

**IN THE MATTER OF ARBITRATION
BETWEEN**

Aggregate Industries,
Employer

**FMCS Case No. 080403-54959-3
Wakefield Termination Grievance**

and

**International Union of Operating
Engineers, Local No. 49,**
Union

**Arbitration Opinion & Award
A. Ray McCoy
Arbitrator**

June 7, 2008

Appearances

For the Employer

Mr. Brian Mumaugh, Esq.
Holland & Hart LLP
8390 E. Crescent Pkwy., Ste. 400
Greenwood Village, CO 80111

For the Union

Mr. Mike Wilde, Esq.
IUOE Local 49
2829 Anthony Lane, So.
Minneapolis, MN 55418

JURISDICTION

The collective bargaining agreement (hereinafter “Agreement” or “Contract”) between Aggregate Industries (hereinafter “Employer”) and IUOE Local 49 (hereinafter “Union”) became effective on May 1, 2006 and continues in effect until April 30, 2009. The Agreement includes a provision for final and binding arbitration. Pursuant to the Agreement, the parties selected the undersigned arbitrator from among a lists of arbitrators provided by the Federal Mediation and Conciliation Services (FMCS.) The arbitrator was notified of his selection by letter from FMCS dated April 14, 2008.

The parties selected May 28, 2008 to conduct the hearing in this matter. The hearing was held on that date at the FMCS offices located at 1300 Godward St. N.E. in Minneapolis, Minnesota. Both sides were given a full and fair opportunity to present their cases. The Employer provided testimony of three witnesses in support of its case as follows: Mr. Doug Wermerskirchen, plant manager, Ms. Lori Waltzer, safety manager and Ms. Megan Wassenberg, human resource manager. The Union presented testimony by the Grievant, Mr. Timothy Wakefield and Mr. Eugene Pickerign, the Union business agent. Ms. Christina Wakefield, the Grievant’s spouse, appeared but did not testify. In addition, the parties submitted 10 joint exhibits. The Employer presented two exhibits regarding the Grievant’s disciplinary record. The Union presented three exhibits in support of its case including the original grievance, a statement by the steward, Ken Mausolf (who did not appear at the hearing in this matter) and the invitation to the Grievant to attend an Employer sponsored First Aid/CPR training. Finally, the Employer submitted a bench brief at the hearing of this matter along with an arbitration award issued by the Honorable Michael L. Allen involving a termination, in support of the Employer’s position.

At the close of the hearing the parties, after important consideration was given to the intent of the arbitration language in the Agreement, agreed to submit post hearing briefs. The parties' Agreement requires the arbitrator to render a decision "within five (5) days of the completion of the hearing."(Agreement at p. 3) In an effort to comply with the parties' intent to resolve disputes as quickly as possible the parties elected to submit post hearing briefs to the arbitrator by the close of business on Monday, June 2, 2008. The parties did submit and the arbitrator received electronic submissions of post hearing briefs by each side before the close of business on Monday, June 2, 2008. The arbitrator closed the record at that time.

ISSUE STATEMENT

The Employer described the issue to be decided as whether the Grievant's "deliberate falsification of his March 13, 2008 time card, and his subsequent, additional deception to cover up that falsification, provide just cause for his discharge . . ." and if not "what is the nature and scope of the appropriate remedy." (Employer's Bench Brief at p. 2) The Union described the issue as follows: "The issue in this case is whether the Company had just cause to discharge the grievant and, if not, what is the appropriate remedy?" (Union's Post Hearing Brief at p. 1)

FINDINGS OF FACT

The Employer serves much of central Minnesota, eastern North Dakota and parts of western Wisconsin providing such products as ready mix concrete, concrete products, asphalt, aggregates and masterblock. The Employer has approximately one thousand employees in its north-central branch. The Union is an affiliate of the AFL-CIO and pursuant to the Agreement

represents employees working at any of the Employer's permanent commercial, sand and gravel plants, crushed stone plants, pits, quarries, storage yards and various auxiliary operations in support of the production and distribution of sand, gravel and crushed stone in the north-central region. (Agreement at p. 1)

The Grievant worked for the Employer for almost 11 years and most recently at its Nelson Mine plant located in Cottage Grove, Minnesota. The plant operates on a seasonal basis. The Employer shuts the plant down from approximately November of each year until late January or early February depending upon weather conditions. As a result, employees, including the Grievant, work approximately eight (8) months out of each year. The Grievant's work record and testimony revealed that the Grievant had a pattern of showing up late for work, calling in to say he was going to be late and then failing to show up for work. Sometimes the Grievant did not call to inform his manager he would not be coming to work and did not show up for work. Most of these incidents took place between 2006 and 2007. (Employer Exs.1 & 2) The Employer issued a written warning to the Grievant in 2006. The Employer specifically and directly warned the Grievant of the consequences of his pattern of lateness and no-shows.

“The number of incidents has disrupted the flow in our unit and placed undue stress on your fellow employees. Furthermore, you are expected to inform your Manager in a timely manner of any unplanned absences. I expect that you will take corrective action to prevent these types of incidents in the future. However, if this issue is not corrected, further attendance issues will result in disciplinary action up to and including termination.” (Employer Ex. 1, p.1)

Nevertheless, the Grievant continued his pattern of failing to report to work on time and failing to show up after calling to say he would be coming to work. Finally after repeating the pattern of lateness and no-shows more than five times between February 2007 and early April

2007, the Employer suspended the Grievant without pay for one day. The Union was notified as required and did not grieve the discipline in 2006 or 2007.

The incident that led to the Grievant's termination stemmed from his failure to attend a voluntary First Aid/CPR training offered by the Employer. Specifically, the Grievant signed up to attend the training that was scheduled for March 13, 2008. The Grievant testified that he told his manager not once but three times prior to the training that he would not be at the plant on March 13, 2008 because he would be attending the First Aid/CPR training offsite at a location in Eagan, Minnesota. The Grievant testified that he made the extraordinary effort to alert his manager to his plan to attend the training because he did not want his manager to say "Where in the hell is Tim?" (Grievant's Testimony at Hearing) In other words, the Grievant did not want his manager to mistake his absence from work as simply a continuation of his behavior that led to his written warning in 2006 and suspension in 2007.

However, on the morning of March 13, 2008, the Grievant called, Ms. Lori Waltzer, the safety manager, for the Employer and told her his car was inoperative and that he would be late arriving at the training. He told Ms. Waltzer that his intent was to repair his car and still attend the training. (Grievant and Waltzer testimony) The Grievant testified that he was unable to repair his car and called back to let Ms. Waltzer know that he would be even later than he expected. Ms. Waltzer testified that she informed the Grievant that it was now too late for him to attend the training because he had already missed too much. Ms. Waltzer informed him of the date and time of the next opportunity to complete the First Aid/CPR course. The Grievant accepted the information and expressed his intent to attend the subsequent training.

The Grievant did not contact his manager and explain that he missed the training due to

car trouble and therefore would not be at the training or at work that day. He simply stayed away from work. Ms. Waltzer reported the names of the employees who attended the training, left early or did not show up to the plant manager. (Waltzer testimony, Jt. Exs. 2, 3 & 4)

The Grievant recorded eight (8) hours on his time card, according to his testimony, on the day before the scheduled First Aid/CPR training since he would not be at work until the day after the training. In other words and according to the Grievant's testimony at the hearing, he wrote in eight (8) hours on his time card on March 12 in anticipation that he would be attending the training the next day and would not be present at the plant. The Grievant testified that after missing the training that he did return to work the following day, March 14. The Grievant did not seek his manager out to explain his absence at the training and did not correct his time card. The Grievant testified that even though he had to punch in and out that day, he simply forgot to correct his time card to show that he had missed work on March 13. The Grievant testified that he did not tell his manager he missed the training on March 13 because he assumed Ms. Waltzer had done so.

The Grievant's manager, Mr. Wermerskirchen testified that he is responsible for payroll. He said his practice is to complete payroll information on the Sunday or early Monday morning before it is due to be sent to corporate headquarters in Baltimore for processing. Mr. Wermerskirchen completed the payroll information consistent with his practice on the Monday morning (March 17, 2008) following the week during which the Grievant missed the training but failed to remove the eight (8) hours he recorded on his time card. Following submission of the payroll information, Mr. Wermerskirchen testified that he reviewed his email messages and discovered the information provided by Ms. Waltzer regarding attendance at the First Aid/CPR

training. In doing so, he discovered that the Grievant's name was not on the list and sought to verify whether Ms. Waltzer had simply made an error in leaving the Grievant's name off the list or whether the Grievant had in fact not attended the training. (Jt. Ex. 2)

After receiving confirmation that the Grievant did not attend the training and did not submit an accurate time card, Mr. Wemerskirchen contacted his supervisor which began the investigative process leading to the Grievant's termination. The Employer and Union conducted separate investigations. The Employer's investigation included examination of the time clock and the process by which employees and the Grievant, in particular, record their time worked each week. In addition, the Employer set up a meeting with the Grievant and his union steward to ask about the error on his time card. At the meeting, the Grievant acknowledged the error and characterized it as a simple mistake. The Employer informed the Grievant that he was suspended pending further investigation and asked him to leave the plant at the conclusion of the meeting. At the conclusion of its investigation, the Employer determined that the Grievant's failure to inform his manager of the fact that he missed the First Aid/CPR training, failure to correct his time card when he returned to work the morning after missing the training and again that evening when he had to punch out, amounted to theft. The Employer held off on issuing a decision regarding the Grievant until such time as the Union was able to complete its investigation. Mr. Eugene (Geno) Pickerign, Local 49 business agent, filed the grievance on behalf of the Grievant on March 18, 2008 and also conducted his own investigation. The Union asked for and was granted access to other employees working at the plant. Mr. Pickerign spoke to and secured a statement from the steward, Ken Mausolf, who attended the meeting described above as the Grievant's representative. (Union Ex. 2) Mr. Pickerign testified that he also interviewed those

working the same shift as the Grievant and secured written statements from at least two employees, Mr. Plan and Mr. Repke. Neither statement was introduced at the hearing.

Mr. Wermerskirchen said he had conversations with the two employees named above, Mr. Plan and Mr. Repke. Mr. Wermerskirchen testified that he asked Repke and Plan whether the Grievant had come to work on the day of the training. According to Wermerskirchen these employees replied that the Grievant had not come to work that day. Moreover, Mr. Wermerskirchen testified that Mr. Repke reported to him that the Grievant had asked how he should complete his time card since he attended the First Aid/CPR training the day before. According to Mr. Wermerskirchen, Mr. Repke reported that he told the Grievant to simply write down eight (8) hours. The Grievant admits recording eight (8) hours on the time card but claims that he did that on the day before he missed the training and not the Friday when he returned to work after missing the training. The Grievant and the Union did not dispute Mr. Wermerskirchen's description of his conversations with Mr. Repke and Mr. Plan. They simply insist that the Grievant recorded his eight (8) hours of attendance at the training the day before. They also argue that the Grievant simply forgot to correct the time card when he returned to work the day after he missed the training. The Employer has a specific set of work rules, of which the Grievant was aware, that prohibit among other things, falsifying any reports or records, including personnel, absence, sickness and time cards. (Jt. Ex. 8) Moreover, the work rules required the Grievant to notify his manager of any absence from work and the reasons as soon as possible.

POSITIONS OF THE PARTIES

Employer's Position

1. The Grievant deliberately falsified his March 13, 2008 time card.
2. The Grievant then engaged in deception to cover up his falsification.
3. The Grievant offered contradictory reasons for reporting eight (8) hours on his time card for the day he was supposed to be at the First Aid/CPR training but failed to attend.
4. First, he said he always enters eight (8) hours for each day at the beginning of each week. Then he argued that he only entered eight (8) hours for the training day because he knew he would not be at work on that day and was therefore simply recording what he expected to happen, namely that he would be paid for the training that was to be held the next day.
5. The investigation revealed that the Grievant actually asked one of his co-workers how to record the time spent at training on the day he returned to work following his failure to attend the training.
6. The Grievant violated the Employer's policy against falsifying any reports or records including time cards.
7. The Grievant violated the Agreement in that he did not put in a full work week but requested pay for a full work week.
8. The Grievant has a pattern of attendance issues with the Employer that he knew, if continued would lead to discharge.
9. The Grievant's falsification of his time card coupled with his poor attendance record left
the Employer no choice but

to terminate his employment.

10. The discharge should not be set aside absent a showing of abuse of discretion.
11. The work rule was clear and known to the Greivant. Lying on the time card is tantamount to stealing.
12. Discharge was the appropriate discipline for the Grievant's deception and there are no mitigating circumstances.
13. The Employer's decision to discharge should not be disturbed and the grievance should be denied.

Position of the Union

1. The Grievant did not intend to falsify his time card or to steal from the Employer.
2. The Grievant simply recorded his time card in advance of attending the scheduled training.
3. The Grievant's failure to correct the time card was simply an error and the sloppy consequence of hurrying to get out of work on Friday.
4. Termination is too harsh.
5. The Grievant has worked for the Employer for eleven (11) years and has never stolen anything during that time. He is a good hard worker and while he has made some mistakes he is not a thief.
6. The Grievant would not falsify his time card because he knew that would not work. He knew that a training attendance report would be sent to his manager because that is

always the way it is done.

7. The Employer's attempt to prove the Grievant is dishonest by examining the time cards for a pattern of pre-recording time is not determinative and cannot be used for comparison because none of the time cards show other time off for training.
8. The time cards do show that the Grievant pre-recorded a planned vacation.
9. The Employer has not established beyond a reasonable doubt, or by clear and convincing evidence that the Grievant intended to steal.
10. Just cause requires consideration be given to the Grievant's eleven (11) year career with the Employer.
11. The Grievant should be reinstated and made whole or in the alternative a less severe penalty should be imposed upon him consistent with missing work without excuse.

OPINION AND AWARD

The critical facts, as both sides acknowledged, are not in dispute. The Grievant submitted a time card with false information as to time worked on March 13, 2008. It is the characterization of the Grievant's conduct about which the parties disagree. The Union characterizes the Grievant's failure to remove the eight (8) hours from the time card as a sloppy error done in haste as the Grievant hurried to leave the work place at the end of the week. The Employer characterizes the act as an intentional and knowing misrepresentation of hours worked. The arbitrator agrees with the Employer's characterization. The Grievant's testimony is not credible. The context in which the Grievant's actions took place makes it impossible to credit his testimony. More specifically, the Grievant understood that his job was in jeopardy. The

Grievant's history of calling his Employer to say he would be late for work and then failing to show up as well as not calling and not showing up brought him to the brink of termination on April 3, 2007. The Grievant was suspended on that day and warned "if this issue is not corrected, further attendance incidents will result in disciplinary action up to and including termination." (Er. Ex. 2) The Grievant said he was very concerned about making sure his attendance at the First Aid/CPR training not be construed as absence from work. He was so concerned that he informed his manager on three different occasions that he would be attending training on March 13, 2008 and not repeating the behavior for which he was disciplined.

The Grievant testified he called his manager and informed him that he planned to attend the training. The Grievant's manager confirmed that he received a voicemail message the week prior to the training from the Grievant informing him that he would be attending the training. The Grievant and his manager confirmed that on two additional occasions following the voicemail message, that the Grievant told his manager he would be attending the training. As the Grievant stated during his testimony, I told him three different times because I did not want him to ask on March 13, 2008: "Where the hell is Tim?"

The Grievant knew that he had a great deal to lose if he failed to show up for work and failed to call his manager to explain his absence. Nevertheless, the Grievant missed the First Aid/CPR training, failed to call his manager and explain his absence and made no attempt to go to work after learning he had missed too much of the training. In short, he decided to follow the same pattern of conduct that led to his suspension last year. To suggest that the Grievant went from being extremely cautious about how his manager viewed his absence from the workplace just one week earlier to being absolutely cavalier about his absence from the workplace after

returning to work following his failure to attend the training or report in is simply not credible.

Moreover, the Grievant acknowledged that he understood his Employer had work rules that applied to situations where an employee needs to be away from work on a scheduled work day. The Grievant knew from his past experience that if he was unable to come to work that he needed to contact his manager.

“If an employee is unable to report for work or perform work due to illness or other justifiable cause, he or she must report the expected absence as soon as possible and give the reasons for the inability to work to his/her immediate supervisor or supervisor’s designee.” (Jt. Ex. 8)

The Grievant’s failure to call his manager to explain his absence from the training and how he planned to use the balance of his day having missed the training as well as his failure to provide an explanation the following day when he returned to the workplace cannot be described as mere oversight or mistake. Given the history and the danger of termination that already existed as well as the Grievant’s understanding of the threat of termination, it is impossible to accept the position advanced by the Union.

The Union asks that the context, history, work record and the Grievant’s numerous opportunities for explanation and correction be ignored. The Grievant’s silence upon returning to work the day after missing the First Aid/CPR training and failing to report to his manager must also be considered. Against a backdrop of admitted fear of termination, the Grievant arrives at work punches in, ignores the eight (8) hours that he says he recorded on March 12 in anticipation of attending the training and went about his work day.

Moreover, the Grievant had to pick up his time card, ignore the fact that eight (8) hours was recorded there for a day he had just missed, according to his testimony, and proceed with his work day without giving a second thought to the need to correct his time card. With so much at

stake, it is unlikely that the Grievant simply forgot about missing the training for the entire day. It is also unlikely that in his haste to leave the workplace at the end of the day, that the Grievant picked up his time card, ignored the fact that he had filled in eight (8) hours for a day he did not work and then added up his hours for the week, wrote in the total as forty (40), punched out and went home.

The Grievant testified that he assumed Ms. Waltzer would send the attendance list to his manager and that would serve as his notice. The Union argues that because the Grievant was aware that it was common practice for the training attendance list to be sent to the manager, that the Grievant would not possibly lie about his absence from the training by adding eight (8) hours to his time card.

The Union's argument on this point must be rejected. First, as stated above, the work rule required the Grievant to notify his manager. That the Grievant did not do. Secondly, notice from Ms. Waltzer arrived in the form of a list. Ms. Waltzer did not report that the Grievant did not attend the training due to car trouble. Ms. Waltzer's practice was not to provide an explanation of why the employee missed the scheduled training but simply a list of those who did attend. Therefore, even if the manager noted that the Grievant's name was not on the list he would not know the "justifiable cause" for his absence as required by the work rule. The Grievant would have to provide that information.

The Grievant said he assumed his manager would learn that he did not attend the training. However, he did not say his manager would learn why he had not attended the training. Again, the Grievant's silence after so many attempts to notify his manager of where he would be on March 13 must be considered a deliberate attempt to mislead as opposed to an innocent

assumption and mistake.

The arbitrator finds that the Employer properly relied upon the results of its investigation to make a determination as to the Grievant's intent. The human resources director, following her examination of the process of punching in and out for work and the general practice of recording time worked by the employees at the plant, concluded that it would be impossible for the Grievant not to notice that he had left eight (8) hours down for March 13 even though he was absent from work that day. In addition, the human resources director reasonably concluded that the Grievant could not have missed his error three times in one day—when he punched in that morning, punched out at the end of the day and when writing in the total number of hours worked for the week. Moreover, there was additional testimony by the Grievant's manager that further challenges the Union's position with regard to whether the Grievant's failure to correct his time card was a harmless mistake.

The manager testified that after he learned from Ms. Waltzer's email that the Grievant had not attended the training and confirmed that he had indeed missed the training, he spoke with the foreman, Mr. Repke to see if the Grievant had come to work on March 13. The manager testified that the foreman told him that the Grievant did not work on March 13. More importantly, the manager testified that the foreman told him that when the Grievant came to work on March 14, the day after he missed the training, that he asked the foreman how he should complete his time card to reflect the First Aid/CPR training. The Union objected to the testimony as hearsay. However, the arbitrator is inclined to accept the testimony of the manager as reliable in this case for a variety of reasons. Most important, the Union interviewed Mr. Repke as a part of its investigation. In fact, the Union business agent said he collected written statements from

Mr. Repke and Mr. Plan both of whom worked with the Grievant. The manager testified that Mr. Plan told him that he asked the Grievant if he was “all certified” when he returned to work on March 14 following the training. The manager said that Mr. Plan told him the Grievant replied that he was “all certified.” The Union did not introduce the written statements it collected from Mr. Plan and Mr. Repke or rebut the testimony of the manager.

The Employer, therefore, properly relied on the statements of Mr. Repke and Mr. Plan. If Mr. Repke and Mr. Plan, both union members, denied ever making those statements to the manager, it is clear that the Union’s investigation would have revealed as much. Mr. Pickerign, the business agent who conducted the investigation on behalf of the Grievant said he specifically spoke to both Mr. Plan and Mr. Repke and took written statements from them.

It is important to note, that in reviewing the Employer’s decision to discharge, the arbitrator is examining the information available to the Employer following reasonable inquiry and investigation. In addition, the arbitrator is examining the results of the Union’s investigation and the information available to it in deciding how best to challenge the most severe form of discipline that can be issued in the workplace. For the Union to have interviewed these key witnesses and failed to present anything resulting from those interviews leaves the Grievant without protection from what is otherwise very reliable information. More importantly, the Employer should be permitted to rely on the statements made to the Grievant’s manager absent any indication that they are unreliable.

The manager testified that he had given the Grievant numerous opportunities to correct his behavior before issuing discipline during both 2006 and 2007. Also, the manager had genuinely sought to help the Grievant and specifically asked whether he was dealing with

difficult family or personal issues that might require specialized assistance. The manager testified that the Grievant denied needing any such help. It is against this backdrop of genuine concern for the Grievant that the manager's testimony must also be examined. The arbitrator finds that the manager's testimony should be given great weight especially in light of the undisputed facts on this point.

Therefore, the arbitrator concludes that the Grievant's intentionally wrote down eight (8) hours on his time card, wrote that he had put in a forty (40) hour work week after having just missed the First Aid/CPR training and intentionally withheld that fact from his manager in an attempt to avoid termination for repeating his pattern of calling in saying he would be late and then not showing up for work at all.

In this case, just cause simply requires an examination as to whether the Employer's actions are arbitrary and capricious. As discussed above, the Employer's decision to terminate was reasonable and taken following progressive discipline designed to correct what can only be characterized as a cavalier attitude on the part of the Grievant toward known work rules. The Grievant had notice of the work rule requiring employees to be at work on time and to work until the agreed upon quitting time. He had notice that falsifying time cards was prohibited. The Grievant had an opportunity to prove that he did not falsify his time card and ample opportunity to correct his pattern of lateness and no-shows. He failed to do these things which he understood were absolutely critical to maintaining his employment. It is clear that what the Grievant and Union are now requesting is leniency.

Just cause will sometimes require a determination as to whether discipline, although warranted, is too harsh. The Union, in fact, urges the arbitrator to consider the lengthy service of

the Grievant as a mitigating circumstance. In this case, however, the arbitrator finds no grounds for altering the discipline. Having concluded that the Grievant engaged in an intentional act of deception, the lengthy work record in and of itself is insufficient reason to reduce the discipline.

AWARD

Based on the hearing and the record as a whole, the arbitrator denies the grievance and the Employer's decision to terminate the Grievant stands.

Respectfully Submitted

A. Ray McCoy
Arbitrator

Date: June 7, 2008