

IN THE MATTER OF ARBITRATION BETWEEN

INTERPLASTIC CORPORATION )  
"Employer" )  
AND ) Discharge  
USW LOCAL NO. 11-409 )  
"Union" )

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: May 28, 2008; St. Paul, MN

DATE OF RECEIPT OF POST-HEARING BRIEFS: None

APPEARANCES

FOR THE EMPLOYER: Ivan M. Levy, VP, General Counsel  
Interplastic Corporation  
1225 Willow Lake Blvd.  
St. Paul, MN 55110  
Terry Pandy, VP, Administration and Human Resources  
Ryan Colison, Corporate Process Engineer

FOR THE UNION: Paul Lindgren, Staff Representative  
USW District 11  
2929 University Avenue SE, #150  
Minneapolis, MN 55414  
Cory L. Sands, Grievant  
Dale A. Hippe, Steward  
Brian Ecker, Local 11-409 President

THE ISSUE

Did the Company have just cause to discharge the Grievant?

If not, what remedy applies?

## BACKGROUND

Cory Sands (the “Grievant”) began his employment with Interplastic Corp. (the “Company”) on July 19, 2006. On October 16, 2006 Gary Severson, Minneapolis Plant Manager, extended the Grievant’s probationary period as a “C” Operator for an additional 30 days, informing him that “Cory, you must improve your performance or you will be in danger of the termination of your employment with Interplastic.” (Jt. Ex. 5)

This comment and the unusual step of extending a probationary period was somewhat at odds with the Grievant’s employee evaluation reports up to that time. His supervisors had given him 30 and 60 day appraisals of “acceptable” to “good” and all performance factors rated. His 60 day appraisal report, however, did contain some criticisms including such comments as “He is a little bit head-long (sic);” “As yet he needs to have specific tasks assigned;” “A little bit impatient of thought...” (Id.) His 90 day appraisal also reflected a generally acceptable rating but contained similar negative comments, including “...needs to listen to trainers instructions and not argue,” an only “Fair” attendance mark, and “People who are training Cory say he doesn’t listen.” (op. cit.).

The Company presented its Exhibit 2, the chronology of the Grievant’s disciplinary record from January 13, 2007 until September 17, 2007. That summary reads as follows:

		TOTAL HRS	HRS PAID	HRS UNPAID
01-13-07	Saturday	11.50	5.50	6.00
01-24-07	Warning Memorandum (Sick Time)			
02-02-07	Written Warning (failed to come in on Tues, Jan. 30)			
		TOTAL HRS	HRS PAID	HRS UNPAID
03-18-07	Sunday	4.25	4.25	0.00
03-19-07	Suspension – 1 Day Technical (Production Error)			
04-17-07	Suspension – 3 Days w/o Pay (Production Error)			
05-05-07	Saturday	8.00	0.00	8.00
05-18-07	Friday	11.50	0.00	11.50
05-19-07	Saturday	11.50	0.00	11.50
06-06-07	Suspension – 5 Days w/o Pay (Last Chance)			
07-19-07	Anniversary Date – Get New Sick Leave Hours (CBA § 8)			
		TOTAL HRS	HRS PAID	HRS UNPAID
09-01-07	Saturday	9.75	9.75	0.00
09-15-07	Saturday	11.50	5.75	5.75
09-17-07	TERMINATION (Production Error)			

## APPLICABLE CONTRACT PROVISIONS

4.3 Probationary Employees. All new Employees will be on probation for the first 90 calendar days of continuous employment. During this Probation Period, the Company may terminate the employment of any such Employee at any time and for any reason without any recourse by the Union.

(a) Seniority. A Probationary Employee shall not acquire any seniority during his or her Probationary Period. However, upon successful completion of the Probationary Period (i) the Employee shall become a Regular Employee, and (ii) the Employee's seniority shall be made retroactive to his or her last date of hire.

(b) Restrictive Benefits. Probationary Employees shall have no rights to any of the benefits listed in § 4.5 below. This shall apply notwithstanding anything in this Agreement to the contrary.

## 8. SICK LEAVE

8.1 Introduction. The term "sick leave" applies both to illnesses and to injuries. Employees should also be aware of the following:

(a) Bona Fide. The sick leave rights granted by this Agreement do not apply unless the illness or injury is bona fide. In other words, sick leave and vacation time are not the same thing. Employees who call in sick – when they really aren't – are subject to discipline.

## 11. TERMINATION OF EMPLOYMENT

11.1 Grounds for Dismissal. The Company may terminate a Regular Employee's employment only for one or more of the following reasons:

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(g) Just Cause. The Employee is discharged by the Company for "just cause."

## 15. EMPLOYEE DUTIES AND RESPONSIBILITIES

15.1 Attendance. Regularity of attendance is a job requirement. If an Employee is unable to report for work at the scheduled starting time, then the Employee must (i) notify his or her supervisor or designated person at least one hour in advance, if possible, before the scheduled work time; and (ii) explain the reason for being unable to report for work.

- If the Employee is unable to give the above notice, then the Employee must also give the Company a reason – acceptable to the Company – why the required notice was not provided.

- Under no circumstances shall the above notices, by themselves, be construed as either (i) permission for excused leave, or (ii) sufficient justification for any leave of absence benefits hereunder.

### COMPANY'S DISCIPLINARY POLICY

After your Probationary Period ends, the Company will normally use progressive discipline as described in this Policy. As a general rule, violations result in the following discipline:

Step 1: Verbal warning	Step 4: 3-day suspension
Step 2: Written warning	Step 5: 5-day suspension
Step 3: 1-day suspension	Step 6: Termination

### FORM OF DISCIPLINE

Employees aren't given any time off in the case of a "verbal warning" or a "written warning." Each SUSPENSION normally results in time off without pay. As an alternative, though, the Company – in its sole discretion – may elect to give an Employee a "technical suspension."

In a TECHNICAL SUSPENSION, the time off is deferred. Hence, the Employee still comes to work, and the Employee gets pay for all such time that he or she actually works. In all other respects, however, the discipline is still treated as a suspension under this Policy.

For example, if there is a 1-day "technical suspension," the Employee must still come to work, and the Employee gets pay for all time that he or she actually works that day. If there's a subsequent violation and the standard progression applies, the Employee's suspension will be 3 days (or, if the Company in its discretion elects to take on the earlier deferral, 4 days).

### DOCUMENTATION

Each and every written disciplinary action must be included in the Employee's personnel file. Materials added to the file shall not be removed.

After a certain amount of time, it becomes unreasonable to use an old disciplinary action as the basis for further discipline. The disciplinary procedure starts over when that occurs. The time when an old incident becomes "stale" depends on the type of infraction and its severity, how often and long ago past incidents occurred, and other relevant facts and circumstances.

For example, suppose an Employee received a 1-day suspension for tardiness, but was not late again for the next 12 months. In this case, the 1-day suspension will be

considered “stale,” and the next lateness should normally result in only a verbal warning (unless the Employee has been a repeat tardiness offender or other circumstances suggest otherwise).

## GOVERNING RULES

This Policy is subject to the Collective Bargaining Agreement between the Company and the Union. In the event of any conflict between the Agreement and this Policy, the Agreement shall control in all cases. This Policy is the Company’s understanding and its Policy; and Union does not necessarily assent to its terms. After the Probationary Period ends, any and all disciplinary actions by the Company under this Policy may be grieved by the Union in accordance with the grievance provisions set forth in § 14 of the Agreement.

## POSITION OF THE COMPANY

The Company followed its progressive disciplinary policy exactly in every detail in response to the Grievant’s violation of attendance rules and in light of his frequent carelessness in performance. The documented lack of care and attention which cost the Company tens of thousands of dollars were never contested by the Grievant.

His defense claims that he was inadequately trained resulting in the substantial performance failures which progressed him up the progressive disciplinary ladder to the point where his “minor” attendance problems led to his termination. The Arbitrator needs to recognize that from early in his employment, the Grievant has been guilty of not paying attention to his trainers and of arguing with their instructions.

Now to the point, his performance errors were never of the kind that would result from inadequate training or could be corrected by further training. Specifically, in the instance where he caused a batch to jell by improperly adding the amount of a key ingredient suitable for a larger batch into a smaller mix, the Grievant’s error was caused by his inattentiveness to the batch formula in hand.

His other major performance failure resulted from failure to clear styrene from the batch mixer before completing the mix and sending it on its way to a shipping container car. If an alert employee had not noticed the clear styrene being on-loaded (instead of a tan colored correctly mixed batch) the Grievant’s error could have been catastrophic for the customer and extremely costly for the Company. The effects of the styrene would have been to defeat the hardening process of a JIT shipment destined to be fed directly into an open excavation for the purpose of repairing age damaged underground conduit pipe.

Again, this failure to purge the batch mixer of styrene before making the formula was the direct result of lack of attention to a routine procedure. His other performance failure was simply the result of putting ingredients into wrong mixing containers – clearly caused by carelessness, a continuing and uncorrected work habit of the Grievant.

As for his final attendance misconduct, the Grievant was clearly forewarned by the Company that his attendance record and performance failures were unacceptable and would result in further discipline up to and including discharge. On June 5, 2007 the Grievant was issued the following notice:

#### Disciplinary Action Memorandum

Date and Time of Occurrence: May 18 and May 19, 2007

Description of Occurrence: You have exceeded your allotted sick time.

After your probationary period, you were granted 23 hours of sick time, which you used on:

November 10, 2006	7.25 hours
January 13, 2007	11.5 hours
March 18, 2007	4.25 hours

You called in with car trouble on May 18, 2007 and called in sick on May 19, 2007, without sick time available. You will not have any sick time available to you until your anniversary date of July 19, 2007.

You received a 3 day suspension for a mistake in production on March 30, 2007. The next step in the progressive discipline policy in a 5 day suspension and final warning.

Disciplinary Action Being Taken: 5 day suspension and final warning that any further occurrences of any kind will result in termination. You will serve this suspension on Friday 6/15 to Sunday 6/17, Friday 6/22 and Saturday 6/23. You are to report back to work on Sunday 6/24.

The Termination Notice issued on September 19, 2007 concisely states the rule violations resulting in the Grievant's termination:

Date and Time of Occurrence: September 16, 2007

Description of Occurrence: You failed to follow the instructions on the batch card.

You were making a batch of COR 78-AT-329 which requires circulating the batch from the scale through the heat exchanger before pulling a sample for QC. You failed to do so. The error was discovered when the loader noticed that the material being loaded was much too thin for this batch. Had he not noticed this, the batch would have to be reworked or the customer would have received unacceptable material and returned the tanker. This was a very serious mistake.

You received a 5-day suspension and final warning on June 5 for attendance issues – stating any further occurrences of any kind will result in termination. The next step in the progressive disciplinary policy is termination.

Disciplinary Action Being Taken: Termination, effective immediately.

As for the Grievant's defense, the Union mistakenly argues that the discharge is premature because the two disciplinary actions prior to his discharge were grieved and not yet resolved. The record contravenes this assertion. The testimony and contemporaneous record (Company Exhibit 9) show that the Union, via memoranda copied to Steward Dale Hippe was informed on July 20, 2007 that the two grievances involved were settled at the Workers Committee Meeting as follows:

#### AGENDA

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Grievance #1029 – Cory Sands – Agreement – The Company will review and clarify the definition of Suspension Days as it related to 8 hour and 12 hour employees. Upon completion, the clarification will be communicated to the Union. Retroactive pay will not be given to any employee that has previously served an unpaid suspension.

Even if these two prior disciplinary actions grieved as #1023 and #1029 were not settled (which they clearly were) their substance were never the issue. Instead, the Grievant agreed with his errors – see his admission on the 1029 grievance. “Not arguing about 5 day step in disciplinary process.” The parties entered into the grievance settlements as outlined in the Agenda summary sent to the Union.

For these reasons the grievance should be denied in its entirety.

#### POSITION OF THE UNION

The plain facts of this case show that the Company followed a highly inconsistent procedure throughout its handling of the Grievant's various disciplinary episodes. From the very beginning of his probationary experience management issued entirely contradictory messages to the Grievant.

It simply makes no sense that all the written employee appraisals completed throughout the Grievant's probationary period rate him as acceptable or good in performance, yet Plant Manager Severson extends his probationary period without any detailed explanation.

This kind of confusing feedback followed the Grievant throughout his employment with Interplastics. It surpasses any explanation that, in the face of performance criticism, implicit in Severson's extension of his probationary period, the Company signals its approval of the Grievant's work by advancing him to “B” operator status with accompanying pay rate.

Neither does it seem reasonable that the Company assigned lower rated “C” operators to train the Grievant to perform the duties of “B” operator for which his trainers were themselves unqualified. It makes even less sense that when the Grievant complained about this inadequate training, the Company criticized him for “arguing with” and/or “not listening to” his unqualified trainers.

The termination decision is further tainted by the Company’s unsupported claim that the Grievant’s earlier two grievances were somehow settled. The Company’s own records show that its unilateral version of what happened at the June Workers’ Committee meeting were never e-mailed to the Union representative present at that meeting, Steward Dale Hippe. The fact is that Dale Hippe does not even possess e-mail capacity.

Certainly, the Company could not show that the Union had ever withdrawn or abandoned these two grievances. The Grievant testified that he never agreed to drop these grievances which would be an essential action before the Union would agree to any disposition of his contractual rights.

In sum, the Company clearly lacks procedural grounds for moving to the termination step of the progressive disciplinary policy before establishing just cause for the preceding two steps in the Policy.

Finally, there was not a single performance miscue by the Grievant that could not have been remedied by additional training. The conclusion, therefore, must be that the Company improperly pursued a punitive, rather than the remedial course of action contemplated by the Collective Bargaining Agreement.

For any and all of the foregoing reasons the Arbitrator should ignore the inadequate excuses offered by the Company for discharging the Grievant – in sum no just cause was shown for this recourse to industrial capital punishment. Therefore, the Grievant should be promptly reinstated to his former position and made whole.

## DISCUSSION AND OPINION

Perhaps the most thorough analysis of this case can flow from applying the well-known Seven Steps to just cause approach first articulated by Arbitrator Carroll Daugherty in his oft-quoted Enterprise Wire Co., 46 LA 359 (1966). Most agree that the seven steps or tests of just cause, while not meant to be strictly applied in all cases, nonetheless provides a useful analytical format for determining whether an employer has established just cause for discharge. Further, most arbitrators tend to fashion their own version of Daugherty’s guidelines. Here are mine:

1. Were the rules/policies under which the Grievant was charged fair and reasonable?

This test simply means were those rules or policies which the Grievant was accused of violating reasonably related to the safe and efficient conduct of the business? Certainly, the performance standards which governed the Grievant’s work product were job-related having

been drawn from those of the industry's standard setting professional association. Clearly, they were fairly applied in the Grievant's case because of the undisputed facts, including his admission to making the serious errors for which he was progressively disciplined.

As for the Company's attendance policies, management was in the process of addressing the penalty disparities between the four day and five day shift allowances. This disparity, however, did not directly affect the progressive steps of discipline and, as such, it was the absences themselves, rather than the degree of penalty which determined the eventual outcome.

Indeed, it is apparent that the Grievant virtually "played the system" by taking exactly the amount of time off up to the exhaustion of his absence allowance so as to not incur any pay loss. Thus, he violated not only the letter but the spirit of the Company's attendance policy.

2. Did the Company provided the Grievant with a full and fair investigation into the facts?

The record shows that in every disciplinary incident up to and including the final rule violations, the Company interviewed the supervisor involved and responded fully when the issue was brought up for group discussion at the Workers' Committee meetings.

The Grievant's side of the story in each instance was received in the contractual grievance steps and fairly considered before disciplinary action was taken.

3. Did the facts uncovered in the Company's investigations support a finding of guilt for the rule violations charged against the Grievant?

In every instance, the Grievant admitted to the omissions or commissions which constituted the particular rule violations found in the Company's investigation. Indeed, the Grievant's explanations consisted essentially of claims that his absences should have been forgiven under circumstances of car trouble or the illness of his girlfriend and the like, but never that the absences did not occur.

In like vein, he readily admitted to his performance mistakes but only contended that he was blameless for these errors because of the alleged inadequacies of his training.

4. Did the Company properly advise the Grievant in regard to the rules and polices he violated?

From the very first day of the Grievant's probationary period, he was informed of the particular work rules and attendance policies which he violated. In not a single instance did the Grievant claim ignorance of the performance standard or attendance requirements which he had failed to observe and maintain.

5. Did the Company provide the Grievant with clear forewarning of the consequences for violating the rules and policies involved in this matter?

The exhibits detailing each disciplinary action against the Grievant specifically identified the stage he was at any particular time. Further, the Company notified him when his sick leave allowance was running out before he exhausted his allotment and was placed on Last Chance status following absences on May 18 and 19, 2007.

That final warning was clear and plainly drawn in notifying the Grievant on June 5, 2007 of: "5-day suspension and final warning that any further occurrences of any kind will result in termination." This series of warning culminating in placement on Last Chance status fully met the Company's notice obligations.

6. Did the Company afford the Grievant even handed treatment with other employees found guilty of similar rule violations?

The Union presented no evidence of disparate treatment in regard to any of the disciplinary actions taken, including the termination of the Grievant's employment.

7. Was the disciplinary penalty at each step, including the critical discharge decision commensurate with the seriousness of the offense?

The record shows that throughout the Grievant's passage up the progressive disciplinary pathway, the penalties assessed were measured and appropriate. It needs repeating here that the Union argued that the Company should have adopted a more corrective and remedial approach, rather than imposing the series of penalties.

The dispositive fact remains that the Grievant's offenses were a result of inattentiveness causing him to ruin various batches, each of which had serious consequences. In one of these his error cost the Company some \$80,000 to clean out a prematurely "jelled" batch plus the lost production time when the unit had to be taken out of service. In another, if a co-worker had not caught a load ruined by styrene which he failed to clear from the batch mix, the defective product was unusable and could have been ruinous to the customer if it were dropped into an excavation to repair underground pipes. No training could have remedied such carelessness.

His choice not to attend a scheduled meeting with management to discuss his performance failures had nothing to do with any deficiencies in the training provided him. He suggested at the hearing that, rather than penalizing him for missing the meeting, his supervisor should have told him that his request that the meeting be rescheduled had been denied.

In plain truth, the Grievant had no right to assume it was alright to miss the meeting merely because he had not heard otherwise. He chose to attend school that day and put his job at risk – as it turned out this was a costly choice.

Nowhere in this hearing record were grounds for mitigation to be found. The sparse facts show that this energetic and ambitious employee would probably succeed at Interplastic if he did not take on such a challenging schedule of two jobs and full-time attendance at Dunwoody Institute. While such drive in many ways is commendable, in terms of his worth as an employee

at Interplastic, however, it appears that he spread himself so thin that he was unable to give his work the kind of attention needed to meet acceptable standards of employment.

DECISION

Based on the forgoing findings and conclusions, the grievance is hereby denied.

June 16, 2008  
Date

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John J. Flagler, Arbitrator