drive to his son's baseball game, then it is likely that he was well enough to drive a bus at 12:50 p.m. At 3:20 p.m., the Grievant had 37 minutes left on his work shift, which was a substantial percentage of time.

Prior to the game, the Grievant felt like a "target" and predicted in the car ride that the City would send someone to the game. Did the Grievant think that he might be "caught" at a place where he should not be and when he was supposed to be at home sick? The Grievant's wife's response suggests that she was preparing him for what to say or do if someone were to show up.

What the Grievant said and did not say at the baseball game indicates dishonesty. When Wagener approached the Grievant, the Grievant's wife asked if he was the Grievant's supervisor, reminding the Grievant of their conversation in the car and providing the Grievant with a few moments to collect himself over what to say.

One would expect the Grievant to explain something about his health to his supervisor, but he did not. Rather, he made an odd statement about "life goes on" in response to Wagener stating that he had hoped not to see the Grievant. The Grievant's comment can only be interpreted as a sarcastic remark about not being caught; which is how Wagener interpreted it.

During the game, the Grievant told Wagener that the reason he didn't seek vacation was because he did not think that he could get it. Within the entire circumstances, this is an admission that "it's better to not ask permission and then apologize later." Wagener's version and interpretation of the events at the ball game are more credible than those of the Grievant.

The Grievant's claim to have been sick is undermined by his testimony that, unless he had a heart attack or a stroke, he was not going to miss that game. In other words, the Grievant was so determined to make that game that he would do anything to be there. From the time of the investigation on June 4, 2004, until his physician's letter of August 20, 2004, the Grievant's health claims became inflated.

The material inconsistencies include the Grievant's use of Nyquil. It does not make sense that the Grievant would not know the effects of Nyquil or that he would risk his CDL while driving while compromised. The Grievant's attempts, during the June 4, 2004 investigation, to explain that there were higher standards for a CDL license than a regular driver's license, implies that the Grievant's condition had not really changed from the time that he called in sick and when he decided to drive to the game at 3:20 p.m.

According to the Grievant, his daughter and wife got off work at 2:45 p.m. and 3:00 p.m. respectively. The Grievant was very vague about how they knew that he would be picking them up to go to the game.

The credibility of the Grievant's brother is called into question by his claims that, when he and the Grievant discussed their plans at noon, there was no decision that the Grievant was not going to work; that when his brother called before 3:20 p.m., there was no answer and he assumed that the Grievant had gone to work; but rather than meeting the Grievant at work at 4:00 p.m., in accordance with their last plan, the Grievant's brother called the Grievant's home at 3:20 p.m. and that it was during this conversation that they decided to go to the game. If the Grievant's brother had truly assumed that his brother had gone to work, he would have simply driven to the terminal at 4:00 p.m.

The Grievant's brother gave an opinion that the Grievant's state of health on June 1, 2004 was "the same as I had seen before." If the Grievant's condition had not changed, then presumably he was able to perform his work duties, as he had done previously.

The Union's claim that the Grievant stated that, at approximately 4:00 p.m., he drove to pick up his wife and daughter is inconsistent with the record evidence. Additionally, it misleads to the conclusion that the Grievant left home closer to the end of his shift then he actually did.

Wagener was not ordered to Prescott to conduct an investigation. He was asked to go to look for the Grievant and obtain a photograph, if seen. Wagener felt more comfortable talking to the Grievant, rather than taking a photo. Weingarten rights are not triggered by Wagener's conduct at the ball game.

The Union incorrectly argues that the City's burden of proof is the "clear and convincing" standard of proof. The appropriate standard of proof is the preponderance of the evidence.

The grievant has engaged in the misconduct for which he was disciplined, *i.e.*, falsely reporting that he was sick. The level of punishment imposed was reasonable under the circumstances. The City did not violate the collective bargaining agreement.

Union

This is a discipline case and, therefore, the City has the burden of proof. The appropriate standard of proof is "clear and convincing."

This case rests upon the fact of whether or not the Grievant was sick at the time that he called into the City's Transit Department to let them know that he was sick and unable to drive his route on June 1, 2004. The nature of the Grievant's job as a bus driver did not allow the Grievant to come in late or begin work at any time. Anything that may have occurred subsequent to the Grievant having called in sick is irrelevant.

The Grievant's testimony establishes that, on June 1, 2004, he developed a headache; took some aspirin, which was not effective; and felt so ill that, at approximately 12:30 p.m., the Grievant decided to take some NyQuil to help him rest and ultimately feel better. Still feeling ill at approximately 12:50 p.m., the Grievant called his employer and spoke with Transit Manager Van Den Heuvel to inform her that he was not able to drive his route because he was sick. The Grievant called in well before the unwritten policy that one should call in at least one hour before the start of one's shift.

Van Den Heuvel's testimony demonstrates that she responded, "Alright, we'll cover your shift." Van Den Heuvel did not inquire further; did not offer the Grievant the opportunity to perform light duty; or require a physician's slip. At that point, the Grievant's responsibility for that shift was absolved.

In addition to Van Den Heuvel, on June 1, 2004, the Grievant reported his illness to his wife and his brother. Ultimately the Grievant went to a physician, who diagnosed the Grievant with an infection, the symptoms of which escalate over time. In the Grievant's case, they became severe around June 1, 2004. When he called at 12:50 p.m., the Grievant was sick; suffering from a headache and dizziness caused by a persistent cough related to his infection.

On June 1, 2004, Supervisor Wagener engaged the Grievant in a disciplinary meeting without first informing the Grievant of his Weingarten rights. Wagener's testimony should be stricken because his conduct was in flagrant violation of the Grievant's Weingarten rights.

The Grievant's testimony regarding this conversation is more credible than that of Wagener. At no point did the Grievant admit that the reason he did not ask for vacation was because he did not think he would get it. Rather, his consistent testimony is that he did not need to take vacation.

The uncontraverted evidence shows that the Grievant was sick at the time that he called into the City's Transit Department to let them know that he was sick and unable to drive his route on June 1, 2004. The uncontraverted evidence shows that the Grievant was sick at 2:21 p.m., when his shift began. Despite a pristine record of attendance, lack of tardiness, and conscientious attempts to request needed time off, the City contends that, on June 1, 2004, the Grievant feigned illness to attend his son's baseball game.

The City violated the collective bargaining agreement when, on June 9, 2004, it suspended the Grievant without pay for 10.4 hours without just or proper cause. The Arbitrator should make the Grievant whole, including an award of full back pay; as required under Article 2, Section 5, of the labor agreement.

DISCUSSION

Issues

The parties were unable to stipulate to a statement of the issues. The grievance requests the dismissal of the "disciplinary action" and asserts a violation of "Article 2, Section 5 of our contract and all other relevant articles of the contract." The "disciplinary action" referenced in the grievance is "a written warning with a one day suspension." Accordingly, the issues are appropriately stated as follows:

1. Did the City violate the parties' labor contract by disciplining the Grievant by issuing a written warning with a one day suspension?

2. If so, what is the appropriate remedy?

Merits

Under Article 2, Section 5, of the parties' collective bargaining agreement, the City must have "just and sufficient cause" to discipline the Grievant. In the present case, the City disciplined the Grievant for conduct occurring on June 1, 2004, *e.g.*, making a false sick report in violation of Sec. 2.09 of the Operator's Manual. The initial question to be answered is whether or not the Grievant has engaged in the misconduct for which he was disciplined.

On June 1, 2004, the Grievant reported sick in a telephone call to Transit Manager Gwen Van Den Heuvel. According to Van Den Heuvel, the Grievant stated that he "felt lousy" and "could not drive" and she replied "all right" and "I'll cover your shift." Neither Van Den Heuvel, nor any other City representative, requested further information regarding the Grievant's health until June 4, 2004.

Van Den Heuvel recalls that, on June 4th, the Grievant stated that "he felt like crap that day;" referred to a splitting headache and dizziness; and stated that he had been experiencing similar symptoms for at least three weeks. Van Den Heuvel further recalls that the Grievant

stated that he had been experiencing excessive coughing; that he had taken Nyquil; that he had laid down to sleep; and that, at 3:15 p.m., when Transit Supervisor Tom Wagener telephoned the Grievant's residence, the Grievant was "out cold." When Van Den Heuvel asked the Grievant why June 1, 2004 was different than the other days in which he now claimed to have been ill, the Grievant first responded that he did not know and then referred to excessive coughing.

Transit Supervisor Tom Wagener was also present at the June 4, 2004 meeting. Wagener recalls that the Grievant maintained that he was feeling poorly for several weeks; that he took Nyquil before he made his sick report; and that when asked why June 1, 2004 was different than the other days that he had been sick, the Grievant first responded that he did not know and then referenced excessive coughing. According to Wagener, the Grievant also stated that, on June 1, 2004, he felt lousy, had a splitting headache and was dizzy.

It is not evident that management had any further discussions with the Grievant regarding his health claims prior to imposing discipline. When the Union met with the City at the City Manager's step in the grievance procedure, the Grievant was not present. At that time, the Union provided the City with a letter from a Marshfield Clinic physician, dated July 6, 2004, indicating that, since approximately April 2004, the Grievant had been experiencing intermittent abdominal pain symptoms secondary to an infection, which had caused him to periodically miss work. The Grievant states that this physician examined the Grievant on or about June 21, 2004.

At some point in August, 2004, Van Den Heuvel received a copy of a letter from the same physician, dated August 20, 2004, that indicated that the Grievant had been diagnosed with an infection and that the Grievant's report of escalating symptoms, dating back six months, was consistent with the normal progression of this infection. The physician did not describe the nature of these symptoms. At no time did the City ask for a physician's excuse for the Grievant's absence of June 1, 2004.

The physician did not examine the Grievant on June 1, 2004. The physician's statements indicate that it was possible that, on June 1, 2004, the Grievant was experiencing symptoms related to his infection, but offer no medical opinion as to the Grievant's specific state of health on June 1, 2004. For the purposes of determining whether or not, on June 1, 2004, the Grievant "felt lousy" and "could not drive," the physician's statements are immaterial. The physician's statements do lend credence to the Grievant's claim that he had been experiencing symptoms of illness for some period of time.

At the September 7, 2004 unemployment compensation hearing, the Grievant provided an explanation of why he reported sick on June 1, 2004:

> (Grievant) I had, and this come out in our little meeting that we had here, that you know I'd been feeling poorly for a long period of time, actually dating back to April. That day, and this is the only time I've called in sick, since I've been with Transit, it's my only sick time.

(ALJ) Tell me a little more about your health there on that day.

(Grievant) But, um, anyway, that day I had the symptoms that were real typical of the illness that I had. I don't, I wasn't diagnosed at that point at that day, but the same thing. A couple of hours after I ate I felt, you know, my stomach hurt, I got acid reflux, the coughing started and then the intense headache that day was really the reason I couldn't take it no more and that's why I took my medication. I took Nyquil.

. . .

(ALJ) Your symptoms were your stomach hurt, you had acid reflux, you had a headache, you had an intense headache. Any other symptoms?

(Grievant) Well, stomach pain, but I was taking shelf acid reflux stuff too. Pepcid AC and Maalox for the acid reflux, which I thought was acid reflux at the time, but it wasn't until later when I went to the doctor and got diagnosed that I found out what was really wrong with me.

(ALJ) Okay. Any other symptoms that you had there on June 1?

(Grievant) No, just the intense headache. Just blurry vision and just you know just felt really rough.

At hearing, the Grievant stated that he did not falsely claim that he was sick on June 1, 2004. According to the Grievant he reported sick on June 1, 2004 because he was sick. The Grievant claimed that, on June 1, 2004, he felt rough due to an intense headache and a lot of coughing. The Grievant states that, before June 1, 2004, he had had headaches, but could not live with the headache that he had on June 1, 2004. According to the Grievant, on June 1, 2004, he first took aspirin and then took Nyquil to relieve this headache and make him sleep. The Grievant also stated that, prior to reporting sick, he was dizzy; had blurry vision; and an upset stomach.

As the City argues, over time, the Grievant did add to the list of symptoms he was experiencing on June 1, 2004; such as referencing stomach pain. The Grievant's embellishments have more to do with his general state of health than with the specific complaints that he claimed were responsible for his sick report of June 1, 2004. With respect to the latter, the Grievant's statements consistently reference a severe headache and excessive coughing.

When, on June 4th, the Grievant was asked what was different about his symptoms of June 1, 2004, the Grievant referenced excessive coughing, rather than a more intense headache. Given the Grievant's testimony that his headaches were caused by excessive coughing; his June 4th focus on excessive coughing is not a material inconsistency.

The Grievant never claimed to be entirely well at the time that he drove to Prescott. The Grievant has emphasized a severe headache and excessive coughing as the factors that prompted his sick report on June 1, 2004. The Grievant's claim that, when he woke up, he had blurred vision, which got better as he drove, does not reasonably indicate that the Grievant had not experienced any material change in his state of health, or that the Grievant was well enough to drive at 12:50 p.m., when he reported sick.

Not all of the Grievant's statements regarding his state of health on June 1, 2004 are identical. Notwithstanding the City's arguments to the contrary, such statements are not so inconsistent as to warrant an inference that the Grievant is not credible, or that his sick report of June 1, 2004 is false.

Prior to June 1, 2004, the Grievant did not miss work due to sickness and did not make any complaint of ill health at work. Notwithstanding the City's argument to the contrary, neither fact provides a reasonable basis to discredit the Grievant's claim that he had been experiencing deteriorating health. The Grievant's failure to miss work and/or complain of ill health is consistent with the Grievant's testimony; which indicates that until June 1, 2004, the Grievant could live with his symptoms. Moreover, given the absence of evidence that the Grievant has a habit of confiding in management or fellow workers, it is conceivable that the Grievant would not complain of symptoms that did not cause the Grievant to miss work.

A fair reading of the Grievant's brother's testimony indicates the following: prior to June 1, 2004, the Grievant and his brother knew that the baseball game would be held in Prescott on June 1st at 5:00 p.m.; that, prior to June 1st, the Grievant and his brother agreed that the brother would meet the Grievant at his worksite, at approximately 4:00 p.m., so that they could travel together to Prescott; that on June 1st, concerned about whether or not the baseball game would be rained out, the Grievant's brother telephoned the Grievant at or about Noon; that the Grievant advised his brother that, as far as he knew, the game would be played at 5:00 p.m.; that the Grievant advised his brother that, if the Grievant did not feel better, he might not go into work; that the Grievant's brother was "left hanging" so he told the Grievant he would call him later to confirm arrangements; that he called the Grievant, but did not get an answer; that, when the Grievant did not answer the telephone, the Grievant's brother assumed that the Grievant had gone to work, but that since he had not been able to confirm what was happening, he decided to call back about 3:20 p.m.; and, at that time, the Grievant's brother ascertained that the Grievant had not gone in to work.

The Grievant's brother has offered a plausible explanation of why he went to the Grievant's house, rather than to the Grievant's worksite. Notwithstanding the City's argument to the contrary, the record does not warrant the conclusion that the Grievant's brother is not a credible witness.

The Grievant recalls that, prior to June 1st, he had intended to work his scheduled shift and then pick up his wife and daughter at their work site so that they could travel together to Prescott. The Grievant further recalls that, on June 1st, and before he laid down to sleep, he

telephoned his wife and stated that he was calling in sick and intended to lay down to sleep. According to the Grievant, his wife then indicated that she and their daughter would wait to see if he would be going to the game. The Grievant states that, at the time of this telephone call, he intended to sleep and feel better. The Grievant does not recall who called whom, but states that, subsequently, he arranged to pick up his wife and daughter at their worksite so that they could travel together to Prescott.

As the City argues, the Grievant's explanation of how he arranged to meet his wife and daughter on June 1, 2004 lacks detail. However, it is not implausible. The Grievant's explanation indicates that, at the time he reported sick, the Grievant anticipated that, if he slept, then he would be well enough to attend his son's baseball game. It does not reasonably indicate that, at the time the Grievant reported sick, he did not "feel lousy" or that he "could drive" his scheduled route.

The City asserts that the Grievant claimed that he picked up his wife and daughter at 4:00 p.m.; that this claim is contrary to the record evidence; and is intended to disguise the fact that the Grievant left home prior to the end of his shift so that he would not miss any of his son's game. A fair reading of the Grievant's statements indicates that the Grievant "guessed" that he and his brother picked his wife and daughter up at 4:00 p.m., but that he did not really recall the time.

The Grievant's brother recalls that they arrived at the wife and daughter's worksite at about 4:00 p.m. The record does not establish otherwise.

The Grievant's brother stated that, when he saw the Grievant on June 1, 2004, he was the same as he had been before with respect to coughing. It is not evident that, on June 1, 2004, the Grievant's brother saw the Grievant prior to approximately 3:30 p.m. This testimony of the Grievant's brother does not, as the City argues, provide a reasonable basis to infer that the Grievant was sufficiently well to perform his duties at the time that the Grievant reported sick.

Van Den Heuvel believes that it would have taken the Grievant one and one-half hours to drive to Prescott. The Grievant claims that the drive would take one hour and fifteen minutes. Wagener recalls that he drove to Prescott in one hour and twenty or twenty-five minutes. By all accounts, it would have been difficult for the Grievant to have ended work at 3:57 p.m. and arrive on time for his son's game, scheduled to start at 5:00 p.m. How difficult, of course, would depend upon a number of factors, including the chosen route and vehicle speed.

The City maintains that it was the Grievant's inability to work his scheduled shift and arrive on time for the baseball game that motivated the Grievant to falsify his sick report. The Grievant states that he was "somewhat concerned" that his scheduled route would make him late for the game on June 1, 2004, but that he had arrived late at other games. The Grievant's claim that he had arrived late at other games is not rebutted by the record evidence.

Van Den Heuvel recalls that, on June 4, 2004, the Grievant stated that he had planned to go to work and then go to the game. Van Den Heuvel also recalls that, when management said you would be late for the game, the Grievant responded that was "ok." Wagener recalls that, on June 4, 2004, the Grievant stated that he had intended to work his shift on June 1, 2004 and leave for the game after the shift.

On April 28, 2004, the Grievant submitted three Driver Request for Time Off slips; requesting draft protection for Monday, May 3; a vacation day for Tuesday, May 4 (from the Tripper 10 route); and draft protection for Thursday, May 6, 2004. At that time, the Grievant's son's baseball team was scheduled to play at 5:00 p.m. at Bement Field; Gilman; and Osseo, respectively. On May 5, 2004, the Grievant submitted three Driver Request for Time Off slips; requesting draft protection for Monday, May 10; Thursday, May 13; and Friday, May 14, 2004. At that time, the Grievant's son's baseball team was scheduled to play at 4:00 p.m. at Bement Field on May 10, at 5:00 p.m. at Bement Field on May 13 and at 5:00 p.m. Elk Mound on May 14. On May 18, 2004, the Grievant submitted two Driver Request for Time Off slips; requesting draft protection for Monday, May 24 and a vacation day for Tuesday, May 25 (from the Tripper 10 route). At that time, the Grievant's son's baseball team was scheduled to play at 5:00 p.m. on May 25 at Hudson.

The June 1, 2004 game was a tournament game. The Grievant acknowledges that he was more likely to fill out a Driver Request for Time Off slip if it was a "main" game. The Grievant did not submit a Driver Request for Time Off slip for June 1, 2004.

The Grievant's statement that he was "somewhat concerned" that his scheduled route would make him late for the June 1, 2004 game is inconsistent with the evidence that this was an important game and that, in the past, he had taken steps to ensure that work would not conflict with less important scheduled games by submitting Driver Request for Time Off slips. The record does not establish that the Grievant had always taken such steps when he was scheduled to drive at a time that could conflict with his son's games.

At the instruction of Van Den Heuvel, Wagener went to Prescott to determine if the Grievant had gone to his son's ballgame. Wagener first observed the Grievant at the Prescott ballpark sometime between 6 and 6:30 p.m. and then engaged the Grievant in a conversation.

During the conversation at Prescott and in response to a question from Wagener, the Grievant stated that Altoona (his son's team) had their chance early, but were now behind. Although Wagener construed this statement to mean that the Grievant was at the game at the time it started, this statement does not establish such a fact.

Before the unemployment compensation ALJ and this arbitrator, the Grievant testified that he arrived after the game had started. The record does not demonstrate otherwise. Presumably, if the Grievant had falsified a sick report in order to ensure that he could attend his son's baseball game, he also would have ensured that he arrived on time.

The Grievant recalls that he did not learn of the June 1st game until the evening of Saturday, May 29, after he had completed work for the day; that the Transit office was closed for a portion of the time between May 29 and June 1; and that the Grievant could have submitted a Driver Request for Time Off slip on June 1st. Wagener's testimony establishes that, based upon the schedule that was in effect on May 29, as well as the staffing level on June 1, 2004, the Grievant would have been granted a vacation day for June 1st.

The Grievant's lack of opportunity to submit a Driver Request for Time Off in advance of June 1st and the importance of the June 1st game reasonably imply that the Grievant had a motive to falsify his sick report. The Grievant, however, has consistently stated that, prior to calling in sick, he had intended to work his shift and then attend the game. According to the Grievant, he expected that his shift would end prior to 3:57, as it often did; and that, although it was possible that he could have been drafted to work additional hours on June 1st, drafting was more of a concern on Thursday or Friday, then on Tuesday.

The testimony of the Grievant's brother corroborates the Grievant's claim that, until he reported ill on June 1, the Grievant had intended to work his scheduled shift. The Grievant has provided a plausible explanation of why he did not submit a Driver Request for Time Off slip for June 1st.

The Grievant did not answer the telephone at 3:15 p.m., when Wagener telephoned the Grievant. The Grievant has consistently claimed that he took Nyquil; was sound asleep and did not hear the telephone. At the unemployment compensation hearing, the Grievant further explained that he was sleeping downstairs, where there was no phone. The Grievant has provided a plausible explanation for why he did not hear Wagener's 3:15 p.m. telephone call.

The Grievant's brother recalls that he initially woke up his brother at approximately 3:20 p.m., when he telephoned the Grievant to confirm arrangements to travel together to the baseball game. According to the Grievant's brother, he arrived at the Grievant's house between 3:30 and 3:35 p.m., but that the Grievant did not come out of the house until after his brother had rapped on the door; then on a window; and then on the door again. From this, the brother surmised that the Grievant had fallen back to sleep after his telephone call of 3:20 p.m.

At hearing, the Grievant did not recall that his brother telephoned at 3:20 p.m. Rather, the Grievant recalled that he woke up when his brother arrived at the Grievant's house about 3:30 p.m. and made noise outside of the house. According to Van Den Heuvel, at the meeting on June 4, 2004, the Grievant did not recall the time at which he woke up, but did state that until his brother woke him up, he was "out cold." The Grievant's failure to recall that his brother had telephoned, as well as the Grievant's brother's testimony that the Grievant did not come out of the house until after he had rapped on the door and window, is consistent with the Grievant's claim that he had been "out cold."

It is not clear why the Grievant would hear his brother's 3:20 p.m. telephone call, but not Wagener's 3:15 p.m. telephone call. It is conceivable, however, that the earlier call had raised the Grievant's level of consciousness.

The Grievant's brother recalls that, when he went to the Grievant's house, the Grievant stated that he was feeling better and that they should go to the game. The Grievant recalls that, after being awakened by his brother, he did feel better and his headache was less intense. The Grievant further recalls that he then drove to his wife's worksite to pick up his wife and daughter and then drove to Prescott to watch his son's baseball game.

There is no medical evidence establishing that, if the Grievant had taken Nyquil at 12:30 p.m., as claimed by the Grievant, then he would have been too impaired to drive to Prescott. Given the nature of the symptoms that the Grievant claims were responsible for his sick report, *i.e.,* severe headache and coughing, and his testimony that he took Nyquil at approximately 12:30 p.m. and, after reporting sick at approximately 12:50 p.m., slept until approximately 3:30 p.m., it is plausible that, at 12:50 p.m., the Grievant was not well enough to drive a route starting at 2:21 p.m., but that at approximately 3:30 p.m., the Grievant was well enough to leave home to drive to Prescott and watch his son's baseball game.

The testimony of Van Den Heuvel and Wagener indicate that, in response to management's questioning the Grievant's judgment in driving to Prescott after ingesting Nyquil at 12:30 p.m., the Grievant offered an opinion that it was ok to operate his personal car, but not the bus because the licensing standards were different. Although management considers the Grievant's claim to be incredible, the record does not establish that the Grievant was offering anything other than his sincere opinion.

The Grievant's statements justifying the operation of his personal car after using Nyquil do not reasonably imply that the Grievant did not use Nyquil, as claimed by the Grievant. Nor do they provide a reasonable basis to infer that the Grievant did not "feel lousy" or "could drive" at the time that he reported sick.

When the Grievant reported sick, he did not claim that he could not drive because he had ingested Nyquil. The Grievant was not disciplined for taking Nyquil in violation of any CDL, or City, requirement. For the purposes of this dispute, it is immaterial whether the Grievant's use of Nyquil was consistent, or inconsistent, with any CDL or City requirement. Notwithstanding the City's argument to the contrary, there are no material inconsistencies with respect to the Grievant's statements regarding his use of Nyquil.

In order to drive his scheduled route, the Grievant would have to have been fit to drive at 2:21 p.m. Van Den Heuvel did not tell the Grievant to report for light duty. Nor does the record establish that, if the Grievant's condition improved during his scheduled shift, management had a reasonable expectation that the Grievant would report for light duty, or any other type of work. Under the circumstances of this case, the Grievant's acknowledgment that, at approximately 3:30 p.m., the Grievant felt well enough to drive to Prescott did not impose a duty to report to work.

At the unemployment compensation hearing, the Grievant stated that, during his drive to Prescott, he and his wife had a conversation regarding his conduct in reporting sick and then

attending his son's ballgame. According to the Grievant, they discussed the possibility of his "boss" showing up at the game and that his wife made the statement "hey you called in sick because you were sick and later on that evening if you decide to go to your game, whatever." At hearing, the Grievant recalled that he stated that there was a "target" on his back and knowing "them," they would send someone.

These conversations reasonably indicate that the Grievant had a concern that management would respond negatively to his attending a baseball game on a day that he had reported sick. These conversations do not reasonably indicate that the Grievant considered management to have a legitimate basis to respond negatively. Although the City considers the Grievant's wife to have been coaching the Grievant on what to say should management show up, it is plausible that she was relating her personal opinion, *i.e.*, you called in because you were sick, so don't worry about it. The evidence of the conversations in the car does not, as the City argues, reasonably imply that the Grievant had a guilty conscience, warranting an inference that he had falsified his sick report.

The Union asserts that Wagener's testimony regarding statements made by the Grievant at Prescott should be disregarded because they were obtained without first informing the Grievant of his Weingarten rights. Weingarten rights, where applicable, are triggered by an employee's request for union representation. No such request was made in this case.

The Grievant recalls that, as Wagener approached, the Grievant's wife asked the Grievant if Wagener was the "boss." The City argues that the Grievant's wife was prompting the Grievant to recall their earlier discussion in the car so that the Grievant would know what to say should Wagener question the Grievant about his sick report. Given the reported conversation in the car, it is not surprising, or suspicious, that the Grievant's wife would ask such a question. The more plausible construction of the wife's remarks is that she was simply inquiring if Wagener was the Grievant's boss.

The City argues that it is "suspicious" that the Grievant did not volunteer information on his state of health during this meeting with Wagener. The undersigned disagrees. Given the testimony that the Grievant considered himself to have a "target" on his back, it is not surprising that the Grievant would fail to volunteer such information.

Initially, Wagener made comments about the ballgame and the Grievant responded to these comments. There is no material dispute regarding this portion of the conversation.

After returning from Prescott, Wagener sent an email to Van Den Heuvel that states as follows:

> Altoona was losing 2-0 in the bottom of the fifth when I got there. I talked with Tom at Prescott. I asked him why he didn't request the time off. He said he looked at the calendar and thought it would have been denied. He said he didn't want to miss what might be his son's last game. I told him that he could have had the time off. I left it at that.

Wagener's testimony reveals that his email does not reflect the entire conversation. Wegner did not confirm whether the statements recalled in the email were reported in, or out of, context.

At hearing, Wagener recalled that he asked the Grievant why the Grievant had not requested vacation for that day; that the Grievant responded that he did not think he would get time off; that Wagener responded we had people in the shop and that it would have been possible; that the Grievant said that it was a long way for Wagener to have come; that Wagener said that he had been hoping not to see the Grievant; that the Grievant then said life goes on or that the world goes on; and that Wagener then left. According to Wagener, the Grievant had a "healthy" demeanor, but was coughing enough for Wagener to recall that he had coughed.

At the unemployment compensation hearing, the Grievant recalled that, after the initial discussion about the game, Wagener asked the Grievant why he did not take vacation; that the Grievant responded why should he; and that the Grievant was trying to get across the fact that he could have worked his shift and made the game. At hearing, the Grievant recalled that Wagener asked the Grievant why he had not signed the vacation calendar; that the Grievant responded that he did not need to take vacation or was not taking vacation; that Wagener stated you could have taken vacation; that the Grievant stated that he was going to work his shift and go to the game; that the Grievant stated this is my son's last game and I want to be here; that the Grievant said you came a long way to get here; that Wagener said that he had hoped that he would not see the Grievant here; the Grievant responded life goes on; and that, after telling the Grievant that he would see him tomorrow, Wagener left.

The Grievant states that, on June 1, 2004, he never told Wagener that the Grievant did not believe they would give him vacation or any words to that effect. Wagener states that, on June 1, 2004, the Grievant did not say that he did not take vacation because he did not have to.

The City argues that the Grievant's comment "life goes on" is a sarcastic response to being "caught" at the baseball game. The remark may have been sarcastic. It cannot, however, be reasonably construed to be an acknowledgment that the Grievant had been caught doing something that he should not be doing, or any acknowledgment that he was not sick at the time that he reported sick.

Van Den Heuvel recalls that, on June 4, 2004, she reviewed the interaction between Wagener and the Grievant and asked the Grievant if the Grievant had said what Wagener had claimed. According to Van Den Heuvel, the Grievant confirmed that, when Wagener asked the Grievant why he had not taken vacation, the Grievant responded I did not think that I would get it. Van Den Heuvel states that, during the meeting of June 4, 2004, the Grievant did not make any claim that he did not have to or did not need to take vacation.

Union Steward Timothy Hillery was present at the June 4th meeting. Hillery does not recall that Van Den Heuvel went over Wagener's statements with the Grievant. Hillery recalls that the Grievant and Wagener each explained what had happened on June 1, 2004. According

to Hillery, the Grievant never admitted that he did not ask for vacation because he did not think he would get the time off if he requested it, but rather, said he did not ever consider taking vacation because he could make the game.

Notwithstanding any argument to the contrary, none of the witnesses are inherently incredible. The contradictions in testimony establish that there is inaccuracy in the testimony. The record does not conclusively establish where the inaccuracies lie.

Wagner and the Grievant agree that it was Wagener, not the Grievant, who raised the issue of vacation. If the Grievant responded to Wagener's questioning of why he did not use vacation by stating that he did not think that he would get vacation, this response is not confirmation that the Grievant was not sick when he reported sick. Such a response could be nothing more than recognition that the Grievant had the option to request vacation, in lieu of sick leave, but did not do so because he did not think a vacation request would be granted. If the Grievant were sick, as he claims, then he would request the leave that would be granted, rather than one that he believed would be denied.

Wagener recalls that, on June 4, 2004, the Grievant stated that he was going to the game unless he had a stroke or a heart attack. The Grievant does not deny making this statement. This statement, on its face, supports the City's argument that the Grievant was so strongly motivated to attend his son's game that he would falsify his sick report. Within the context of the June 4th discussion, it is conceivable that the statement indicates nothing more than an acknowledgment that the Grievant was not too ill to attend his son's game. Given the Grievant's claim that he felt better after sleeping and that his headache was less intense, such an acknowledgment does not provide a reasonable basis to infer that, at the time that the Grievant reported sick, he was not too ill to report to work.

Conclusion

On June 1, 2004, the Grievant reported sick on the basis that he "felt lousy" and "could not drive." The record, as a whole, does not provide a reasonable basis to discredit the Grievant's testimony that he did not falsify this sick leave report and that he reported sick because he "felt lousy" and "could not drive."

The record does not establish that the Grievant engaged in the misconduct for which he was disciplined, *i.e.*, on June 1, 2004, making a false sick report in violation of Sec. 2.09 of the Operator's Manual. Accordingly, the City does not have "just and sufficient cause" to discipline the Grievant for engaging in such misconduct. By disciplining the Grievant without just and sufficient cause, the City has violated Article 2, Section 5, of the parties' collective bargaining agreement.

The Grievant is not found to be sufficiently guilty to warrant the suspension without pay. Accordingly, consistent with Article 2, Section 5, the make-whole remedy includes the restoration of lost seniority rights and pay for all time lost.

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

AWARD

1. The City violated the parties' labor contract by disciplining the Grievant by issuing a written warning with a one day suspension.

2. To appropriately remedy the City's violation of the parties' labor contract, the City is to immediately:

a) rescind the discipline that it imposed upon the Grievant for conduct which occurred on June 1, 2004;

b) remove all references to this discipline from the Grievant's personnel file;

c) make the Grievant whole for all losses suffered as a result of this discipline, including the restoration of any lost seniority rights, wages and benefits.

Dated at Madison, Wisconsin this 21st day of October, 2005.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

CAB/gjc
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