NH Supreme Court affirmed and remanded this decision on November 23, 1999, NH Supreme Court Case No. 98-038.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

MANCHESTER TRANSIT AUTHORITY Complainant v. AMALGAMATED TRANSIT UNION, LOCAL 717 Respondent	CASE NO. M-0596:10
AMALGAMATED TRANSIT UNION, LOCAL 717 Complainant v. MANCHESTER TRANSIT AUTHORITY Respondent	CASE NO. M-0596:11 DECISION NO. 97-101

APPEARANCES

Representing Manchester Transit Authority:

Diane Quinlan, Esq.

Representing Amalgamated Transit Union, Local 717:

Stephanie S. Ferro, Amalgamated Transit Union, Local 717

Also appearing:

Ron Roy, Manchester Transit Authority
Don Clay, Manchester Transit Authority

BACKGROUND

These proceedings come from two unfair labor practice (ULP) charges filed by these parties against each other. The Manchester Transit Authority (Authority) filed unfair labor practice (ULP) charges against the Amalgamated Transit Union, Local 717 (Union) on July 10, 1997 alleging violations of RSA 273-A:5 II (f) pertaining to the Union's attempting to implement an arbitrator's award which is against public policy. The Union filed its answer to these charges on July 23, 1997. The Amalgamated Transit Union, Local 717 filed unfair labor practice charges against the Authority on July 16, 1997 alleging violations of RSA 273-A:5 I (g), (h) and (i) for breach of contract because it failed to implement a final and binding arbitration award. The Authority filed its answer on July 28, 1997. These cases were then consolidated for hearing and heard by the PELRB on September 4, 1997.

FINDINGS OF FACT

1. The Manchester Transit Authority is a "public employer" of driver-operators, mechanics, maintenance personnel and other positions within the meaning of RSA 273-A:I X.

2. The Amalgamated Transit Union, Local 717, is the duly certified bargaining agent for drivers, mechanics and other positions employed by the Authority.

3. The Union and the Authority stipulated that they have a binding collective bargaining agreement (CBA) in effect, that it contains an agreed-upon grievance process, which concludes with final and binding grievance arbitration, and that they, the parties, participated in the selection of the arbitrator, consistent with the contract, who heard the case in question.

4. In February and March of 1997, Arbitrator Tim Bornstein heard grievance arbitration cases involving the discharge of two Authority employees, Ted Urban, a maintenance/utility worker, and Dave Conway, a driver, administered under the docket of the American Arbitration Association, Case Nos. 1130-1691-96 and 1130-1692-96, respectively. In each case, the issues posed were whether the specific employee was discharged for just cause

and/or whether the employer violated Section III.B of the CBA which says in pertinent part:

> In connection with the investigation of charges involving disciplinary action because of alleged misconduct or violation of rules, members of the Union shall be given an opportunity to answer such charge or charges within forty-eight (48) hours of the entering of the complaint by or with the Authority, provided, however, in cases of investigation of conduct made by the Authority, the limit of time in which members shall be called upon to answer charges may be extended to six (6) days. In no case shall any member of the Union be charged with or required to answer the offenses not called to his attention within twelve (12) days.

5. Both discharges resulted after the particular employee was tested for and returned a positive result for marijuana usage in a random drug test. Facts were not specifically retried before the PELRB and there is no challenge to the arbitrator's findings that there is "no evidence that either grievant was at anytime impaired because of drug use" and that the Authority, in both cases, discharged the grievants "more than twelve days after it received a laboratory report that they had tested positive for drugs." The arbitrator also noted (Award, page 5 introduced as Authority Exhibit A) that "the Authority did not actually adopt a drug policy providing for discharge after testing positive on a single drug test until June, 1996, after Ted Urban and Dave Conway had been discharged. Although management discussed a draft of a no-tolerance drug policy with the Union before June 1996, the Union never agreed to that policy, and management...did not communicate the terms of its new policy until after its unilateral adoption in June 1996." Conversely, back in 1990, the Authority had adopted a policy prohibiting the use of drugs in the workplace and stating that violators were subject to discipline up to termination.

6. The arbitrator reversed the disciplinary terminations of both grievants for several reasons. First, the Authority's June 26, 1996 drug policy was not applicable because it was adopted after Urban and

Conway were discharged. Second, neither discharge occurred within the twelve days mandated in Section III.B of the CBA. Urban's discharge was, according to the arbitrator, 40 days after the Authority learned of the positive test results; Conway's termination was thirteen days after the Authority learned those results. Third, given the timing of the discharge and the June 26, 1996 drug policy, the arbitrator cited Section I.A.4 of the CBA which refers to the principle of progressive discipline, namely, "when discipline is to be given, it shall be given in a fair and progressive manner for repeated offenses," something which did not happen in Conway's case. In reaching his decision to reverse the termination, the arbitrator noted that the Manchester School District policy, articulated in a letter dated January 27, 1997, was to prohibit employee interaction with students if the employee was "caught under the influence (even once)," something that was neither alleged nor proved about the grievants. (Award, page 6.) He also noted that the U.S. Department of Transportation regulations which mandate random drug testing "do not prescribe the level of discipline to be imposed when an employee tests positive for drugs on one occasion without any evidence of impairment." (Award, page 13.)

7. The Authority argues (Brief, page 8) that the reinstatement of the grievants "would destroy the integrity of the MTA's drug testing program and would offend the public policy of the State of New Hampshire which encourages employers to develop, establish and enforce programs to prevent their employees from attempting to perform their jobs while under the influence of narcotics or other intoxicants." It cites numerous private sector cases in support of its argument, e.g., United Paperworkers International Union v. MISCO, Inc., 484 US 29, 43 (1987); W.R. Grace & Company v. International Union of Rubber Workers, 461 U.S. 757,766 (1983), Exxon Corp. v. Esso Workers' Union, 118 F.3d 841 (1st Cir. 1997) and Exxon Corp.v. Baton Rouge Oil, 77 F.3d 850 (1996). Statutorily, on brief (pp. 5-6), the Authority relies upon the Drug Free Workplace Act, 41 U.S.C. § 701, the Omnibus Transportation Employee Testing Act, the New Hampshire Drug-Free School Zone Act, RSA 193-A and RSA 265:82 I (a) "which criminalizes the operation of motor vehicles by persons who are under the influence of alcohol or controlled substances." Finally, the Authority asserts that the National Highway Safety Administration

Authorization Act, 49 USC § 30101 *et. seq.* requires the removal of any employee who tests positive for a controlled substance from performing safety sensitive functions regardless of whether there is evidence of on-the-job impairment. (Brief, page 8.)

8. The Union objects to the Authority's use of the "public policy" argument since the policy in question was not adopted until after the discharge of the two grievants (brief, page 7). It argued that both Steelworkers v. Enterprise Wheel, 363 U.S. 593, 597 (1960) and Board of Trustees v. Keene State College Education Association 126 NH 339, 342 (1985) recognize that the failure to implement an arbitration award which resulted from an appropriate exercise of an arbitrator's authority under the CBA is an unfair labor practice. The Union (brief, page 5) claims the Authority may not effectively raise "public policy" issues on the merits if it has not first "acted within a contractual period of limitations." It cites Oil, Chemical and Atomic Workers, etc. Local 4-228, 818 F.2d 437 (5th Cir, 1987) as an example, albeit not from the First Circuit as was Exxon, *supra*, that off-duty/off-premises conduct involving the use of drugs "is not a *per se* justification for a worker's discharge" and that "it was within the discretion of the arbitrator...to find that the employee...would not present a safety risk in the future." (Brief, page 7).

DECISION AND ORDER

The crux of the matter in this case is whether we uphold the authority of the arbitrator to interpret and enforce the CBA or if we consider the broader public policy issues relative to drug usage, impairment in the workplace or evidence that employees in safety-sensitive jobs are engaging in a life style which shows evidence of drug usage. We have weighed the arguments in favor of contract enforcement through the arbitrator's award on the one hand and the issues raised through evidence of drug usage on the other.

Ordinarily, we would confine our role as to whether the arbitrator exceeded the authority conferred by the CBA when he sustained the grievances and ordered reinstatement of the two employees. (Authority brief, page 5.) In this case, however, we cannot confine our mandate under Nashua School District v. Murray, 128 N.H. 417 (1986) and Appeal of Westmoreland School Board, 132 N.H. 103 (1989) because the acts complained of, i.e., the discharges, are addressed under the broader term of "discipline" and because the grievance process is an appropriate means by which to address disputes concerning alleged inappropriate imposition of that discipline. This

is cause for us to evaluate the broader public policy implications of employee drug usage or impairment resulting therefrom. (We will not speak to impairment here because there is no evidence before us that either grievant was impaired -- or showed characteristics of being impaired -- while in the workplace. Likewise, there is no evidence as to the degree by which they "flunked" the drug test by testing positive for marijuana usage, i.e., the extent to which an excess of THC metabolites were found in the grievants' specimens.) The Authority would have us follow this course of action because, they assert, public policy "is not within the arbitral domain and where public policy is implicated, the PELRB must determine whether the award offends public policy." (Authority brief, page 5, citing W.R. Grace & Company v. International Union of Rubber Workers, 461 U.S. 757 at 766 (1983) and Exxon Corporation v. Esso Workers' Union, 118 F.3d 841 (1st Cir. 1997).

The Authority (Brief, pp. 5-6) cited numerous cases and authorities to us arguing that there is "dominant public policy against drug use in the workplace" and "strong public policy ...which criminalizes the operation of motor vehicles by persons who are under the influence of alcohol or controlled substances." Neither of these conditions existed here. In reaching our decision in this case, we want the parties clearly to understand that neither workplace usage nor impaired operation influenced this decision because neither was shown to have occurred. Having said that, we think the Exxon case, *supra*, makes a compelling argument to sustain the discharges and to reverse the arbitrator's award.

In Exxon, 118 F.3d 841, 844 (1997), the First Circuit (Selya, J.), after citing Local 1445, United Food & Commercial Workers v. Stop & Shop, 776 F. 2d 19, 21 (1985) for proposition that it should "not tamper with an arbitral award unless it can be shown that the arbitrator acted in a way for which neither party could have bargained," said "public policy, however has its own imperatives -- and they occasionally conflict with the imperatives of contract interpretation. It is a fundamental rule that courts must refrain from enforcing contracts that violate public policy."

The Exxon case, is particularly apropos to this case because the Union argued that, even if there was a "cognizable public policy against the performance of safety-sensitive work by individuals who are under the influence of drugs, reinstating [the grievant] would not insult such a policy because there is no evidence that [he] was in the grip of cocaine while driving his...truck." We believe, as did the court in Exxon, that the presence of a controlled substance, verified by random drug tests which measured bodily fluids of the grievants, is enough to cause the employer to take corrective action which, in this case, was termination. Citing the Exxon Valdez incident, the First Circuit said, "If we have learned anything from such catastrophes, it

Circuit said, "If we have learned anything from such catastrophes, it is that employers must act affirmatively to avoid drug-related accidents rather than wait patiently for such accidents to happen." The same is true for the Manchester Transit Authority.

Safety-sensitive jobs may well require that employees may not perform duties while under the influence of drugs and that employers adopt and enforce drug-free workplace programs which include mandatory drug testing. As the court said in Exxon, *supra*, "Consistent with this enhanced understanding of the discerned public policy, we hold that forcing the employer to reinstate an employee who tests positive for drug use pursuant to a test that the employer administers as part of a drug-free workplace program would undermine that policy." We agree. The same philosophy appropriately applies in this case.

The Union's ULP (Case No. M-0596:11) is DISMISSED. The Authority's ULP (Case No. M-0596:10) is sustained by our finding that the Union committed a violation of RSA 273-A:5 II (f) in the form of a breach of contract for attempting to seek enforcement of the arbitrator's award. The arbitrator's award is hereby VACATED

So ordered.

Signed this 19th day of NOVEMBER. 1997.

EDWARD J. HASELTINE
Chairman

By majority vote. Chairman Haseltine and Member Kidder voting in the majority and Member Hall voting in the minority.

Member Hall's dissent is as follows:

Under the provisions of RSA 273-A:5 and 273-A:6, this board is charged with the hearing and adjudication of unfair labor practice complaints. It is well-settled that failure to implement a final and binding arbitration award may constitute a breach of the CBA. Trustees v. Keene State College Education Association, 126 NH 339, 341 (1985) quoting Steelworkers v. Enterprise Wheel & Car Corp., 363 US 593 (1960).

Breaches of contract are unfair labor practices in New Hampshire under RSA 273-A:5 I (h), apart from this board's

mandate to resolve arbitrability under Westmoreland, 132 N.H. 103, 109 (1989). The second leg of the Steelworker's *Trilogy*, namely, Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960), also applies as its "presumption of arbitrability", now more than thirty-five years old, has been held to apply in New Hampshire via A T & T Technologies v. Communications Workers, 475 U.S. 643 (1986), and the "positive assurance" test cited in Warrior & Gulf, A T & T and, in this state, in Appeal of Westmoreland School Board, 132 NH 103, 105 (1989). There must be "forceful evidence" of intent to exclude the subject matter of a grievance from the arbitration process in order for the process to be enjoined or reversed. Westmoreland, 132 NH 103, 106 (1989). There is no showing that that quantum of "forceful evidence" is present here.

The PELRB has a statutory duty to hear and adjudicate unfair labor practices which have been defined statutorily and honed to even finer precision by case law. In this case, the thrust of the Authority's argument is that the arbitrator's award violates public policy, yet "public policy" provides no standard of measurement, codified or otherwise, especially as to balancing a public policy issue or argument against what clearly is a ULP for breach of contract for failing to implement a duly issued arbitration award. I reject the majority's position that Exxon, *supra*, should be controlling because there was no impairment and because of the contract language.

The facts in this case establish without dispute that the parties have a CBA, that it contains a grievance procedure culminating with final and binding grievance arbitration, and that the parties utilized that process, through the American Arbitration Association and its rules, for the selection of the arbitrator, the hearing of this case and the issuance of the award. Finding Nos. 3 & 4, above. The contract language itself, and Article III.B and I.A.4 discussed below, confers authority on the arbitrator in this case. The United States Supreme Court, in W. R. Grace & Co. v. Rubber Workers, Local 759, 461 U.S. 757 103 S.Ct. 2177 (1983), said:

> Under well established standards for review of labor arbitration awards, a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one. When the parties include an arbitration clause in their collective bargaining

> agreement, they choose to have disputes concerning constructions of the contract resolved by the arbitrator. Unless the arbitral decision does not 'dra[w] its essence from the collective bargaining argument,' a court is bound to enforce the award and is not entitled to review the merits of a contract dispute.

The same constraints should apply here. The parties have selected their process, negotiated their own language, presented their cases to a duly appointed arbitrator and, now, one side is not pleased with the outcome of the arbitration decision. It has manifested that displeasure by refusing to implement the award. That is a ULP under RSA 273-A:5 I (h), and should require remedial action on the part of the Authority.

First, the parties agreed in Article, or "section" as both have been used interchangeably herein, III.B (Finding No. 4) that "no...member of the Union [shall] be charged with or required to answer the offenses not called to his attention within twelve (12) days." The record in this case is undisputed: neither Urban's nor Conway's discharge occurred within the requisite twelve (12) days. Finding No. 6. The arbitrator so found and ordered their respective reinstatements. There is no cause to reverse; he appropriately and properly applied the provisions of the CBA.

Second, in discharging the two employees, the Authority did not follow progressive discipline. Thus, the arbitrator found that the Authority violated Article I.A.4 by this discharge because of the nature of Conway's drug usage (off duty, off premises and several days in the past) and the failure to recognize his spotless (with the exception of a running motor warning) employment record since 1985. The arbitrator's reasons were well founded in the facts and the language of Article I.A.4. There is no cause to reverse.

Third and finally, the Authority appears to have discharged Urban on May 22, 1996 and Conway on June 19, 1996, and subsequently relied on its "first occasion" or "zero tolerance" drug policy of June 26, 1996 to justify those discharges. The arbitrator said, "in the instant cases, the Authority's June 26, 1996 drug policy is inapplicable, for the reason that it was adopted after Urban and Conway were discharged." (Award, pp. 8 and 13.) I cannot dispute this rationale, which embodies the

most basic tenets of due process, that a law or rule cannot be made to apply to circumstances occurring before it was enacted. Again, there is no fault in the arbitrator's reasoning and no cause to reverse.

The arbitrator had a bona fide concern that "management is obligated to make public safety its highest priority. No one questions that." (Award, page 12.) Yet, neither in the record of the arbitration proceedings nor in the material presented to us was there any indication that either of the grievants showed evidence of being impaired or exercised poor judgment such as to raise an issue of safety with respect to the conditions which led to their respective discharges. The arbitrator addressed this in his award and should not be reversed.

I believe the majority has placed undue reliance on Exxon. This is not an Exxon case. The Authority's June 26th zero tolerance program was not in place when the testing occurred. In Exxon, the drug policy was in place and included in the CBA. Moreover, the Exxon drug and substance abuse program "reflects the company's recognition that drug use during the performance of safety-sensitive tasks poses a significant threat to co-workers and the public." 118 F.3d 841, 843 (1997). There is no evidence that either grievant posed a threat to co-workers or to the public. Other than flunking the drug test, there was no evidence of impairment.

I would reinstate both grievants conditioned upon their both passing new drug tests and being in compliance with Federal Motor Eamier Safety Regulations and explained in the Authority's brief, page 10, and 49 CFR § 382.605.