In the Matter of Grievance Arbitration	*	
	*	FMCS No. 09026-01457-A
Between	*	
	*	Issue: Maintenance of Medical Benefits
KANSAS CITY AREA TRANSPORTATION AUTHORITY ("Authority")	*	
	*	**Arbitration Board:**
and	*	
	*	Fern Kohler (Authority Member)
AMALGAMATED TRANSIT UNION, LOCAL DIVISION 1287 ("Union")	*	William L. Wilson (Union Member)
	*	Lon Moeller (Neutral Chair)
	*	

Preliminary Statement

A grievance arbitration hearing was held on June 30, 2009 at the Howard C. Breem Building, located at Forest and 18th Streets in Kansas City, Missouri. The Authority and Union appeared through their designated representatives and offered evidence through exhibits and the testimony of witnesses, who were subject to cross-examination. The record was closed on February 23, 2010 upon the Arbitrator's receipt of the parties' post-hearing briefs.

Appearances

For the Union:

Scott A. Raisher, Attorney and Spokesperson

For the Authority:

Jeffrey M. Place, Attorney and Spokesperson
Fern Kohler, General Manager
Brenda J. Mack, Director of Human Resources

I. Background and Facts

The grievance in this case was filed on October 1, 2008, and reads as follows:

ATA is not maintaining employees' medical benefits after paid sick leave is exhausted. ATA has in the past maintained the above mentioned benefits pursuant to Sec. 1.18 of the collective bargaining agreement. Local 1287 asks that benefits continue to be maintained and all affected employees be made whole for all lost monies (Joint Exhibit 2).

The Authority denied the grievance at the second and third steps of the contractual grievance procedure (Joint Exhibit 3). The Union appealed the grievance to arbitration. There are no issues concerning the timeliness or procedural arbitrability of the grievance. The grievance is now before the Arbitration Board for a final and binding decision on the merits.

II. Statement of the Stipulated Issues

Does the Authority violate the Agreement if it fails to maintain group health insurance benefits for those employees on an approved medical leave of absence or sick leave in the event the employee fails to pay the monthly employee portion of the premium after his/her accumulated sick leave runs out? If so, what should the remedy be?

III. Position of the Union

The Union argues that the Authority is obligated to pay the employee's share of the group health insurance premium cost when the employee is on an approved medical leave of absence and the employee has exhausted his/her accumulated sick leave. This, according to the Union, is based on the clear and unambiguous language of Sections 1.18(c), 1.18(g) and 1.22(b) of the Agreement. The Union maintains that its position is further supported by the "long-standing manner" in which the Authority has implemented these provisions (Union Brief, p. 4). It contends that "[f]or well over thirty years prior to the Union filing its grievance in October 2008, the KCATA has paid the full health insurance premium – both its share (80%) and the employee share (20%) – for employees on an unpaid leave if the employee has been unable to do so" and "[w]hen the employee returned to work, the Authority would then recoup the funds it had advanced to cover the employee's contribution from the employee's wages" (Union Brief, p. 1).

Next, the Union makes the following points in support of its argument:

- Under Section 1.22(b) – **Basic Health Insurance – Active Employees**, the Authority is obligated to provide group health insurance benefits for employees who elect health insurance coverage and pay "eighty percent (80%) of the average of all plans at each level of coverage (i.e., employee only, employee and one dependent and family)" (Joint Exhibit 1, p. 51).

- Section 1.18(a) - **General** offers a broad definition of an approved "leave absence" – "A leave of absence shall be any excused absence from work, with or without pay and/or benefits" (Joint Exhibit 1, p. 28). It adds that "[a]n approved leave of absence shall not constitute a break in the continuous service record or company benefits and the employee shall be responsible for the usual employee contribution to benefits unless otherwise specified" (emphasis added) (Id.).

- Under Section 1.18(c) – **Sick Leave**, "[s]ick leave may be used for maternity/paternity leave in FMLA cases. Any time requested beyond what the employee has available in sick leave, must be taken without pay. The

employee's medical benefits and seniority will be maintained" (emphasis added) (Joint Exhibit 1, p. 31). Section 1.18(g) – **Maternity Leave** provides that during a maternity leave, "[t]he employee's medical benefits, seniority, and all other benefits will be maintained as a sick leave" (emphasis added) (Joint Exhibit 1, p. 34).

- The specific language of Sections 1.18(c), 1.18(g) and 1.22(b), according to the Union, falls into the "unless otherwise specified" exception for Section 1.18(a)'s general rule that an employee on an approved leave of absence "shall be responsible for the usual employee contribution to benefits."

- The reference to "medical benefits" in Sections 1.18(c) and 1.18(g) means the benefits described in the Authority's health insurance plans (Joint Exhibits 14-16). "Medical benefits" are different than "insurance premiums" (Union Brief, p. 14). These "medical benefits," the Union claims, must be maintained by the Authority even if the employee cannot pay his or her share of the health insurance premium cost while on an approved medical leave of absence (Union Brief, pp. 14, 17). It acknowledges the Authority's right to recover this amount when the employee returns from or is taken off of his/her approved leave of absence.

- The Authority's reading of Section 1.18 would result in a forfeiture of the employee's "medical insurance and benefits at a time when they are most needed" (Union Brief, p. 20).

- The relevant language of Section 1.18(a) stating "[a] leave of absence shall be any excused absence from work, with or without pay and/or benefits' and "[a]n approved leave of absence shall not constitute a break in the continuous service record or company benefits unless otherwise specified. However, the employee shall be responsible for the usual employee contribution to benefits" was first included in the parties' 1977-1979 Agreement (Joint Exhibit 7, pp. 10-11). Congress, the Union points out, amended Title VII in 1978 to prohibit pregnancy-based discrimination. The negotiated changes to Section 1.18 were added to bring the parties' Agreement "in line" with the Pregnancy Discrimination Act amendments to Title VII. The nondiscrimination clause found in Section 1.3 (Joint Exhibit 1, p. 4) was added to the Agreement at the same time.

- As part of the 1984 collective bargaining agreement, the Union and Authority further modified Section 1.18(a) to read:

  An approved leave of absence shall not constitute a break in the continuous service record or company benefits and the employee shall be responsible for the usual employee contribution to benefits unless otherwise specified (Joint Exhibit 8, p. 11).

- The Union claims that the language of Section 1.18 demonstrates that employees are to have their health insurance coverage continued during the time of their approved leave of absence. This helps to explain the 30-year practice whereby the Authority has paid the employee's share of his/her premium cost when the employee has exhausted sick leave while on an approved medical leave of absence. Because its position is based on the clear and unambiguous language of Section 1.18, the Union contends that the Authority's reliance on Section 1.4 – **Past Practices** is misplaced.

- While sympathetic to the Authority's budgetary challenges, the Union points out that the Authority did not provide any evidence of the cost it incurred over the years advancing premium payments to employees on approved medical leaves. It emphasizes that any changes to the manner in which Section 1.18 has been administered over the years can be made by the Authority in contract negotiations. In short, "[t]he Authority should not be permitted to seek through arbitration a change in the terms of the Agreement that it can gain through negotiations" (Union Brief, p. 26).

In conclusion, the Union contends that the Authority's recent decision to refuse to pay the employee share of the health insurance premium for employees on an approved medical leave or sick leave who have exhausted their accumulated sick leave and who fail to pay their monthly premium violates the Agreement. It thus asks that the grievance be sustained, "the Authority be directed to 'cease and desist' from refusing to make the disputed payments," any affected employee be made whole and the Arbitrator retain jurisdiction over the remedy aspect of this matter (Authority Brief, p. 5).

IV. Position of the Authority

The Authority first argues that the grievance must be denied because the Union's position is not supported by the "plain" and "clear-cut" language of the Agreement. Employees have the contractual right under Section 1.22(b) to elect health insurance coverage from several different plans. The Authority pays approximately 80% of the monthly premium cost for employees who elect health insurance coverage and the employees are required to pay the remaining 20% premium cost. The employee's share of the premium contribution is taken out of his or her bi-weekly paycheck by payroll deduction. If an employee fails to pay his or her share of the monthly health insurance premium, the insurance coverage will lapse. There is no language in the Agreement that obligates the Authority to "make up the shortfall" if the employee cannot pay his or her share of the monthly health insurance premium (Authority Brief, p. 2).

Turning to the language of the Agreement, the Authority points out that Section 1.18(a) provides that "[a]n approved leave of absence shall not constitute a break in the continuous service record or company benefits and the employee shall be responsible for the usual employee contribution to benefits unless otherwise specified." Section 1.18(c) states "[a]ny time requested beyond what the employee has available in sick leave, must be taken without pay. The employee's medical benefits and service will be maintained." The Authority is required to maintain the "medical benefits" for an employee on an approved medical/sick leave – paying

80% of the cost of the premium for the employee's elected health insurance plan – and not to provide "enhanced" benefits. It does not have the contractual obligation to pay the portion of the employee's share of monthly health insurance premium or to "act as a surety for any employee on medical leave who fails to meet his or her 'responsibility' to pay his or her portion of the monthly health insurance premium" (Authority Brief, p. 3).

The Authority contends that the Union cannot establish a past practice under the language of Section 1.4, which states "[a]ll past practice agreements between the parties that have not been reduced to writing and signed by the parties shall be considered void as of July 1, 1979" (Joint Exhibit 1, p. 5). Because there is no written agreement establishing that the Authority has committed to pay the employee portion of the health insurance premium for employees on an approved medical leave of absence who have exhausted their paid sick leave, and who are otherwise unable to pay their share of the monthly health insurance premium cost, there is no basis for the Union's past practice claim. Alternatively, the Authority maintains that the Union's past practice claim fails to meet the generally accepted arbitral past practice standards – "clearly enunciated, mutually understood, and acted upon over a long period of time" (Authority Brief, p. 6).

The Authority admits that in the past it has "voluntarily paid the full premium for employees on unpaid leave and then recouped the employee portion of the premium payments from wages once the employee returns to work" (Joint Exhibit 3, p. 1). The problem is that when employees don't return to work, and they don't pay for their share of the insurance coverage during the leave, the Authority is left with an "uncollectible debt" (Id.). Director of Human Resources Brenda Mack testified that employees on leave who exhaust their sick leave frequently receive other sources of income that would allow them to pay their share of the health insurance premium cost – workers' compensation benefits, short-term disability benefits or income through other employment. The Authority has recouped the cost of the health insurance premiums for employees on leave who don't return to work by deducting that cost from the payout of the employees' unvested pension contributions (See e.g., Joint Exhibit 13, pp. 37-38). A recent legal opinion has suggested that the Authority would jeopardize the tax-protected status of its pension plan if it makes such deductions in the future.

Collecting premium money from employees who have exhausted their accumulated sick leave has been frustrating for the Authority. Some employees refuse to pay despite receiving letters from the Authority advising them of the consequence of not making their premium payments (Joint Exhibits 12 and 13) – the cancellation of their health insurance coverage. The Authority has tried to work with employees who encounter difficulties making premium payments while on a leave of absence. Employees are given advance notice about the possible cancellation of their insurance coverage if they don't pay their share of the premium cost. The Authority is not, however, required under the Agreement to give "interest-free loans" to employees who are unable to pay their portion of the premium cost needed to continue their health insurance.

The Authority had to deal with a $4.1 million operating budget cut this past year (Joint Exhibit 11). In response to its budget shortfall, the Authority laid employees off and was forced to reduce bus schedules. It simply cannot afford to continue "fronting" money to employees on

leaves of absence who refuse to or cannot pay their share of the premium cost for insurance. The Authority's reasons for no longer indefinitely advancing "non-contractual loans to employees on unpaid medical leave" are reasonable and were made in good faith (Authority Brief, pp. 7-8).

In conclusion, the Authority asks that the grievance be denied in its entirety.

V. Discussion and Analysis

The fundamental question in this case is whether the Authority is contractually obligated to pay the employee portion of the monthly health insurance premium for an employee on an approved medical leave of absence who has exhausted accumulated sick leave and fails to make the monthly employee health insurance premium payment. The answer to this question can be found in the language of Section 1.18 – **Leaves of Absence** and Section 1.22 – **Group Insurance – Welfare.**

Section 1.18(a) defines a "leave of absence" to mean "any excused absence from work, with or without pay and/or benefits." It additionally identifies specific types of leave: union leave, sick leave, bereavement leave, military leave, court and jury duty leave and maternity leave. The requirements that apply to all leaves of absence are spelled out in Section 1.18(a), including the requirement that "the employee shall be responsible for the usual employee contribution to benefits unless otherwise specified." That was first added in the parties' 1977-1979 Agreement (Joint Exhibit 7, p. 11).

The conditions under which employees earn and use sick leave are laid out in Section 1.18(c). Sick leave can be "used for maternity/paternity leave in FMLA cases." Under Section 1.18(c), "[a]ny time requested beyond what the employee has available in sick leave, must be taken without pay" and [t]he employee's medical benefits and seniority will be maintained."

The "maintenance of medical benefits" language of Section 1.18(c) was first added to the parties' 1977-1979 Agreement. It was included in a paragraph that allowed employees to use sick leave for maternity leave and stated "[a]ny time requested beyond what the employee has available in sick leave must be taken without pay" (Joint Exhibit 7, p. 14). A separate maternity leave provision – Section 1.18(g) – was added during negotiations for the 1983-1984 Agreement (Joint Exhibit 8, p. 16). Section 1.18(g) likewise provided that [t]he employee's medical benefits, seniority, and all other benefits will be maintained as a sick leave" (Id.).

Section 1.18(c)'s general reference to "medical benefits" is certainly broad enough to include the "comprehensive hospital, medical and surgical plan(s) with coordinated benefits" offered employees in Section 1.22(b). The "medical benefits" employees elect under Section 1.22(b) are provided through coverage of one of the Authority's health insurance plans. In order to receive the benefit of their elected health insurance coverage, employees must pay their portion (20%) of the monthly premium cost. There is no "otherwise specified" language in Section 1.18(c) that specifically shifts that responsibility to the Authority when an employee is on an approved medical leave or sick leave. An employee on an approved medical leave or sick leave is, therefore, still obligated to pay his or her share of the monthly premium cost to maintain the benefit of the elected group health insurance coverage. Failure to do so may mean that the

employee's health insurance coverage will lapse. There is no express language in Section 1.18 that requires the Authority to cover the employee portion of the monthly health insurance premium when the employee refuses or is unable to make the payment.

The Union points to the Authority's nearly 30-year administration of Section 1.18(c) to support its argument that the "maintenance of medical benefits" language of Section 1.18(c) obligates the Authority to pay for an employee's share of the premium cost of health insurance coverage when he or she is on an approved medical leave or sick leave and fails to make the required monthly premium payment. This history, reflected in a sampling of letters the Authority sent to employees on an approved medical leave or sick leave between 1988 and 1996 (Joint Exhibit 12) and between 2005 and June 2009 (Joint Exhibit 13), does not show an acknowledgment by the Authority of a contractual obligation to pay the employee share of the monthly health insurance premium. Over the years, the Authority has reminded employees about their "responsibility to keep all payments current" and about their "past due insurance deductions." The Authority has also advised employees that:

- *"...your medical and life premiums are due each month, the same as if you were receiving your regular paycheck,"*
- *"Please remit [premium amount] by ...to continue your benefits,"*
- *"These amounts should be remitted to our office...or your insurance coverage will be subject to cancellation,"*
- *"If the payment has not been received...your health premiums will be terminated,"*
- *"Please pay [premium amount] in full in order to be considered for continued benefits" and*
- *"If payment is not received by the end of the month, your coverage may be subject to suspension or cancellation."*

In 2008, prior to the Union's filing of the instant grievance, employees on leave who had not made health insurance premium payments were sent a Disability & Insurance Continuation Notification which read in relevant part as follows:

> *As listed on page 28 Section 1.18 of your Union Agreement union employees are responsible for the usual employee contribution to benefits unless otherwise specified. Please understand that failure to submit payments during your leave of absence may result in cancellation of your coverage...*
>
> *Please note insurance benefits are deducted from sick and vacation pay, so if you are receiving sick or vacation pay from the KCATA you do not need to send in your benefit payments. However, if you are on an unpaid leave or receiving Short or Long Term Disability you must reimburse KCATA for your insurance premiums monthly...* (Joint Exhibit 13, pp. 40-42).

Employees have avoided the cancellation of their health insurance coverage by ultimately submitting payment for their past due premiums. Ms. Mack testified that the "vast majority" of employees on an approved leave of absence pay their required premiums and suggested the case

of an employee who lacks an "income stream" while on an approved medical leave of absence is "increasingly rare."

The Authority has been lenient over the years in giving employees on leave notice of their past due premium amounts and been willing to work with employees who had exhausted their paid leave. Ms. Mack's testimony indicates that there have also been employees who have refused to pay their premium portion while on an approved leave of absence. In the past, the Authority avoided cancelling the health insurance coverage for these employees by taking the "advanced" premium amounts out of the employee's unvested pension contributions. The Authority, however, cannot "recoup" advanced premium payments by taking an offset against the employee's pension contributions when he or she leaves the Authority's employ without running the risk of having its pension plan disqualified under IRS rules.

Since it is not obligated under the express language of Section 1.18 to pay for the employee share of the health insurance premium cost for an employee on an approved medical leave or sick leave who has exhausted his or her accumulated sick leave and who fails to make the monthly premium payment, the Authority has not violated the Agreement as charged in the Union's grievance. The grievance must, accordingly, be denied.

Ms. Mack testified at the arbitration hearing about the Authority's "future process" in dealing with employees on an approved medical leave who have difficulties making their premium payments. She said that the Authority "will work with people," talked about giving employees notice before health insurance coverage is canceled and discussed the possibility of the Authority "fronting" employees the employee premium portion under certain circumstances. While the Union raised questions in its post-hearing brief about the Authority's commitment to this "future process" (Union Brief, pp. 5-6), the undersigned takes Ms. Mack and the Authority at their word about working with employees who encounter difficulties paying their monthly health insurance premiums while on an approved medical leave of absence.

VI. Award

For the reasons set forth above, the grievance is hereby denied.

Lon Moeller, Neutral Chair

Fern Kohler, Authority Member
(Concur/Dissent)

William L. Wilson, Union Member
(Concur/Dissent)

Dated at Iowa City, Iowa
this 21st day of March 2010