STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMALGAMATED TRANSIT UNION LOCAL 1704, Charging Party, v. OMNITRANS, Respondent.	Case No. LA-CE-358-M PERB Decision No. 2121-M June 25, 2010

Appearances: Neyhart, Anderson, Flynn & Grosboll by William J. Flynn and Benjamin K. Lunch, Attorneys, for Amalgamated Transit Union Local 1704; County of San Bernardino by Carol A. Greene, Deputy County Counsel, for Omnitrans.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Omnitrans, and on cross-exceptions filed by Amalgamated Transit Union Local 1704 (ATU), to the proposed decision of an administrative law judge (ALJ). The complaint alleged that Omnitrans violated the Meyers-Milias-Brown Act (MMBA)[1] by terminating the employment of coach operator[2] Dale Moore (Moore) because of his protected activities as ATU president. The ALJ concluded the termination constituted unlawful retaliation in violation of MMBA sections 3503 and 3506 because it was motivated by Moore's union activities and Omnitrans failed to establish that it would have terminated Moore absent this protected activity.

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

[2] "Coach operator" is Omnitrans' term for a bus driver.

The Board has reviewed the proposed decision and the record in light of Omnitrans' exceptions, ATU's cross-exceptions and response to exceptions, and the relevant law. Based on this review, the Board reverses the proposed decision for the reasons discussed below.

FACTUAL BACKGROUND

Omnitrans is a joint powers agency that provides public bus service in San Bernardino County. ATU is a recognized employee organization representing a bargaining unit of Omnitrans coach operators.

Omnitrans operates two facilities: the West Valley facility in Montclair employs approximately 130 regular (full-time) drivers; the East Valley facility in San Bernardino employs approximately 250 regular drivers. Omnitrans also has "extra board" drivers who fill in for absences or unfilled vacancies.[3] There are approximately 170 buses in the fleet, 95 percent of which are usually in route at any given time. Bus service runs from 3:15 a.m. to 11 p.m. every day, and driver shifts vary within that time period. Each facility has a dispatcher who fills out the driver schedules each day between 4 p.m. and 6 p.m. for the following day.

ATU and Omnitrans were parties to a memorandum of understanding (MOU) effective April 1, 2004 through March 31, 2007. During early 2007, the parties engaged in negotiations for a successor MOU. In mid-March, Omnitrans presented its last, best and final offer (LBFO), which ATU took to the unit members with the recommendation that it be rejected. On March 30, 2007, unit members voted to reject the LBFO. As of the date of Moore's termination, May 3, 2007, the parties had neither reached agreement on a successor MOU nor

[3] Moore testified that there are approximately 50 extra board drivers at the East Valley facility. While the record does not indicate the number of extra board drivers at West Valley, it does establish that extra board drivers can work shifts at either facility.

reached impasse. Accordingly, the following relevant MOU provisions were in effect at the time of the alleged violation:[4]

Article 27, Attendance

> Method of Counting Absences. This no-fault absenteeism policy will count absences as follows:
>
> One-half day (to 4/year) = one-half day
> One day = one absence
> Two or more consecutive work days off for the same reason = to a maximum of two full absences
>
> . . . . . .
>
> Ten (10) chargeable, counted absences within a floating twelve (12) month period will be considered grounds for discharge. Any periods not actively working for more than 14 calendar days will extend the 12-month period by a like number of days counted after the fourteenth calendar day on the first occurrence and from the first day for all subsequent occurrences each calendar year.
>
> 180 calendar days between counted absences will clear all counted absences from the employee's records. An employee must be actively working during this 180 day period. Actively working is defined as actually working, or while on vacation, jury duty, Agency compensated military duty, non-operational holidays or *authorized union business*.
>
> . . . . . .
>
> Method of Reviewing Absences. All days absent are counted absences except if an employee is in one of the following categories: approved leave of absence of fourteen (14) days or more, vacation, holiday, bereavement, jury or military duty, or *authorized union business* or Agency confirmed FMLA, CFRA, PDL or absences specifically protected by State or Federal legislation. . . .
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> . . . . . .
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> Progressive Discipline. Progressive discipline will be applied to employees who have excessive absenteeism. Specific counted absence dates can only be grieved (in accordance with Article 22) when they first appear on any warning notice.

[4] *Antelope Valley Union High School District* (1998) PERB Decision No. 1287.

A. A sixth counted absence in a floating 12-month period will result in a verbal warning with written confirmation and counseling to the employee.

B. An eighth counted absence in a floating 12-month period will result in a two (2) day suspension.

C. A ninth counted absence in a floating 12-month period will result in a four (4) day suspension.

D. A tenth counted absence in a floating 12 month period will result in discharge.

All charged absences that have been over turned by the employer through the counseling and review process due to mitigating circumstances or overturned through the grievance procedure, shall not be counted as just and reasonable cause for the purpose of progressive discipline.

(Italics added.)

Article 19, Shop Steward's Provision

. . . . . .

Shop Stewards will be granted a reasonable amount of time, without loss of pay or benefits, for the purpose of meeting with the Agency representatives to process grievances, provided, however, that such time does not interfere with normal department operations.

Upon specific request of the ATU President/Business Agent, the Agency will initially pay wages lost from regularly assigned work, at the employee's current wage rate, to ATU Officers and Shop Stewards for up to a total of 75 times (seventy-five (75) times is understood to mean 75 eight hour days which may be taken in increments of four (4) hours) per calendar year for all Officers and Stewards. The *ATU Officer or Steward must also submit an 'Omnitrans Employee Vacation/Sick Leave Request Form' at least 24 hours in advance* (exclusive of Saturdays, Sundays and holidays). The ATU will reimburse the Agency for these wages on a Quarterly basis. Omnitrans will pay all benefits associated with these hours at the time they are incurred. *These hours will also be considered authorized union business and an active work status.*

(Italics added.)

Article 21, Leave of Absence – Union Position

> An employee's election as an officer or member of the Executive Board of the Union or appointment to act on Union business shall be considered a good and sufficient reason for a leave of absence. Any employee elected or appointed to a full-time position in the Union shall be given an unpaid leave of absence for the duration of their term of office, which period may be extended upon submittal of written request. During such Leave of Absence, no benefits or wages shall be payable by the Agency. Upon return from such leave of absence, the employee shall be reinstated without loss of seniority.

Moore had been a regular driver for Omnitrans since 1993. For some time, his work shift had been 4 a.m. to 12 noon. Since 1996 he had been active with ATU, serving as shop steward, executive board member, and president from 1999 to 2001, and again from January 2005 until at least October 2007.

On February 15, 2007, Moore received a "Notice of Proposed Disciplinary Action: Dismissal" from Douglas Stanley (Stanley), West Valley Transportation Manager, citing MOU Article 27 and listing the following charged absences:

3/29/2006	LWOP-UB[5] No Leave Slip Turned in	1
4/21/2006	Sick	2
4/24/2006	Sick	3
5/22/2006	Other – No Valid Medical Card	4
6/9/2006	LWOP - Called Disp @ 0300 Hrs	5
6/26/2006	LWOP-UB No Leave Slip Turned in	6
6/30/2006	LWOP Personal	7
7/18/2006	Missout/AWOL No Leave Slip Turned in[6]	8
7/31/2006	LWOP-UB Called Disp on Sun 7/30/06 No Leave Slip	9
1/18/2007	LWOP-UB < 24 Hrs notice & Scot Informed no due to MP shortage	10

[5] "LWOP" stands for leave without pay; "UB" stands for union business.

[6] A "miss-out" is charged when an employee does not call in or report for work.

The memorandum explains the last absence as follows:

> On January 18, 2007, you were off work due to LWOP-UB. You called Scot Huffman [Huffman][7] on 1/17/07 and asked off for Union Business. You stated to him that you had forgotten to submit a request. After looking at manpower needs for that day and discussing the matter with me, Scot called you back and informed you that due to manpower needs for 1/18/07, that your request to be off was denied. You then stated to Scot that you would not be in anyway. This was your tenth (10) chargeable, counted absence.

The memorandum also states:

> This proposed dismissal will be held in abeyance in order that you may avail yourself of the grievance procedures under Article 22 of the above mentioned [MOU]. During the time period in which the dismissal is held in abeyance, you will be allowed to continue working in your normal capacity as a Coach Operator.

(Italics and underscoring omitted.)

The memorandum gave Moore five days to respond in writing and/or orally. On February 18, Moore responded by letter to both Stanley and John Steffon (Steffon), East Valley Transportation Manager, and requested a due process hearing. He sent another letter to Steffon on February 27 defending his actions and stating that he did not want a verbal hearing.

Moore called in sick on March 8 and 9, 2007, after the agency's doctor refused to renew his medical certificate because of high blood pressure. Omnitrans provisionally approved Family Medical Leave Act (FMLA) leave for the two days. However, Moore never turned in the required medical certification. Moore testified that when he spoke with Scott Graham (Graham), Omnitrans' Operations Director, on March 9, Graham asked Moore if he wanted to use vacation to cover the absence. From this conversation, Moore assumed that Omnitrans would charge the two days to his vacation bank and therefore did not turn in a vacation request. Omnitrans charged Moore with an absence for each of these days.

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[7] Huffman is Omnitrans' dispatch supervisor.

Moore requested to take union leave on March 5, 19, 29 and 30, April 4, 5, 10, 12, 16, 17, and 19, and May 2 and 3, 2007. In each case, Moore turned in an "Omnitrans Employee Vacation/Sick Leave Request Form" at least 24 hours in advance. Huffman denied each request in writing, citing an "extreme lack of manpower."[8] For all but the first two dates, Moore received the denial before the date for which leave was requested; Moore testified that he did not receive notice of the denials for March 5 and 19 until after those dates. Because Moore did not report for work on any of these dates, Omnitrans charged them as absences pursuant to MOU Article 27. Omnitrans issued Moore successive notices of proposed dismissal incorporating each of these charged absences.

Meanwhile, on March 17, 2007, Moore filed two grievances, one over the original proposed dismissal and the other over Omnitrans' placement of the proposed dismissal in abeyance. Omnitrans denied both grievances at Step 1.

On May 2, 2007, a Step 2 hearing on Moore's grievances was held before Employee Relations Manager Michael Lloyd (Lloyd). Lloyd issued his decision on May 3. He invalidated Moore's eighth charged absence of July 18, 2006, because it violated a provision of the MOU.[9] Lloyd also voided the abeyance clause in all of the disciplinary notices.

That same day, Stanley called Moore, informed him that he would be dismissed and instructed him to meet with Steffon the following day. Upon reporting to human resources on May 4, Moore received an Order of Dismissal that stated, in relevant part:

> In accordance with the attached Grievance #07-17 and #07-18 Step 2 Responses and Findings, dated May 3, 2007, you are

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[8] Moore also requested union business leave for MOU negotiations on March 7, 13, and 14, and May 1. Those requests were granted.

[9] Article 29 of the MOU requires that an employee receive notice of disciplinary action within 40 days of the alleged misconduct. Lloyd found that Omnitrans failed to give notice of discipline for Moore's July 18 absence within that time limit.

dismissed from your employment from Omnitrans effective today, Thursday, May 3, 2007.[10]

DISCUSSION

The complaint alleged that Omnitrans terminated Moore's employment because of his activities as ATU president. The ALJ concluded the termination was unlawful because Omnitrans had no contractual right to deny Moore's union business leave requests and its denials of his requests were pretextual because no manpower shortage existed.

Omnitrans contends in its exceptions that a manpower shortage did in fact exist at the time the requests were denied and therefore both its denials and the charged absences arising from them were legitimate. Omnitrans further argues that the ALJ made numerous factual and legal errors that require reversal of the proposed decision. ATU urges affirmance of the proposed decision but also raises two cross-exceptions: (1) ATU has a statutory right to union leave; and (2) a manpower shortage can never justify denial of union leave.

"When a party files a statement of exceptions to an ALJ's proposed decision, the Board reviews the record de novo, and is empowered to reweigh the evidence and draw its own factual conclusions. Although the Board generally gives deference to the ALJ's credibility determinations, which may be based on considerations such as witness demeanor (*Beverly Hills Unified School Dist* (1990) PERB Dec. No. 789 [14 PERC ¶ 21042]), it is not bound by the ALJ's evaluation of the weight to be given to disputed evidence. '[T]he [Board], not the hearing officer, is the ultimate fact finder, entitled to draw inferences from the available evidence.'" (*California Teachers Assn. v. Public Employment Relations Bd.* (2009) 169

[10] On May 8, 2007, Moore received in the mail a "Notice of Proposed Disciplinary Action – Suspension" imposing a one-day suspension for five miss-outs between March 19 and May 2, and advising that seven miss-outs may result in dismissal. Because the only violation alleged in the complaint is Moore's termination, we do not consider whether issuance of this memorandum violated the MMBA.

Cal.App.4th 1076, 1086-1087, quoting *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.)

1. Prima Facie Case

To establish a prima facie case of retaliation against an employee in violation of MMBA section 3506 and PERB Regulation 32603(a),[11] the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the adverse action because of the employee's exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210; *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553.)

It is undisputed that Moore engaged in protected activity when he: (1) served as ATU president and a member of ATU's bargaining team (*Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778); (2) filed two grievances on March 17, 2007 (*Bay Area Air Quality Management District* (2006) PERB Decision No. 1807-M); and (3) requested and used union business leave to participate in ATU activities. (*Omnitrans* (2008) PERB Decision No. 1996-M; *City & County of San Francisco* (2004) PERB Decision No. 1664-M.) It is also undisputed that Omnitrans was aware of each of these activities. Omnitrans took adverse action against Moore when it terminated his employment. (*Rainbow Municipal Water District* (2004) PERB Decision No. 1676-M.)

To establish the final element of the prima facie case, the charging party must show that the employee's protected activity was a motivating factor in the employer's decision to impose the adverse action. (*County of San Joaquin (Health Care Services)* (2004) PERB Decision No. 1649-M). "PERB has long recognized that direct evidence of discriminatory intent - the

[11] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

proverbial 'smoking gun' - is rarely possible." (*Berkeley Unified School District* (2003) PERB Decision No. 1538.) Therefore, the employer's motivation may be proven by either direct or circumstantial evidence, or a combination of both. (*Carlsbad Unified School District* (1979) PERB Decision No. 89.)

Omnitrans admittedly terminated Moore for being absent from work on dates when Moore engaged in protected union activity. This constitutes direct evidence of Omnitrans' discriminatory intent and is sufficient in itself to establish that Moore's union activity was a motivating factor in Omnitrans' decision to terminate his employment. (*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C.) Consequently, ATU has established a prima facie case of retaliation.

2. Employer's Affirmative Defense – The "But For" Test

Because ATU has established a prima facie case of retaliation, Omnitrans bears the burden of proving that it would have taken the adverse action even if Moore had not engaged in protected activity. (*Novato Unified School District*, *supra*; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line* (1980) 251 NLRB 1083, 1089.) Thus, when it appears that the adverse action was motivated by both valid and invalid reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers Distributors*, *supra*, 29 Cal.3d at p. 729.) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson*, *supra*, 189 Cal.App.3d at p. 304.) For the following reasons, we conclude Omnitrans has met its burden to establish this defense.

It appears from the language in the Order of Dismissal that Omnitrans removed Moore's termination from abeyance and implemented it in response to Lloyd's grievance ruling that the abeyance clause of the original notice of proposed dismissal was invalid. However, Lloyd's ruling also invalidated the charged absence for July 18, 2006, one of the 10

absences upon which the original notice was based. Consequently, we must examine the charged absences for the 12 month period ending on May 3, 2007, the date of termination, to determine whether there were sufficient charged absences in the successive dismissal notices up to that date to support the termination under Article 27 of the MOU and, if so, whether those absences would have been charged if Moore had not engaged in protected activity.

a. Absences Unrelated To ATU Business

Omnitrans charged Moore for an absence on May 22, 2006, when he could not drive because he did not have a copy of his medical card with him.[12] At the hearing, Moore could not remember the reasons for his charged absences on June 9 and 30, 2006, and February 16, 2007; the record does not indicate that Moore conducted ATU business on those days. Omnitrans charged Moore with absences on March 8 and 9, 2007, because he did not submit a medical certification for FMLA leave or a request to charge the days as vacation leave. We find nothing in the record to invalidate any of these charged absences nor does ATU contend they were the product of union animus. Therefore, we find that Omnitrans properly charged Moore with these six absences during the relevant 12 month period.

b. Absences Charged For Failure To Properly Request Union Business Leave

Omnitrans charged Moore with five absences during the relevant 12 month period because he failed to properly request union business leave before taking a full day off to conduct ATU business. In *Omnitrans*, *supra*, PERB Decision No. 1996-M, the Board, after an exhaustive examination of the record, concluded that ATU and Omnitrans had an enforceable past practice that a request for union business leave must be made on the "Omnitrans

[12] A license to operate a commercial motor vehicle, including a bus, is valid only when a current medical certificate "is within the licensee's immediate possession." (Veh. Code, § 12804.9, subd. (c).)

Employee Vacation/Sick Leave Request Form" and must be submitted at least 24 hours before the requested time off.[13] The record in this case does not support overturning that conclusion.

For each of these five charged absences, Moore failed to comply with the past practice for submission of union business leave requests. Moore was charged with an absence for June 26, 2006, because he did not submit a leave request form for that date. Moore testified that he submitted a request form yet ATU did not produce a copy of the form at the hearing. Given that ATU produced a copy of every other union business leave request form Moore submitted during this time, it is reasonable to infer that a form does not exist for June 26, 2006. Accordingly, we find Moore did not submit a request form for that date and therefore this absence was properly charged.

On July 31, 2006, January 18, 2007, and March 23 and 26, 2007, Moore called dispatch the evening before his scheduled 4:00 a.m. shift and informed the dispatcher that he would be taking union business leave the following day. Moore did not submit a leave request form for any of these dates. All of the phone calls were made less than 24 hours before the start of his scheduled shift. Because they failed to meet the requirement that union business leave requests be submitted in writing at least 24 hours before the leave is to begin, each of these four absences was properly charged. (*Omnitrans*, *supra*, PERB Decision No. 1996-M.)

Adding the five charged absences for failure to properly request union leave to those that did not involve union business, we find that Moore had 11 properly charged absences as of the date of his termination. While these absences were sufficient to justify termination under

[13] The parties make the same arguments about the applicable union business leave procedures in this case that they made in *Omnitrans*, *supra*, PERB Decision No. 1996-M. Because those arguments were thoroughly addressed in that decision, we do not reiterate them or the Board's analysis of them here. *Omnitrans*, *supra*, PERB Decision No. 1996-M was summarily affirmed by the California Court of Appeal for the Fourth District, Division Two, on February 3, 2010. The California Supreme Court denied ATU's petition for review of that decision on March 18, 2010.

Article 27 of the MOU, we nonetheless address the remaining charged absences because it is unclear from the Order of Dismissal whether they played a part in the decision to dismiss Moore.

c. Absences Charged For Failure To Report To Work On Day For Which Union Business Leave Denied

Omnitrans charged Moore with 13 absences between March 5 and May 3, 2007, for failure to report to work on a day for which his request for union business leave had been denied. In all cases, Moore submitted a written leave request more than 24 hours before the leave was to begin and the request was denied by the dispatch supervisor due to "an extreme lack of manpower."

The ALJ concluded that Omnitrans had no contractual right to deny Moore's properly submitted union business leave requests because the term "authorized union business" in the MOU meant union business authorized by ATU, not Omnitrans. In *Omnitrans*, *supra*, PERB Decision No. 1996-M, the Board concluded that "the phrase 'authorized union leave' in Article [27][14] is reasonably interpreted to include Article 19 union paid leave as well as properly noticed union leave not covered by the MOU *which is authorized by Omnitrans*." (Italics added.) In that same decision, the Board held that Omnitrans lawfully denied requests for union leave to conduct ATU business unrelated to representation of Omnitrans employees. The Board thus found that Omnitrans had the contractual right to approve or deny requests for union leave. Nothing in the record in this case compels a different conclusion.

The Board's conclusion in *Omnitrans*, *supra*, is consistent with the longstanding principle that participation in union activities does not shield an employee from routine employment decisions or insulate the employee from disciplinary action for misconduct.

[14] The decision mistakenly refers to the attendance article as Article 24, which was the attendance article in the parties' 2001-2004 MOU.

(*Trustees of the California State University* (2006) PERB Decision No. 1853-H; *Los Angeles Unified School District* (1992) PERB Decision No. 957.) Thus, when an employer has a neutral policy governing a particular subject, an employee may be disciplined for violating that policy even if the violation involves union activity. For example, in *Los Angeles County Superior Court*, *supra*, the Board upheld discipline of a union president for sending union meeting announcements via the court's email system when the emails violated a court policy that limited the number of recipients of non-court business emails.

With regard to an employer's attendance policy, one court has stated: "Just as an employee cannot 'shield himself from all possibility of termination merely by becoming a union activist,' [citation], neither can a union official – absent a bargain to that effect – shield himself from ever having to show up for work merely by conducting union business." (*Sasol North America, Inc. v. National Labor Relations Bd.* (D.C. Cir. 2002) 275 F.3d 1106, 1111-1112.) Therefore, an employer may discipline an employee for failure to report for work even if the employee is absent due to union business, unless the parties have agreed that absences for union business are exempt from the attendance policy.

We find no evidence that ATU and Omnitrans agreed to such a broad exemption from MOU Article 27. Article 27 states that an absence will not be charged for "authorized union business." However, nothing in the record indicates that Omnitrans waived its right to discipline a coach operator when an *unauthorized* absence involves union business. Accordingly, we conclude that Omnitrans has the contractual authority to charge an employee with an absence pursuant to Article 27 when the employee fails to report for work on a day for which union leave was denied.[15]

[15] This is consistent with Omnitrans' practice regarding other unauthorized absences such as sick leave, which according to Moore's own testimony is charged as an absence under Article 27.

Of course, Omnitrans' ability to exercise this contractual right is subject to the existence of a lawful and legitimate reason for the denial of union business leave. The ALJ found that no manpower shortage existed and therefore Moore's union business leave requests could only have been denied because of his union activities. Omnitrans argues this finding is erroneous because the record contains sufficient evidence of a manpower shortage between January and May 2007 to establish the legitimacy of the denials. We agree that a preponderance of the evidence supports Omnitrans' position.

Three Omnitrans witnesses testified about the agency's manpower shortage in early 2007. Dispatch Supervisor Huffman testified that between January and May 2007, Omnitrans experienced an unusually high rate of both sick leave[16] and industrial injury leave among coach operators. Huffman testified that he determines a manpower shortage based on the number of routes to be run on a particular day, the driver days off and known leaves for that day, and the number of drivers on the extra board for that day. He further testified that scheduling for the next day is not an "exact science" because employees may call in sick before their shift and other employees who were not expected to work may in fact report for duty.

If the dispatcher is unable to cover all routes with available drivers, a manpower shortage exists and a loss of service, i.e. cancellation of all or part of bus routes, results.[17] According to Huffman, loss of service occurred regularly between January and May 2007. The record contains dispatcher documentation for three days during this period, March 29 and April 3 and 4, 2007, all of which show a loss of service.

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[16] From the documents in the record, it appears that several coach operators were on FMLA leave during this period.

[17] Huffman testified that loss of service may also result from non-personnel reasons such as mechanical problems with a bus.

Transportation Manager Stanley testified that between January and May 2007, the number of sick and industrial injury leaves among drivers, coupled with regular driver turnover of 10 to 12 percent, resulted in a manpower shortage. Stanley admitted that Omnitrans was recruiting new drivers at a lower level than usual during this time because of planned service reductions that would begin in May 2007.

The record also contains a spreadsheet of Moore's absences that Stanley created from dispatcher logs.[18] The spreadsheet shows that Omnitrans experienced a loss of service on many of the days Moore was absent despite the denial of his union leave request. It also shows that Omnitrans incurred considerable hours of unscheduled overtime on those days.

Operations Director Graham testified that during February and March 2007, Omnitrans was experiencing delays in service from the contractor that conducted background investigations of coach operator applicants. Graham stated this caused a three to four week delay in processing the applications. He also testified that following passage of the background investigation, a driver would participate in six to seven weeks of training before being assigned a route.

ATU produced scant evidence to support its position that no manpower shortage existed. ATU witnesses stated their belief that no shortage existed but, when pressed for the factual basis for their belief, admitted they did not have one other than Omnitrans' alleged animus toward ATU.

ATU relies largely on evidence that Omnitrans granted coach operators leave to attend four meetings of the Cultural Design Team (CDT) during April and May 2007 yet consistently denied drivers' requests for union business leave during the same time. The CDT was a new project by Omnitrans to improve employee morale that was facilitated by an outside contractor.

[18] ATU did not contest the accuracy of the information in Stanley's spreadsheet. The dispatch logs themselves were not entered into the record.

Employees from all Omnitrans departments, including coach operators, were selected to participate. The ALJ found that Omnitrans lost a total of 50 hours of driver time because of the CDT meetings. The only evidence in the record to support this finding is the dispatcher documents from April 3, 2007, which show that three coach operators attended a three-hour CDT meeting and that Omnitrans suffered 44.19 hours of lost service that day. Huffman testified that the three drivers who attended the CDT meeting missed, at most, two hours of their shifts. ATU presented no evidence to rebut this testimony. Therefore, we conclude that the CDT meetings had only a minor impact on driver availability during April and May 2007 and do not belie Omnitrans' claim of a manpower shortage.

In rejecting this claim, the ALJ relied on the fact that Omnitrans never formally declared a manpower shortage and that Huffman only discussed the shortage with Moore when he rejected Moore's union business leave requests.[19] We find the lack of a formal declaration to be of minimal significance. As Huffman testified, manpower varies from day to day depending on a number of variables. Given this fluidity, it does not appear that manpower can be predicted with sufficient accuracy to justify a formal declaration. Nor should the fact that a dispatcher is unable to perfectly predict manpower for a particular day subject the agency to liability when it denies leave for a day when manpower turns out to be higher than anticipated.

The ALJ also found "there is no evidence to show that Omnitrans could not have called upon its extra-board drivers or requested its regular drivers to work overtime" to ease the manpower shortage. Huffman testified that on days Omnitrans lost service in early 2007, he had exhausted available extra board drivers and off duty regular drivers. ATU presented no evidence to rebut this testimony, such as an extra board driver who was not called on a day

[19] The formal declaration argument appears to arise from MOU Article 56, Part-Time Provision/Part-Time Coach Operators, which states that part-time drivers may only work more than 30 hours per week in cases of emergency. "Manpower shortage" is listed as an example of such an emergency.

when Omnitrans lost service. Further, as noted above, drivers worked a substantial amount of unscheduled overtime during this period. Accordingly, we find that Omnitrans exhausted its available personnel to minimize loss of transit service to the public between January and early May 2007.

As a whole, the evidence establishes that Omnitrans was indeed suffering from a manpower shortage from January until early May 2007. ATU nonetheless argues that, even if a manpower shortage existed, it was not a legitimate basis for denial of union business leave because the shortage was self-inflicted. The evidence does not establish that Omnitrans intentionally created the manpower shortage. Furthermore, whether or not Omnitrans could have prevented the shortage, the fact is that such a shortage existed during the time when Moore's requests for union business leave were denied. That Omnitrans may have failed to adequately plan for this particular contingency does not amount to a waiver of its right to deny union leave based on operational needs.

Because Omnitrans has proven that a manpower shortage existed in March, April and early May 2007, we find that the denials of Moore's properly submitted union business leave requests during those months were based on a legitimate operational need. Accordingly, Omnitrans properly charged Moore with absences for failing to report to work on 11 of the 13 days for which union business leave had been denied for manpower reasons.[20]

In sum, we find that Omnitrans properly charged Moore with 22 absences during the 12 month period ending May 3, 2007. While some of these absences occurred when the parties were negotiating a successor MOU and some occurred after ATU rejected Omnitrans' LBFO, ATU has failed to prove that the absences were charged in retaliation for Moore's participation

[20] Because the record does not establish that Moore received the written denials of his union business leave requests for March 5 and 19, 2007, before those dates, we cannot find that the absences for those days were properly charged.

in these activities. Instead, Omnitrans has proven that it would have dismissed Moore based on his unauthorized absences even if he had not engaged in protected activity. Accordingly, we hold that Omnitrans did not terminate Moore because of his ATU activities.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-358-M are hereby DISMISSED.

Members McKeag and Wesley joined in this Decision.