

Attendance 4/6/83 Discharged Denied

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Sustained

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*   ARBITRATION IN THE MATTER   * Grievants:  Otis Boldridge,
*                               *                   Sam Crout, and
*                               *                   Lester Hood
*                               *
*   Between
*                               *
*   KANSAS CITY AREA TRANSPORTATION * Issue:  Discharge
*   AUTHORITY
*                               *
*                               *
*   and
*   Anthony V. Sinicropi, Neutral
*                               *                   Board Member
*   AMALGAMATED TRANSIT UNION, * Eric George, Employer Board Member
*   DIVISION 1287
*   Otis Rusher, Union Board Member
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Preliminary Statement

This award is in response to grievances by Otis Boldridge, Sam Crout, and Lester Hood. The hearing in this matter was conducted on the Employer's premises in Kansas City on December 16, 1982. Post hearing briefs were exchanged on January 31, 1983. The parties waived the requirement that all three members of the Board determine the award and thus the neutral panel member will be the sole arbitrator.

APPEARANCES

For the Employer:

- Mr. Mark S. Bryant, Esq. - Attorney and Spokesman
- Walter Barlow - Director of Transportation
- Jack Ethridge - Superintendent of Transportation
- John Waterman - Director of Maintenance in 1982

For the Union:

- Mr. Doyle R. Pryor, Esq. - Attorney and Spokesman
- Otis Baldridge - Grievant
- Sam Crout - Grievant
- Xavier Perez - Executive Board
- Lester Hood - Grievant
- Otis Rusher - President of Division 1287

## I. BACKGROUND AND FACTS

The instant case involves the discharges of Messrs. Otis Boldridge, Sam Crout, and Lester Hood for incurring a fifth missed assignment in a twelve (12) month period under the Kansas City Area Transit Authority (hereinafter referred to as ATA or the Authority) absenteeism policy [Joint Ex. 2]. The particular facts surrounding each discharge are as follows:

### A. Otis Boldridge

Prior to his discharge on June 7, 1982, Mr. Boldridge had worked more than five years as a bus driver. The 1981 and 1982 Attendance Records for Operators reveals that the missed assignments causing his discharge occurred on September 9, 17, 26, October 29, 1981, and June 7, 1982 [Joint Ex. 3]. At the hearing Operator Boldridge confined his evidence to the events surrounding his fifth missed assignment on June 7, 1982.

The record indicates that on June 7 the Grievant was working a split run on the Country Club line. He worked the morning part of the run which ended at approximately 8:00 a.m. The Grievant's sign-in time for the afternoon part of his shift was 12:56 p.m. and he was to relieve another operator at 11th and Walnut Streets at 1:23 p.m. Operator Boldridge related that on June 6, 1982, there had been a storm which had knocked down trees and power lines which shut off the electricity at his home. On June 7, after his morning run, the Grievant allegedly worked in his yard removing fallen trees and making an effort to save some refrigerated goods. The Grievant testified that he became so involved in this work that he lost track of time. He glanced at his watch which incorrectly stated that it was 12:40 p.m. Believing that it was actually later he called a local telephone number which provides the correct time and discovered that it was actually 1:12 p.m. Although the Grievant had already missed the 1:05 p.m. Troost bus that he normally catches to make his relief, he testified that he honestly thought he could still make it to his relief point by 1:23 p.m. [see, Brief for the Union at 5].

Mr. Boldridge further testified that he ran up the hill from his home in an effort to catch the 1:15 p.m. bus, but halfway up the hill he saw the bus pulling away. He then decided to go back home to call his dispatcher. At that time, according to the Grievant, his neighbor was driving up the hill and, seeing that Boldridge had missed his bus, asked if he needed a ride into town. The Grievant accepted a ride to a point some six to eight blocks from his relief point. It was approximately 1:35 p.m. when he arrived at the relief point.

Not seeing the bus he was to relieve, Boldridge ran over to 11th and Main Streets and caught a bus that immediately follows the one that he should have been driving and used the phone on the bus to call the dispatcher. He was then instructed to come to the terminal [ATA] for a meeting which resulted in his discharge.

B. Sam Crout

Mr. Sam Crout was hired by the Authority as a bus operator in July, 1978. The 1981 and 1982 Attendance Records for Mr. Crout reveal that the missed assignments causing his discharge occurred on July 5, July 24, 1981, and February 10, April 16, and June 5, 1982 (Joint Ex. #4). Operator Crout was discharged effective June 5, 1982.

Mr. Crout testified that for several years he had been suffering from severe headaches and has been treated by Dr. Armando H. Moreano. In addition, the Grievant indicated that Dr. Moreano had referred Crout to a neurologist for a neurological exam, EEG and brain scan (Joint Ex. 6). Mr. Crout also presented evidence that he had been prescribed various medications. A pharmaceutical journal explaining the chemical constituents of specific medications was also produced. One of the medications that Crout had been taking for his headaches was Fiorinal #3 which, according to the Physician's Desk Reference, contains thirty milligrams of codeine along with certain other compounds (Brief for the Union at 7). On June 5, 1982, Crout missed his assignment at 5:44 a.m. because he overslept. The evening before he had taken Fiorinal #3. Mr. Crout has alleged that he missed his assignment because of his medication.

C. Lester Hood, Jr.

Operator Lester Hood, Jr., was discharged for missing five of his assignments within a period of twelve months. The record indicates that Mr. Hood missed his assignments on June 13 and October 20, 1981 and April 17, May 7 and May 31, 1982. Operator Hood was discharged on June 2, 1982. Mr. Hood testified that he missed his assignment because he believed that if he had no Sunday assignment (which he did not) and Monday was a holiday, he would be given the holiday off the same as a driver with a regular run. Hood, who usually calls in around 8:00 p.m. to find out his assignment on the extra board for the next day, did not call in at all on Sunday, May 30, 1982. It was not until he called in Monday night to find out his Tuesday assignment that he learned that he had missed his Monday assignment. Mr. Hood acknowledged that his belief regarding the extra board practice was mistaken (Brief for the Union at 10).

II. THE ISSUES

The parties stipulated that the issues are whether each of the Grievants, Otis Boldridge, Sam Crout and Lester Hood, were discharged for just cause and, if not, what shall be the remedy.

### III. RELEVANT CONTRACT PROVISIONS AND EXHIBITS

#### A. Relevant Contract Provisions

##### Section 1.12. Management-Discipline

(a) The Union recognizes that the management of the business, including the right to direct the working forces, to prescribe, effectuate and change service and work schedules consistent with and not contrary to any specific provisions hereinafter contained in this Agreement, to plan and control corporate operations, to introduce new or improved facilities or operating methods, to relieve employees from duty because of lack of available work or for other legitimate reasons, to transfer them, to determine the minimum qualifications of experience, health and physical and mental fitness for any job covered hereby and to appraise the qualifications of any individual therefor, is vested exclusively in the Authority; subject, however, to the seniority rules and grievance procedure hereinafter set forth as concerns any employee to whom this Agreement is applicable and who may be relieved from duty or transferred or whose qualifications may be questioned.

The Authority shall have the right to require appropriate medical examinations from time to time by competent doctors in order to maintain adequate and safe standards of service to the public and to minimize employee accidents; provided, that any employee to whom this Agreement is applicable and who may be adversely affected in his/her position or earnings as a result of an adverse medical report by an Authority doctor shall have the right to present as a grievance, for action in accordance with the grievance procedure hereinafter set forth in Section 1.13, the question of his/her physical or mental fitness.

(b) The Union further recognizes that the power of discipline is vested exclusively in the Authority, and it will not attempt to interfere with or limit the Authority in the discharge or discipline of its employees for just cause; subject, however, to the right of any employee to whom this Agreement is applicable and who may be discharged or disciplined to present as a grievance, for action in accordance with the grievance procedure hereinafter in Section 1.13 set forth, the question whether he/she has been discharged or disciplined for just cause; but neither (a) the appointment, promotion, demotion, discharge or discipline by the Authority of any individual to or in any official, supervisory or other classification excluded from the collective bargaining unit of employees to which this Agreement is applicable, nor (b) the retention in service, discharge or suspension by the Authority of a probationary or temporary employee (as defined in Section 1.5), shall present a grievance hereunder or be subject to the provisions hereof, and the Authority's action in relation thereto shall be final; nor shall any other discipline imposed upon a probationary or temporary employee present a grievance hereunder or be subject to the provisions hereof unless it is claimed that the discipline thus imposed violates any other provision of this Agreement.

(c) The Union covenants that its members shall render faithful service in their respective positions and will cooperate with the

management in the efficient operation of the business and in fostering friendly relations between the Authority and the general public; that they will be courteous to passengers and to others with whom they come into official contact; that they will at all times seek to protect the property of the Authority from injury at their own hands or at the hands of others; that, in the handling of equipment and other property of the Authority, they will at all times comply to the best of their ability with the rules of the Authority and with the applicable Federal, State and Municipal laws, ordinances, regulations and orders, and will make every effort to prevent injury to property and person; and that under the Authority bringing to its attention any alleged fraudulent handling of funds or fares or other wrongful practices, the Union will assist the Authority in eliminating such malpractices.

(d) Suspension means a total cessation of work and pay for the calendar days specified. Suspensions shall not deprive employees of Holiday pay for which they are otherwise qualified.

(e) Warning slips will be removed from an employee's file after twelve (12) months.

(f) Employees shall cooperate with the Management upon call in all matters of mutual interest, but no employee to whom this Agreement is applicable shall be called before an official in connection with the investigation of a matter which may involve his/her discharge, suspension or other discipline unless so called within four (4) weeks (Saturdays, Sundays, and Holidays excepted) in cases of alleged misappropriation of fares or other property, and within ten (10) working days, Monday through Friday, except holidays, in other cases, after notice of the alleged offense has come to the attention of management; and if the employee is discharged, suspended or otherwise disciplined as a result of such investigation and believes himself/herself to be aggrieved thereby, he/she shall have the right to proceed before his/her Superintendent, Lead Foreman, Manager or Director when none of the others exist, under the grievance procedure set forth in Section 1.13, by presenting the matter to the appropriate official within seven (7) days (Saturdays, Sundays and holidays excepted) after such disciplinary action.

(g) If, after discussion with the employee, it is evident disciplinary action is indicated, the employee will be told to contact a Union representative before finalization of the disciplinary action. It is understood that the employee has the right to waive Union representation if he/she so desires.

(h) Employees shall be called in and notified in writing of any disciplinary actions placed in the employee's record.

(i) An employee who is suspended will not be permitted to return to work until all suspension time has been served. The days of suspension will be consecutive unless interrupted by assigned day(s) off or otherwise specified in an agreement between the Union and Management.

Section 1.13. Grievances, in part:

Any employee to whom this Agreement is applicable and who claims to be aggrieved by any action of the Authority or its officials, whether occasioned by discharge, suspension or other discipline or whether because of alleged unjust treatment or failure to apply to him/her any of the benefits of this Agreement to which he/she believes himself/herself entitled, may proceed in accordance with the following grievance procedure (except that when an employee has been discharged, suspended or otherwise disciplined after an investigation under the final paragraph of the preceding Section hereof, he/she may go directly to his/her Superintendent Lead Foreman, Manager or Director when none of the other exist, as in Section 1.12(f) provided). Saturdays, Sundays and holidays will not be considered in computing the time in the following steps.

1. The employee, or his/her accredited Union representative, shall personally and informally present the alleged grievance to the Dispatcher, Foreman or other official immediately superior to him/her in rank, within seven (7) days after same has come to his/her attention, otherwise it shall not be considered; and, in presenting such alleged grievance, the employee may be accompanied by a duly accredited representative of the Union if he/she so desires; and if such alleged grievance is presented in time and is not adjusted to his/her satisfaction within two (2) days thereafter; then
2. The employee shall present his/her alleged grievance in writing on the proper grievance form, either individually or through a duly accredited representative of the Union, to his/her Superintendent, Lead Foreman, Manager or Director at a time to be agreed upon with the latter, when none of the others exist, within five (5) days after his/her immediate superior has acted or should have acted. If not adjusted in writing to his/her satisfaction within five (5) days after presentation; then
3. The employee may appeal to the Director, or his/her designated representative by filing therewith, individually or through a duly accredited representative of the Union and within five (5) days after the Superintendent, Lead Foreman, or Manager has acted or should have acted, a complaint in writing, setting forth the alleged grievance and stating the action of the Superintendent, Lead Foreman or Manager; whereupon the Director or his/her designated representative, shall set the case down for a hearing at a specified place, date and time not more than seven (7) days thereafter, giving at least two (2) days' notice thereof to the employee or his/her representative, and shall render a decision thereon in writing and deliver copies thereof to the employee and to the President of the Union within five (5) days after the close of the hearing. The third step of the grievance procedure will be held either during working hours or immediately preceding, or immediately following the employee's run or shift. If held during nonworking hours and the grievance is upheld, the grievant will be paid up to one-half (1/2) hour at his or her regular hourly rate.

4. If the Director's decision is not satisfactory, then the dispute may be referred to arbitration by the Union by delivering a notice of intent to arbitrate to the Director within five (5) days of the Union's receipt of his/her decision. Arbitration shall be invoked only by the Union and, if it is not, the dispute shall be resolved according to the last answer in the grievance procedure. The Union may intervene and participate in the handling of a grievance or dispute at any level of the grievance procedure and no settlement may be reached between the Authority and an employee at Step 2 or above without the Union's knowledge and approval. The Union and Authority may mutually agree to settle, compromise, dismiss or resolve any dispute, disagreement, claim, controversy or problem at any time or at any grievance step before the Arbitration Board issues its final and binding decision. The matter may be submitted to regular or expedited arbitration. Expedited arbitration must be mutual consent.
  - a. Regular Arbitration. Each party shall, within five (5) days of the Union's notice of intent to arbitrate, appoint a member of said Arbitration Board and deliver written notice thereof to the other party, or otherwise forfeit its case. The two members thus appointed shall forthwith proceed to select an additional member of the Board (who shall be an impartial and disinterested person); but should the two members first selected fail to agree upon the other member within ten (10) days after being appointed, they shall request the American Arbitration Association to furnish a list of seven (7) members of the National Academy of Arbitration from which the third member shall be selected. Within five (5) days after receipt of such a list, the two members shall determine by lot the order of elimination, and thereafter each shall in that order alternately eliminate one name until only one name remains. The remaining person on the list shall be the third member of the Arbitration Board. Any vacancy in the Arbitration Board shall be filled in like manner as the predecessor member was selected. Multiple grievances may be submitted to the same arbitrator only if they arise out of the same factual situation, involved the same contract clause or work rule, or with the consent of the parties.

The Arbitration Board as thus constituted shall promptly proceed to hear the case and render a decision thereon and the decision of a majority thereof shall be final; provided, that the party appealing to the Arbitration Board shall bring the case on for hearing within ninety (90) days after the third member has been appointed, unless extended by mutual agreement, else the appeal shall be deemed abandoned and the case closed. The Arbitration Board shall make every reasonable effort to render its decision within thirty (30) days from the date of the completion of the hearing in the proceedings, or within such longer period as the parties to the proceedings may mutually agree upon in writing. All decisions of the Arbitration Board shall be in writing in triplicate, signed by

at least a majority thereof, and the originals thereof shall be filed with the Authority, the employee and the Union.

5. All costs for the hearing and service of the arbitrator shall be borne by the parties jointly. Each party will bear the expense of its representatives and for the presentation of its own case.
6. In the aforesaid first step of the grievance procedure the employee may be requested to be present. In the aforesaid subsequent three (3) steps, or any thereof, he/she shall have the right to be present if he/she so desires, and he/she shall be present in person if he/she or his/her representative is so requested by the official of the Authority conducting the hearing or the party representing the Authority before the Arbitration Board (as the case may be).
7. When a case is submitted to an Arbitration Board, the Authority and the employee involved (or his/her representative) shall jointly present a statement in writing of the specific issue or issues to be decided, based upon the record before the Department Director (or his/her designated representative) and the Arbitration Board shall confine its decision to the issue or issues so presented; and no such Arbitration Board shall be authorized to deal with wage, hours-of-service or working-condition controversies of a general nature but shall be limited to considering and acting upon individual grievances as hereinbefore provided. If the parties cannot agree upon such a joint statement, each party may submit a written statement of the specific issue or issues believed by it to be involved, subject to written objection by the other party, and from such statements, objections and the record before the Department Director (or his/her designated representative) the Arbitration Board shall determine the specific issue or issues before it and notify each party thereof in writing at the start of the case.
8. The expense of each proceeding before an Arbitration Board, including reasonable compensation to the impartial and disinterested member, shall be equally divided between the parties, except that each party shall bear the expense of the member selected by it, its witnesses and the production of its evidence; and, in any grievance proceeding before an official of the Authority or an Arbitration Board, each party may present such witnesses and evidence as it deems material to the issue or issues involved and shall bear the expense thereof.
9. If, as concerns any grievance presented, the decision of the immediate superior official, Superintendent, Lead Foreman, Manager or the Director when none of the others exist, the Department Director or Arbitration Board, or any of them, shall sustain the position of the employee, the latter shall be awarded such remedy as the Arbitrator shall determine, less any interim earnings or unemployment compensation.



Section 1.21(g). Holidays-Holiday Allowances

(g) EXTRA BOARD PRACTICES TO BE CHANGED FOR HOLIDAYS, AS FOLLOWS:

All open work must be accounted for each holiday on the Extra Board and marked-up as follows:

1. Active operators on board that day. Day runs and showups for day work will be assigned to day operators and night runs and show-ups for night work will be assigned to night operators. Operators serving time will receive work ahead of volunteer and drafted operators.
2. Regular, relief and vacation run operators active that day will be assigned to work in seniority order.
3. Regular, relief and vacation run operators who are off on account of Holiday schedules and not their assigned day off, who volunteer to work that day will be assigned work in seniority order.
4. Regular, relief and vacation run operators who are off on account of Holiday schedules and not their assigned day off, who are required to work that day due to shortage of operators, will be drafted, beginning with operators who have least seniority and continuing up; however, the work will be assigned in seniority order beginning with operator at top of list of such drafted operators. Operators will be drafted for day work from those who have day runs, and for night work from those who have night runs. However, an operator can volunteer for day or night work and be used ahead of a drafted operator.
5. Extra operators on day off - day operators for day work and night operators for night work.
6. Regular, relief and vacation run operators on day off - day operators for day work and night operators for night work.
7. Operators on the Extra Board who are not needed for holiday work at the time Extra Board is made out will be marked "Excused this day only," starting with the last operator in seniority Day or Night Board, as is presently done. In case of unforeseen circumstances, creating extra work on the Holiday, operators marked "excused this day only" will be entitled to work ahead of all active operators (operators serving time will be considered active) that day who have had eight (8) hours work or pay, excluding holiday or shop-up pay; also will be called ahead of operators who have volunteered to work. Operators marked "Excused this day only" will be called for work in the inverse order in which excused.

Any extras, or other pieces of work, which cannot reasonably be assigned will be shown on the Board and marked "To Fill."

## Procedure for Holiday Allowance in Transportation Seniority Unit

The computation of holiday pay for bus operators will be for the run that is normally classed as holiday work. For example, a night run which may start at 4:00 p.m. on the holiday and run through 2:00 a.m. on the next day would also be classed as a holiday run. There is no question concerning the runs which are wholly within the holiday.

The computation of holiday pay for non-operating employees in the Transportation Seniority unit will be for the shifts that are normally classed as holiday shifts for the various classifications of work. The shifts are normally classed as holiday shifts if the major portion of the time of the shift is during the holiday. If the time of the shift is equally divided between that worked on the holiday and the day before or the day after, the holiday shift is the one that starts in the evening and continues on past midnight of the holiday.

### B. Exhibits

Jt. Ex. 1	Agreement 1982
Jt. Ex. 2	Revised Absenteeism Policy
Jt. Ex. 3	Grievance of Otis Boldridge
Jt. Ex. 4	Grievance of Sam Crout
Jt. Ex. 5	Grievance of Lester Hood
Jt. Ex. 6	Doctor's Records
Co. Ex. 1	Docket Schedules
Co. Ex. 2	Warning Slips on Misses (5 pages)
Co. Ex. 3	Attendance Records of grievants (6 pages)
Co. Ex. 4	Metropolitan Operators Manual (Union objection noted)
Co. Ex. 5	Extra Board List
Co. Ex. 6	Second Step Response of E. George Re: Crout
Co. Ex. 7	Troost Weekday Schedule
Union Ex. 1	Physicians's Guide Extract
Union Ex. 2	Doctors Letter of June 25, 1982
Union Ex. 3	Doctors Records

### IV. POSITION OF THE EMPLOYER

The Authority submits that an examination of the facts and circumstances surrounding the dismissal of all three Grievants indicates that just and proper cause existed for their discharges. In support of this assertion the Company makes the following arguments with respect to each Grievant:

#### A. Otis Boldridge

Operator Boldridge actually missed five (5) assignments in less than nine (9) months. The Company points out that his first four (4) misses occurred within a period of two months from the effective date of the Absenteeism Policy providing that employees could be dismissed for five missed assignments (Brief for the Authority at 13). Although there is a

break of approximately eight (8) months between the fourth and fifth misses, the Company asserts that the fact that Mr. Boldridge was relieved from duty for 79 work days should be taken into account by the Arbitrator.

The Company further argues that the Grievant knew that missing assignments was a violation of Company rules. The rule and penalty for missing assignments is reasonable due to the ease of avoidance. It is pointed out by the Company that to avoid a "miss" all the operator need do is telephone the Authority any time prior to the start of the work shift so that timeliness can be maintained. Otherwise the public must either endure standing on bus stops for buses which do not run on schedule or, alternatively, pay an operator due for relief overtime rates (Brief at 13-14). The Employer contends that it maintains an Extra Board of 62 operators at an average annual cost in wages and benefits of \$30,000 each to cover operator absences. The operation of the Extra Board and the timeliness of the system is undermined when an operator fails to give the common courtesy of advance notice of his intention.

In summary, the Company argues that the Grievant knew the rule and seriousness of its violation because he had been counselled and disciplined time and time again. Not only was he counselled and warned on each occasion, but he had been suspended without pay approximately twenty (20) days in 1981 to no avail. It is contended that the Grievant has not been discharged as a result of the perils of life, but because he was not conscientious enough to make a reasonable effort to reduce the hardship he caused his Employer (Brief at 14).

B. Sam Crout

The Company concedes that Operator Crout has experienced headaches as this problem is documented by his attendance which, in the words of the Company, cannot be described as anything but "atrocious."

With respect to the Grievant's argument that it was the Fiorinal #3 which caused him to miss his assignment on June 5, 1981, the Company notes that it seems contrived and a bit convenient. The Authority submits that if this drug had the effect on the Grievant as he alleges, Mr. Crout would have known this before he filed his grievance. It is more likely, argues the Employer, that the Grievant missed his assignment for a variety of reasons and that Mr. Crout only relied on the medical problem to justify his failure to make a reasonable effort to perform his assigned task (Brief at 16-17).

The Company further argues that the Grievant knew that he was on the brink of disaster on April 16, 1982, the date that he incurred his fourth missed assignment (Brief at 17). Nevertheless, Operator Crout took no affirmative measures to correct his problem nor did he do what a reasonable person would have done under the circumstances, such as employing a wake-up service or ask to share a ride with another driver. The Company notes that when the Grievant began to experience another late night headache he could have called in and informed the ATA that he was going to be ill again and avoid his fifth miss (Brief at 17). While the Authority sympathizes and understands this apparently incurable medical

problem, and tolerated the Grievant's full-time wages for his part-time service, the Authority argues that it is an unreasonable burden to carry this employee who is not considerate enough to tell the Authority he will not perform the assigned task before his shift begins (Brief at 18).

With regard to the Union's defense of discriminatory treatment, the Employer contends that this defense was asserted for the first time at the arbitration hearing. It is argued that the surprise of new issues such as this one prevents the opposing party from presenting all relevant information (Brief at 19).

Even if the issue had been raised in a timely manner, the Company submits there was no discriminatory treatment since the facts surrounding the Grievant's infraction were different from those infractions of other employees cited by the Union. Operator Crout had relied on his headaches and medication prior to the present missed assignment. The other employees had suffered problems which could reasonably be expected to be temporary, unlike that of the Grievant (Brief at 20). The Employer argues that one grant of leniency is not carte blanche authorization for every employee to miss an assignment. It is asserted that Operator Crout is clearly in a class by himself and his grievance should be denied.

C. Lester Hood, Jr.

With respect to Mr. Hood's grievance the ATA argues that the operation of the Extra Board is governed by the Agreement, Section 2.21 (Brief at 20). That Agreement, notes the Employer, makes it clear that Extra-Board operators work on holidays. It is argued that Operator Hood clearly knew that incurring a fifth missed assignment would cause his discharge. Nevertheless, Mr. Hood did not bother to check the Agreement, or ask a supervisor or dispatcher whether he was required to work on the holiday at issue (Brief at 21). The Company asserts that the Grievant had been previously counselled and disciplined to no avail. Operator Hood did not act as any reasonable and responsible person would under the circumstances and, therefore, the Employer argues that his discharge should be upheld.

V. POSITION OF THE UNION

The Union initially points out that there are two points not in dispute between the parties. According to the Union, there is no dispute that each of the three Grievants did in fact incur five missed assignments within a twelve (12) month period. Secondly, despite the fact that the absenteeism policy states that the penalty for the fifth miss in a twelve month period will be a discharge, it is undisputed, argues the Union, that the penalty of discharge is not mandatory. The Union points out that the ATA's Director of Transportation testified that the policy allows consideration of the employee's seniority, work record or mitigating circumstances which surround the missed assignment to reduce the penalty for the fifth miss (Brief at 11). In light of the fact that the absenteeism policy does not mandate discharge for the fifth miss as a "hard and fast rule," the question in these

cases is whether the circumstances surrounding each of the Grievant's fifth miss entitles him to one or more chances before the ultimate penalty of discharge is imposed. The Union submits that each of the Grievants have not demonstrated that his absenteeism is "incurable" to the extent that it justifies dumping him into the ranks of the unemployed (Brief at 11).

A. Otis Boldridge

With respect to Otis Boldridge, an employee with more than five (5) years of seniority, the Union argues that the progressive discipline outlined by the absenteeism policy apparently made its point. It is noted that the Grievant, who had missed four assignments in less than two months during September and October 1981, had managed to make it to work for more than seven months without a miss. It was apparent from his testimony, submits the Union, that Boldridge was trying to do better than he had in the past (Brief at 12).

The Union asserts that the Grievant made every effort to make it to his relief point at 11th and Walnut Streets by 1:23 p.m., the time that the prior operator was to finish the run. The Union submits that because the Grievant's neighbor stopped a few blocks from the relief point, Boldridge had to run the last few blocks himself. Consequently he arrived at the relief point some 12 minutes past the relief time (Brief at 12).

The Union admits that the Grievant made a mistake by not keeping better track of the time between his a.m. and p.m. runs. It is argued, however, that his conduct that day in attempting by whatever means were available to make it to his relief point on time, coupled with the length of time that he has been "miss free," show that Mr. Boldridge does take his work responsibilities seriously and should be given another opportunity to prove that he is capable of meeting the Company's expectations (Brief at 13).

B. Sam Crout

The Union argues that in Mr. Crout's case, not only are there mitigating circumstances to explain the fifth missed assignment, but this Grievant was not treated in the same manner as other employees similarly situated. Furthermore, the Union maintains that the Employer failed to meet its own responsibility to conduct a fair and impartial investigation prior to administering discipline (Brief at 13).

Specifically, the Union asserts that, because of the medication that Crout was taking for his severe headaches, Fiorinal #3, the Grievant overslept on June 5, 1982, missing his job assignment at 5:44 a.m. The Union argues that this drug contains 30 milligrams of codeine and has an "enhanced analgesic-sedative action" (Brief at 13). More important, the Union contends that evidence from the Employer's own files demonstrates that medication which could cause drowsiness has been a factor that has been taken into account in previous cases and has even resulted in the reversal of discharges for missed assignments.

In this same respect the Union points out that the Company did not request the Grievant to produce evidence that his missed assignment was due to his medication. This failure to investigate the Grievant's excuse, it is argued, must be contrasted to the practice when other similarly-situated employees were involved. Citing arbitral authority,<sup>1</sup> the Union maintains that the Company's disparate treatment of Mr. Crout, coupled with the failure to investigate as required by the parties' contract, should result in sustaining the grievance (Brief at 16-18).

C. Lester Hood

The Union argues that Mr. Hood incurred his fifth miss in a twelve (12) month period because of confusion regarding the scheduling of extra board operators on holidays. It is argued that Mr. Hood in good faith, but mistakenly, believed that extra board operators were to be treated the same as operators holding regular runs. That is, if the operator had no assignment on Sunday preceding a Monday holiday, the holiday would also result in a non-work day (Brief at 19). It is pointed out by the Union that although Mr. Hood had previously worked the extra board several times, this was the first time he ever had enough seniority to obtain Sunday off when a holiday fell on the following Monday. Thus, he had no experience upon which to draw for a situation such as this.

The Union argues that since it was an honest mistake, the Grievant should not be required to pay the price of the ultimate penalty of discharge. This is especially so when one considers that all Hood needed to do in order to obtain the day off was to sign the "want off book." It is noted by the Union that there were sufficient operators on the Extra Board to allow four employees beneath Mr. Hood in seniority to be excused (Co. Ex. 5). Under these circumstances the Union maintains that Hood, who is now well aware of the extra board scheduling practices, should be given another opportunity to show that he is a responsible employee (Brief at 19-20).

VI. DISCUSSION

There is no dispute that all three Grievants were discharged pursuant to the Authority's absenteeism policy of October 1, 1981.<sup>2</sup> That policy defines a

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<sup>1</sup>See, Grief Brothers Cooperage Corp., 42 L.A. 555 (Daugherty, 1964); Borden's Farm Products, Inc., 3 L.A. 607 (Burke, 1945); Penn-Dixie Cement Corp., 29 L.A. 451 (Brecht, 1957); Decor Corp., 44 L.A. 389 (Kates, 1965).

<sup>2</sup>The record indicates that, on September 28, 1981, the Company announced a new absenteeism policy. While the Union participated in discussions regarding the policy's provisions, the policy was not made part of the parties' collective bargaining agreement. In fact, the Union refused to sign it. As such, it was unilaterally implemented by the Transit Authority [see, Brief for the Union at 3].

"missed assignment" as an operator's failing to report at the assigned time (Jt. Ex. 2 at par. I). The policy further provides that if an operator finds that due to unusual circumstances he may be late for an assignment, he must call the dispatcher prior to sign-on time for later assignment if one is available. Calling or arriving without prior call after the sign-on time constitutes a "missed assignment" (Jt. Ex. 2 at par. VI). The policy outlines progressively more severe penalties as operators accumulate more missed assignments. After the first miss the employee is either released from duty or given a substitute assignment at the foot of the Extra Board. For a second miss the operator is given two days at the foot of the Extra Board if work is available, a review of the attendance record by the Superintendent, and a warning letter. For the third miss the driver serves three days at the foot of the Extra Board, has his attendance record reviewed, and receives a warning letter. A three-day suspension is given for a fourth miss. Finally, for an operator's fifth missed assignment within a twelve (12) month period, the penalty is discharge (Joint Ex. 2).

While each of the Grievants was discharged for incurring a fifth missed assignment within the twelve-month time frame, supervisors, in implementing the policy, have discretion to reduce the penalty for the fifth miss in light of an employee's seniority, work record, or other mitigating circumstances. As noted by ATA Director of Transportation, Mr. Walter Barlow, it is not a "hard and fast rule" that five missed assignments mandates a discharge. Accordingly, it is central to the resolution of the grievances whether the circumstances surrounding each of the Grievants' fifth missed assignment entitle him to still another chance under the absenteeism policy. In this respect the instant policy is not a "no fault" system whereby an employee is given a specified amount of misses prior to a mandated penalty of discharge without regard to the facts and circumstances surrounding each missed assignment.<sup>3</sup>

In discussing the specific cases of the three Grievants it should be noted for the record that arbitrators, when confronted with dismissals for absenteeism, have consistently held that chronic or excessive absenteeism is just cause for discharge. In general, before sustaining a discharge for absenteeism, arbitrators require that three factors be present: (1) there must be a clear disciplinary policy on absenteeism known to employees; (2) the policy must have been applied fairly and consistently; and (3) the worker must

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<sup>3</sup>See, e.g., Arizona Portland Cement Co., 79 L.A. 128 (Weizenbaum, 1982) (employer had just cause for discharge for excessive absences that included illness, notwithstanding contentions that employer discriminated against employee in applying discipline because other employees with similar problem received more lenient treatment; employer's "no fault" policy applied); Safeway Stores, Inc., 79 L.A. 742 (MacLean, 1982) (employee terminated as result of application of "no fault" rule without regard to considerations of individual circumstances involved); General Electric Co., 71 L.A. 129 (Twomey, 1978) (just cause for discharge under "no fault"-type practice of dismissal for fourth warning notice during six-month period).

have been given fair warning that he faced discharge unless his attendance record improved.<sup>4</sup>

A. Otis Boldridge

There is no question that Mr. Boldridge knew that missing his assignments was a violation of the Employer's absenteeism policy. Likewise, there is no argument from the Union that the scheme of progressive discipline is unreasonable. The Employer has clearly demonstrated that, due to the nature of its business, it must expect its operators to be on time for their respective runs. To avoid being charged with a "missed assignment" all that is required of an operator is to telephone the Authority any time prior to the start of the work shift so that transit schedules can be maintained. Otherwise, as noted by the Company, the public is forced to suffer the effects of delays when the busses do not run on schedule. The Arbitrator would be hard pressed to think of a business where timeliness is more important.

Furthermore, there is no question that the Grievant was prone to tardiness or missed assignments. The Union has argued that the progressive discipline outlined by the Authority had taken its effect since the Grievant had managed to make it to work for more than seven months without a miss (Brief for the Union at 11-12). The record further indicates, however, that the Grievant actually missed five assignments in less than nine months. His first four misses occurred within a period of two months from the effective date of the implementation of the absenteeism policy, October 1, 1981. While there is a break of approximately eight months between the fourth and fifth missed assignments, Mr. Boldridge was relieved from duty during that interim period for 79 work days (Joint Ex. 3). Within three weeks of his return to work Boldridge again missed an assignment on March 21, 1982 which, it should be noted, was voided by the Director of Transportation when the Grievant stated that the miss resulted from some medication that he had taken (see, Brief for the Employer at 15). Less than three months later, on June 7, 1982, Mr. Boldridge missed yet another assignment. In effect, this employee missed six assignments (one of which was voided) within the designated period.

The Union has argued that it would be a severe penalty to sustain the discharge of an employee merely because he let the time get away from him (see, Brief for the Union at 12-13). Yet Mr. Boldridge could have notified his dispatcher as early as 1:12 p.m. on June 7, 1982, the time

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<sup>4</sup>See, e.g., Grievance Guide (BNA Books, 1972) at 18-23; City of Allentown, 78 L.A. 809 (Calnan, 1982) (employer had just cause for discharge where Company had given repeated warnings to grievant regarding consequences of continued conduct, requirement tht employees report to work on time is reasonable, employer consistently applied requirement, and next logical step following warnings was discharge). See also, Shepard Niles Crane & Hoist Corp., 71 L.A. 828 (Alutto, 1978); General Electric Co., 74 L.A. 290 (MacDonald, 1979); AMBAC, Inc., 72 L.A. 347 (Kuypers, 1979).



that the Grievant testified he discovered his watch was running late. Although he had already missed his sign-up time, in view of the fact that he had accumulated four recorded misses it would be reasonable to expect the Grievant to notify his employer at approximately 1:12 p.m. Instead, the Grievant, according to his testimony, attempted to reach his relief point by 1:23 p.m.

The Authority has argued that, for one reason or another, Operator Boldridge missed his assignments and cannot be depended upon to fulfill his job responsibilities. The Company accorded the Grievant every opportunity to demonstrate that he was a conscientious operator. The record supports the Company's conclusion that this Grievant had been given numerous chances to change his pattern, all to no apparent avail. His pattern of missed assignments is disruptive to the Authority and, more important, to the public which it serves. There is simply no evidence that, if given still another chance, this employee will conform to the requirements of his Employer. Under these facts the Arbitrator has no choice but to sustain the discharge.

B. Samuel Crout

Operator Crout has alleged that the effects of his medication, Fiorinal #3, caused him to incur his fifth missed assignment on June 5, 1982. Moreover, in his grievance Mr. Crout stated that since his employment the Authority "has made no effort to help...or work with me."

The Company does not contest the medical problems of Mr. Crout (see, Brief for the Employer at 16). There is, however, nothing in the record that warrants the conclusion that the Company has made no attempt to work with the Grievant. Similar to the other Grievants, the Authority has demonstrated that it counselled Mr. Crout in an attempt to solve his attendance problems.

In the instant case the Company has attempted to justify the discharge by arguing, in part, that the Grievant's health problems are of such a nature tha he is not likely to ever render acceptable service (Brief for the Employer at 18).

In this respect the Company's argument is well taken. As cited by a well recognized authority,

It may be relatively easy for a company to justify a discharge for excessive absenteeism where the employee has had frequently recurring illnesses for short periods over a long period of time showing symptoms of psychosomatic origin or chronic bad health.

[Grievance Guide (BNA Books, 1972 at 18)].

The record is clear that this Grievant was well aware of his medical condition, having been treated by his personal physician and a neurologist (see, Brief for the Union at 6). In addition, there is no evidence that the Grievant took any action to guard against the problems he now argues should mitigate his discharge. As pointed out by the ATA,

Operator Crout did not do what a reasonable person under the circumstances would do. He did not employ a wake-up service, he did not ask to share-a-ride with another driver, or anything else. When Operator Crout began to experience another late night headache he could have called then and said that he was going to be ill again and avoid his fifth miss.

(Brief for the Employer at 17).

The Union, as an affirmative defense, has asserted that the Authority has acted in a discriminatory manner with respect to the fifth missed assignment of Mr. Crout. Specifically, the Union asserted that since the missed assignments of Otis Boldridge, Delton Pitts and William Green had been voided when they alleged that one of their missed assignments was caused by the medication prescribed, Mr. Crout's fifth miss should also be voided. In response the Authority submits that the circumstances surrounding Mr. Crout differ from those of Messrs. Boldridge, Pitts and Green in the following respects: (1) Pitts, Green and Boldridge had not previously used this explanation; (2) Pitts, Green and Boldridge suffered illnesses which were temporary and capable of cure within the foreseeable future; and (3) Pitts, Green and Boldridge provided prompt verification that they had been prescribed medication which could cause drowsiness (see, Brief for the Employer at 19).

While the Union's argument has some validity, there are other considerations in the instant case that warrant a finding that there was no discriminatory treatment such that the discharge should not be sustained. First, it is of note that the Union apparently inserted for the first time at the arbitration hearing the issue of discriminatory treatment by the Company (see, Brief for the Employer at 18). There is no indication by the Union that this argument was not available in the lower stages of the grievance procedure. It is simply not conducive to the settlement of grievances to allow the introduction of new evidence at the arbitration hearing when that evidence was readily available in prior deliberations [see, Hill, M. & A. V. Sinicropi, Evidence in Arbitration (BNA Books, 1980)]. No mention of this was made in the grievance form or in other steps of the parties' grievance procedure (see, Brief for the Company at 19). Although the Arbitrator will not disregard this evidence in this case, it certainly would carry much more weight had the Union argued this point prior to arbitration.

Second, even if the evidence is accorded full weight, there is little evidence that warrants the conclusion that Mr. Crout was treated differently than some other employees. The Grievant has had recurring trouble with his medical problems. Indeed, as noted by the Company, he had relied on this excuse in the past, unlike the other employees cited by the Union. Mr. Crout's problems were also of a recurring nature, again unlike those of the other operators. In this respect the Company was reasonable in concluding that leniency with Boldridge, Pitts and Green might prove worthwhile, while it would not in the case of Mr. Crout.

The Union, citing various arbitrators, has argued that the discharge of Mr. Crout should not be sustained since the Authority did not make a

proper investigation before assessing discipline (see, Brief for the Union at 14-18). In this respect the Union notes that Jack Ethridge, who made the decision to discharge Mr. Crout, admitted that he discharged Mr. Crout even without knowing whether it was true that Crout had missed his assignment because of the medication he was taking (Brief at 14]. The Union accordingly asserts that Mr. Ethridge's failure to even investigate Crout's excuse is a serious violation of the Employer's obligations in the disciplinary context (Brief at 14).

The Union's argument assumes that the Authority disregarded the Grievant's explanation in reaching the decision to discharge him. There is no evidence in the record, however, that such was the case. In this respect there is evidence that the Employer did not request medical verification from the Grievant because they assumed that the Grievant once again was having problems with his medication for his recurring medical condition. As such, the cases cited by the Union are not on point here. In general, those decisions deal with situations where discipline is assessed and in the process the facts are resolved against the employee prior to an investigation.

In summary, the Employer has demonstrated that it had just cause for the dismissal of Mr. Crout. Moreover, the Union has not shown that the Company engaged in any discriminatory treatment of the Grievant. Finally, it cannot be concluded that the discipline was unwarranted because the Company did not conduct a proper investigation.

C. Lester Hood, Jr.

There is no question that this Grievant knew, or had reason to know, that missing a fifth assignment could result in his discharge. Moreover, the Company is correct in asserting that, being on the brink of disaster, Mr. Hood should have called a supervisor or dispatcher to check the agreement in order to ascertain whether he had the holiday off (Brief for the Employer at 21).

Notwithstanding the above, this Arbitrator has concluded that the special facts surrounding this missed assignment warrant extending Mr. Hood an additional chance. As stated by other arbitrators in discharge cases, the reasonableness of a disciplinary penalty is an essential ingredient of just cause for discharge. See, e.g., Ludington News Co., 78 L.A. 1165 (Platt, 1982). It would appear unduly harsh to sustain a discharge where, as here, an employee incurs a missed assignment merely because of his misunderstanding of a complex provision of the collective bargaining agreement. It is of note that in this case, unlike those of the other Grievants, Mr. Hood had no indication that he was assigned to work on the day in question. It is certainly reasonable that a person who had never worked the Extra Board under the specific circumstances in question could reasonably conclude that, if an operator had no assignment on Sunday preceding a Monday holiday, he would have the holiday as an off day. Mr. Hood had previously worked the Extra Board, but this was the first time that he had enough seniority to obtain Sunday off when a holiday fell on the following Monday. Moreover, there were a number of operators on the Extra Board that day who were junior to the Grievant in

seniority. Had Mr. Hood wanted the holiday off on Monday, all that he had to do was sign the "want off book" (see, Brief for the Union at 19).

In summary, the Grievant should be given another chance to demonstrate that he is a responsible employee. This is not to be construed that the Employer has an affirmative duty to make sure that all employees know and fully understand the terms of the collective bargaining agreement. For this reason it would be unfair to require that the Employer forward backpay to the Grievant because he failed to understand the collective bargaining agreement. The Arbitrator only holds that, under these special facts, Mr. Hood is deserving of another chance. Thus he should be reinstated with all contractual benefits he would have received had he not been discharged, except backpay.

VII. AWARD

For the reasons cited in the opinion above, the Arbitrator finds that the Authority had just cause for the discharge of Operators Boldridge and Crout. The third Grievant, Mr. Lester Hood, Jr., is to be reinstated with all contractual benefits that he would have received had he not been discharged, with the exception of backpay.

Iowa City, Iowa  
April 6, 1983

  
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Anthony V. Sinicropi, Neutral Member  
of the Board of Arbitration