

<p>In the Matter of Arbitration between:</p> <p>Transervice Logistics, Inc. Mountain Transport Division, Employer and Teamsters Local Union No. 455, Union</p>	<p>)))))))))))</p>	<p>OPINION AND AWARD</p> <p>FMCS Case No. 110321-54352-3</p> <p>Christel Jorgensen, Arbitrator</p>
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APPEARANCES

For the Employer: Joseph Baumgarten, Attorney, Proskauer Rose LLP, New York, NY; Gina Lydakakis, Assistant Vice President Human Resources, Transervice Logistics, Lake Success, NY; Tony Fetta, Senior Vice President, Transervice Logistics, Lake Success, NY; John Walker, Assistant Vice President Operations, Transervice Logistics, Lake Success, NY; Darrel Leeper, General Manager, Mountain Transport Division, Denver, CO; Jon Peterson, Assistant Vice President Fleet Manager, Mountain Transport Division, Denver, CO.

For the Union: Linda M. Cote, General Counsel, Teamsters Local Union 455, Denver, CO; Ron Cash, Business Agent, Teamsters Local Union 455, Denver, CO; Dennis Hrabe, Grievant; Mike Baumann, Steward.

BACKGROUND

The case arises as a result of the termination of Dennis Hrabe (hereinafter referred to as the “Grievant”) from his employment with Transervice Logistics Mountain Transport Division (hereinafter referred to as the “Employer” or “Company”). Subsequent to his termination for a violation of the company’s absentee policy a grievance was filed and processed on his behalf by Teamsters Local 455 (thereinafter referred to as the “Union”). The grievance was processed through the grievance procedure.

The Employer provides carriage services for fleet accounts, service leasing, and truck leasing and, in that capacity, operates the Mountain Transport Division in Denver, Colorado where the grievant has been employed for 27 years as a truck driver, delivering products to stores.

There is no dispute that the instant matter is properly before the Arbitrator and both procedurally and substantively arbitrable.

ISSUE

The parties stipulated to the issue:

Was Dennis Hrabe terminated for just cause? If not, what is the appropriate remedy?

APPLICABLE PROVISIONS OF THE DRIVER'S HANDBOOK

The Absentee and Tardy Policy has been in effect since 1988 with the most recent update in 12/02/05. A copy of the policy is provided to employees at orientation.

*Absence is defined as any time away from work during which time the employee is scheduled to work. **Failure to work signed voluntary overtime shall be considered an absence.***

1. *An occasion of tardiness is defined as reporting for work after the employee's scheduled starting time, but not later than two (2) hours after the scheduled starting time, or leaving work early during the last two (2) hours work. As an employee who reports after two (2) hours before scheduled shift end shall have such day counted as an absence.*
2. ***The following absences and tardiness are excused and will not be counted as an incident:***
 - i. *Approved by management personnel time off*
 - ii. *Authorized paid time off*
 - iii. *On the job injury*
 - iv. *Time required by the Collective Bargaining Agreement*
3. *Each period of absences shall be recorded a "ONE" (1) incident.*

4. Two (2) occasions of tardiness shall be recorded as "ONE" (1) incident of tardiness

DISCIPLINARY STEPS OF ACTION: DISCIPLINE WILL BE BASED ON THE PAST SIX MONTHS FOR WHICH THE EMPLOYEE WAS SCHEDULED. DISCIPLINE WILL BE AS FOLLOWS:

Incidents of ABSENCE

Discipline

4 INCIDENTS
5 INCIDENTS
6 INCIDENTS
7 INCIDENTS

Verbal Warning
Written Warning
3 – Day Suspension
Termination

Incidents of TARDINESS

Discipline

3 INCIDENTS
4 INCIDENTS
5 INCIDENTS
6 INCIDENTS

Verbal Warning
Written Warning
3 – Day Suspension
Termination

5. An employee with a NO-CALL/NO SHOW will be subject to immediate disciplinary action, up to and including termination.
6. An employee that has three (3) consecutive NO-CALL/NO-SHOWS shall be considered a voluntary resignation by the employee.
7. An employee who has been absent for five (5) consecutive work shifts without an authorized leave of absence shall constitute being absent without leave and will be subject to immediate disciplinary action up to and including termination.

POSITION OF THE COMPANY

The Company maintains that the Grievant did not provide the necessary medical verification to make him eligible for FMLA leave and by not signing the '*Authorization to Use and/or Disclose Protected Health Information*' form and, therefore, was in violation of the Company's absentee policy (Company Exhibit 10) and, after following the progressive discipline procedure, the grievant was terminated. The Employer argues that the Company went through great length to give the Grievant the opportunity to

provide the medical substantiation to support his request for FMLA leave for 2011 and that the Grievant provided insufficient and questionable information. The Company maintains that it acted within its rights under FMLA regulations and the absentee and disciplinary policy in effect and believes that the grievance must be denied.

UNION POSITION

The Union believes that the termination of Dennis Hrabe does not meet the standards of just cause and, therefore, the grievance must be sustained. The Union argues that the Grievant did provide requested medical information and acted within his rights to refuse to sign a release form that provided access to medical information to the Company reaching beyond the requirements for FMLA leave.

DISCUSSION

There are no disputes regarding the meaning of the absentee policy and the attached penalties. There also was no challenge to the Company's right to request additional information regarding FMLA eligibility. The question that needs to be answered is whether the grievant did not make sufficient efforts to provide the required information to the Company to allow them to decide if the grievant was eligible for FMLA leave of absence for 2011, due to a chronic condition. A letter from Gina Lydak, Assistant Vice President, Human Resources in New York, dated January 3, 2010 (Company Exhibit 4), placed the Grievant on temporary Family and Medical Leave subject to providing additional medical information and a second opinion within 15 days. As testimony and exhibits show, the Grievant did follow through to the point where he saw his medical provider, Dr. Hardee and the physician selected by the Company, Dr. Cutler. The second opinion physician Dr. Cutler did not prepare an opinion and ordered additional tests (the grievant did not schedule the CAT scan because he wanted to be sure that the Company would pay for the test). The Company also requested a conversation with Dr. Hardee and, in order to do so, the clinic required a signed '*Authorization to Use and/or Disclose Protected Health Information*' (Employer Exhibit 9). The clinic faxed the form to the Employer. It is at this point that the waters become muddy when the grievant refused to sign the release form presented to him by Darrel Leeper, General Manager of the

Mountain Transport Division. The Grievant's reluctance to sign was based on his understanding that signing this form would entitle the Company to a full release of all medical information and not be limited to FMLA issues only. Subsequent conversation between the Grievant, acting union steward Mike Baumann, and Gina Lydakis in New York on that issue took place with Mr. Leeper being the messenger. The content of the conversation between Ms. Lydakis and Mr. Leeper were relayed to the Grievant and the steward by Mr. Leeper, ending with the official termination of Mr. Hrabe (Joint Exhibit 3). The Grievant testified that Mr. Leeper did state that Ms. Lydakis only wanted FMLA information but, did not offer an explanation how that could be achieved.

To write all of this off to miscommunication as argued by the union is not reasonable. However, failure to communicate clearly did contribute. In the big picture, Mr. Hrabe's absentee record is anything but stellar and his failure to follow through more thoroughly on the Employer's request for additional information as well as scheduling the CAT scan or, failure to ask for an extension to consult with his business agent on January 20, 2011, was negligent on his part. At the same time, however, the Employer had the option to offer a limited extension to the time line on the Grievant's temporary Family Medical Leave. Mr. Leeper testified that he had no human resources experience and, it could have been helpful to the situation if the phone discussion would have taken place with all the parties present. This might have cleared up the issue over the release form.

AWARD

The grievance is sustained to the extent that the Grievant Dennis Habre will be reinstated within 30 days of the award to his former position with seniority intact. However, no back pay is awarded.

Dated this day of November 3, 2011



Christel Jorgensen, Arbitrator
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