

**IN RE ARBITRATION BETWEEN:**

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**BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS,  
AFL, CIO, LOCAL LODGE #647**

**and**

**DCI, Inc.**

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**DECISION AND AWARD OF ARBITRATOR**

**FMCS CASE # 080324-54681-3**

**JEFFREY W. JACOBS**

**ARBITRATOR**

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**September 27, 2008**

IN RE ARBITRATION BETWEEN:

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Boilermakers Lodge #647

and

DECISION AND AWARD OF ARBITRATOR  
FMCS CASE # 080324-54681-3  
Kenneth Wozniak grievance matter

DCI, Inc

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**APPEARANCES:**

**FOR THE UNION:**

Angela Rouillard, Attorney for the Union  
Glenn Weismann, Asst. Business Mgr.  
Kenneth Wozniak, grievant  
Paul Pendergast, former Union Bus. Mgr.

**FOR THE EMPLOYER:**

Alec Beck, Attorney for the Employer  
Allison Waggoner, HR & Communications Mgr.

**PRELIMINARY STATEMENT**

The hearing in the matter was held on August 5, 2008 at 9:00 p.m. at the Holiday Inn in St. Cloud, MN. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on August 29, 2008 at which point the record was closed.

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement dated May 1, 2007 through April 30, 2010. The grievance procedure is contained at Article 7. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. The parties agreed there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

**ISSUE**

Whether there was just cause for the suspensions and discharge of the grievant? If not, what shall the remedy be?

## COMPANY'S POSITION

The Company took the position that the termination was justified and that the Company's interpretation of the attendance policy at Appendix H of the labor agreement was correct on these facts.

In support of this position the Company made the following contentions:

1. The Company argued that despite the fact that the grievant was terminated this case is not so much about just cause but is rather a contract interpretation case. The Company pointed to the provisions of the No Fault attendance policy found at Appendix H of the labor agreement as support for the termination action taken in this matter.

2. That policy provides in relevant part as follows:

### APPENDIX H

#### DCI ATTENDANCE PLAN

A. Employees will receive 1 point for each hour or any part of an [sic] hour missed during a scheduled work period, maximum of 8 points – day shift and 10 points – night shift will be assigned. Which includes voluntary overtime once accepted.

B. In addition to the points received for hours away from work, employees shall be limited to the following:

1. 3 tardies during any 3 month period; and/or,
2. 3 leaving early during any 3 month period.
3. Each violation of tardy/leave early will constitute a warning under the warning system described.

C. Warning levels

1. 21 points = 1<sup>st</sup> written warning – 1 day unpaid suspension  
41 points = 2<sup>nd</sup> written warning – 3 day suspension  
61 points = subject to discharge
2. In the event that an employee reaches a level 1 warning they will receive a 1 day suspension. For the quarter that a 1<sup>st</sup> level is earned the employee's gainshare amount will be forfeited by 50%.
3. In the event that an employee reaches a level 2 warning they will receive a 3 day suspension. For the quarter that a 2<sup>nd</sup> level is earned the employee's gainshare amount will be forfeited by 100%.

D. Miscellaneous conditions

1. Occurrence (points) will be accumulated and dropped during any moving (12) month period.

2. Once an employee has reached a warning level any and all points related to that warning level will remain in effect for 1 year after the warning was received.

3. Employees who have perfect attendance for 30 calendar days from the last occurrence will receive credit for one (1) points [sic] to reduce total points by one (1), not to go negative or below any given credit level. Gainshare reduction will only apply for the quarter in which the warning level was earned.

3. The Company asserted that the main issue in this case is the interpretation of Sections D 1 & 2 above. The Company contends that once a 2<sup>nd</sup> warning level is reached that part of the policy that requires that “any and all points related to that warning level will remain in effect for 1 year after the warning was received” means that *all* of the points, including the points earned for the 1<sup>st</sup> warning, carry through and that none of the points earned are dropped until one year has passed from the date of the 2<sup>nd</sup> warning.

4. Applying that notion to the instant case results in the grievant’s termination. Here the grievant had very spotty attendance and was given a 1<sup>st</sup> warning on August 22, 2006. He had earned 25 points as of that time and under the policy was given a 1<sup>st</sup> warning and a 2 day suspension. That was not grieved by the Union at that time.

5. The grievant accumulated more points due to poor attendance and/or leaving early and on March 29, 2007 he was given a 2<sup>nd</sup> warning under the policy and a 5 day suspension. This also was not grieved.

6. The grievant’s attendance continued to falter and on March 12, 2008 he was terminated under the policy when he accumulated more than 61 points under the system. The Company argued that the underlying accumulation of points is not in issue here – the grievant accumulated 61 points over time. The sole question is whether the points that gave rise to the August 2006 1<sup>st</sup> warning and suspension carried through beyond August of 2007 or whether they dropped off pursuant to the terms of the Policy set forth above. The Company argued that the policy is clear and requires that “any and all points related to *that* warning level,” (emphasis added), must also include the points that gave rise to the 1<sup>st</sup> warning too.

7. The Company reasoned that one cannot have a 2<sup>nd</sup> warning without also having accumulated a 1<sup>st</sup> warning so the clear implication is that all the points carry through. Here, that means that the August 2006 points did not simply drop off in August 2007 but rather carried through to the March 2007 warning and would not have dropped off until one year after March 2007.

8. Further, the grievant did not go one year between warning levels and the undisputed facts show that he fell short of going one year by 8 days. Under the policy termination is appropriate.

9. The Company further asserted that while the policy is cumbersome to administer, it is what the parties negotiated and that clause D2 was inserted into the labor agreement during the 2004 negotiations for 2004-2007 contract by the Company to make it clear that points cannot fall off until one year had passed from the last warning.

10. Ms. Waggoner testified that attendance is a huge issue and an ongoing problem that both parties have tried to address. Section D2 was placed in the contract to clarify that everyone started with a clean slate unless there were warnings in place. In placing that language in the contract it became clear that all the points carry through, not just those related to the last warning, and that points accumulated for a 1<sup>st</sup> warning do not drop off if there is a subsequent warning given. If the Union is correct and the points fall off after a year, the Employer argued, a person whose attendance was as bad as the grievant's would not be held accountable.

11. The essence of the Company's argument is that the grievant clearly accumulated enough points, 61, to warrant discharge and that the points he accumulated in August of 2006 did not simply fall away under the terms of the policy.

The Company seeks an award denying the grievance in its entirety reinstating the grievant with full back pay and accrued benefits and requiring the Company to amend its record to reflect that the grievant has a 1<sup>st</sup> level warning on his record.

## **UNION'S POSITION:**

The Union took the position that there was not just cause for the discipline in this case. In support of this the Union made the following contentions:

1. The Union's position with respect to the interpretation of the disputed language of the attendance policy is just the opposite of the Company's. The Union argued that the language is clear and unambiguous and that when it says "any and all points related to that warning level will remain in effect for 1 year after the warning was received" it means that the points related to *that warning*, i.e. only those points necessary to escalate to the actual warning itself. That means here that the August 2006 points should have come off the grievant's record as of August 2007. When he accumulated more points in March of 2008 those August 2006 points should not have been included and he should only have been given a 2<sup>nd</sup> warning under the policy.

2. The Union acknowledged that the grievant was given a 1<sup>st</sup> warning in August 2006 for accumulating more than 21 points. The grievant served a 2-day suspension at that time and that discipline was not grieved.

3. The Union further acknowledged that the grievant was given a 2<sup>nd</sup> warning in March of 2007 for accumulating 41 points or more and served a 5 day suspension at that time. That also was not grieved. The Union argued that as of March 2007 when the 2<sup>nd</sup> warning was given, the August 2006 points would not have come off pursuant to the policy so there was no reason to believe at that point that the Company was in violation of the agreement as of that time.

4. The Union argued that if the Company's interpretation is allowed to prevail it would run squarely contrary to the provisions of Section D1 of the attendance policy that reads "Occurrence (points) will be accumulated and dropped during any moving (12) month period."

5. The Union acknowledged that there are circumstances where points may actually stay on longer than one year even under its reading of the policy but that the Company's interpretation essentially reads Section D1 out of the agreement by requiring that all points included on both a 1<sup>st</sup> and a 2<sup>nd</sup> warning stay on far longer. The Union argued most strenuously that the Company's reading of the language is contrary to the clear intent of those provisions that points should drop off after a year.

6. The Union argued that the Company placed this language in the contract but never explained that it would be interpreted or applied in the way it now asserts. The Union pointed to several time honored contract interpretative principles and asserted that disputed contract language is generally interpreted against the drafter. Here that was the Company.

7. Further, there was no discussion of what that language meant during the negotiations for the current agreement and no reason to believe that the Company would ever apply it this way. The parties believed when it was placed in the agreement in 2004 that it was there for a very different purpose. The Union further argued that there is nothing in the policy preventing a person from being given multiple 1<sup>st</sup> or even 2<sup>nd</sup> warnings under appropriate circumstances

8. Further, this is the first time under this policy that anyone has been terminated so there is no "precedent" or "past practice" upon which the Company can rely. While the warnings and suspensions given to the grievant in August 2006 and March 2007 may have been appropriate under the terms of the 2004-2007 contract, the August 2006 points should have dropped off and not been included in the accumulated points under the policy to reach the 61 point level necessary to discharge under the Policy.

9. Thus, the essence of the Union's argument is that the language requires that the points for any given warning drop off after one year following that warning, just as the language says, and that here the grievant's record should have reflected that the points related to his 1<sup>st</sup> warning in August 2006 dropped off his record as of August 2007.

The Union requests that the grievant be reinstated with full back pay and accrued benefits.

## MEMORANDUM AND DISCUSSION

As noted, there were no disputes about the underlying facts of the case. The grievant is a welder for the Company. His job performance is not at issue in this matter, rather it is his attendance. The record shows that he has had issue with attendance for several years and was given a 1<sup>st</sup> warning under the terms of the policy in effect pursuant to the 2004-2007 labor agreement on August 22, 2006. The evidence showed that he had accumulated 25 points as of that time. He was given a 2-day suspension. See Joint exhibit 5. This was not grieved.

The grievant accumulated enough points due to leaving early and tardiness to warrant a 2<sup>nd</sup> warning as of March 12, 2007. He was given a 2<sup>nd</sup> warning and a 5 day suspension at that time. See Joint exhibit 6. This too was not grieved.

When the current labor agreement was negotiated, the point levels set forth in the attendance policy were altered from the previous contract. Under the 2004-2007 contract an employee needed 25 points for a 1<sup>st</sup> warning and 2-day suspension; 50 points for a 2<sup>nd</sup> warning and 5-day suspension and 75 points for termination. Those were adjusted down to the current levels of 21, 41 and 61 noted above. Everyone's levels were adjusted down by negotiated agreement such that the grievant's point levels for the March 2007 2<sup>nd</sup> warning were adjusted from 50 to 41 points. He thus in effect "had" 41 points as of the effective date of the new contract

It was clear that the policy is somewhat cumbersome to administer and enforce. However, the technical difficulty in applying the policy was not the cause of this dispute. There was no evidence that the number of points was miscalculated or that there was some inaccuracy in the records. The evidence supported the Company's claim that the grievant missed work as alleged. This dispute is about how those points should be calculated and whether the points from the 1<sup>st</sup> warning given in August 2006 should have dropped off the grievant's record in August 2007. The difference is that if they do the grievant's points would be far lower than the number required to terminate him as of March 2008. If those point did not drop off as of August 2007, the discharge must be sustained.

It should be noted that under the terms of the Attendance policy in effect under the labor agreement in effect from May 1, 2004 through April 30, 2007, the consequences for a 1<sup>st</sup> and 2<sup>nd</sup> warning were the 2 and 5-day suspensions meted out and served by the grievant. These were apparently changed during the negotiations for the current labor agreement and now provide for a 1 and 3 day suspension respectively.

The evidence showed that Section D2 of the Policy was inserted in the negotiations for the 2004-2007 agreement. Section D1 was in the prior contract in substantially the same form as it is now. See Joint exhibit 3 and 4.

This case is about the interpretation of the Attendance Policy as applied to this grievant's attendance record. The essential issue is whether the points accumulated and which were the subject of the 1<sup>st</sup> warning and suspension meted out in August 2006 should have dropped off the grievant's record as of August 2007 or not. This calls for a somewhat straight contract interpretation analysis in the face of both sides' arguments that the language is clear and unambiguous and supports their view of its interpretation and application.

The dispute is over the term "any and all points related to that warning" as found in Section D2 of the Policy. The Company argues that this can only mean that it includes any and all points related to the 2<sup>nd</sup> level, which would by definition include those accumulated for the 1<sup>st</sup> warning too. The Company reasoned that since one cannot have a 2<sup>nd</sup> warning without also accumulating enough points for a 1<sup>st</sup> warning, the term "any and all" must also include the points accumulated to earn a 1<sup>st</sup> warning. Accordingly, so the argument goes, those points carry through and "remain in effect for 1 year after the warning (i.e. the second warning) was received." The Company also argued that D2 was inserted after D1 and must therefore mean something. Here the Company asserted that it was inserted to clarify that all points stay on until after one year has passed from the last warning in order to wipe the slate clean. Otherwise it would not mean anything and could allow employees to continue to exhibit very poor attendance and simply continue to get warning after warning without any more dire consequences.

The Union asserted just the opposite and pointed to the provisions of D1, which require that the points are to be dropped during any moving 12 month period. The Union further asserted that the meaning of Section D2 was to clarify that the points pertaining to any particular warning would drop off after one year and that the points from a warning level before it would not carry through.

The bargaining history showed that section D2 was indeed inserted in the 2004-2007 contract at the Company's behest. The notation on Employer Exhibit 1, the bargaining notes from the 2004 negotiations in reference to the insertion of the language that eventually became Section D2 says only that "everyone starts with a clean slate unless there are warnings." The language was carried through to the 2007-2010 contract but there was apparently no further discussion about what it meant at that time.

This dispute presents an almost classic case of a good faith misunderstanding as to the terms of a contract clause and one in which both sides have put forth rational and reasonable interpretations as to its meaning. It is also one in which there is little if any extrinsic evidence available to aid in the decision. This is the first time anyone has been fired pursuant to this policy so this exact issue has not arisen before either in negotiations or in a disciplinary setting. Moreover, the parties differed greatly as to why Section D2 was placed in the contract and as to what was discussed about its purpose during bargaining. The parties did not discuss this scenario or what exactly was meant by the clause "any and all points related to that warning." They never discussed what "that warning" was or whether "any and all points" meant only the points necessary to go from a 1<sup>st</sup> warning to a 2<sup>nd</sup> warning or whether that meant all of the accumulated points, including those necessary to get to a 1<sup>st</sup> warning. There was no evidence of prior grievance settlements or practices that can aid in the determination here.

Elkouri references several interpretation principles that are at work here and which do provide some guidance in determining the intent of the parties. First, there is the notion that the contract must be read as a whole. See Elkouri and Elkouri, *How arbitration Works*, 6<sup>th</sup> Ed at page 462.

One must read the entire agreement to make certain how this clause fits into the mix. The Attendance Policy repeatedly recites that points accumulated are to be dropped after one year. See, Sections D1 & D2. There is thus a very strong implication, expressed by this language that points once accumulated are to be dropped after 12 months. This tends to support the Union's argument that the August 2006 points should have been dropped as of August 2007. However, this concept alone does not negate the Company's argument that only after a full year after the 2<sup>nd</sup> warning would the points from the 1<sup>st</sup> warning be dropped off an employee's record.

There is also the notion that words used must be given some effect. An interpretation that give effect to another clause is generally favored over one that renders the other provisions meaningless or ineffective. See Elkouri, 6<sup>th</sup> Ed at 463. Here the Company's argument that since Section D2 was inserted after Section D1, it must mean something other than the points simply drop off after a year for any one warning. The Company argues that what it must mean is that "any and all points" must mean all points necessary to even get to a 2<sup>nd</sup> warning. This however does not entirely negate the Union's claim that the terms "a warning" and "that warning" means that only those points necessary to proceed from a 1<sup>st</sup> to a 2<sup>nd</sup> warning stay on for a year after "that warning," i.e. the 2<sup>nd</sup> warning.

Having said that, it is clear that under some circumstances, as here, the language of D1 and D2 create a potential conflict and even diametrically opposed results. Section D1 provides that points drop off after a moving 12-month period. That clause supports the Union's view that the August 2006 points should have dropped off in August 2007 even though there was another warning in March of 2007.

Section D2 seems to imply that the points only drop off if there are no further warnings given, and that if there are, any and all points related to a 2<sup>nd</sup> warning, for example, stay on the employee's record for one year after the 2<sup>nd</sup> warning in order to provide an incentive for that employee to comply with the attendance requirements.

The Union provided a cogent explanation however for the apparent conflict by noting that Section D1 refers to “points” while Section D2 refers to “warning levels.” Section D1 refers to what happens to points and requires that they be dropped after one year. The language requires that any points accumulated drop off after a year. Section D2, which was added later to clarify what happens to the points if there is a warning level reached, provides that if there is a warning level any and all points related to that warning level stay on for one year. This is a sensible and reasonable reading of the language but still does not address the ultimate question here as to whether “any and all points related to that warning” means those points necessary to get from one warning level to the other or all the points the employee has accumulated in order to qualify for a 2<sup>nd</sup> warning, including the points accumulated in order to reach the first level. Clearly, as was shown here, if it is the latter, the points accumulated for the 1<sup>st</sup> level could stay on an employee’s record far longer than one year.

Perhaps the one contract interpretation principle and factor that finally sways the scales definitively one way or the other on these facts is what Elkouri refers to as the “contra proferentem” (against the proponent) principle. This rule of contract interpretation states that “if language supplied by one party is reasonably susceptible to two interpretations ... the one less favorable to the party that supplied the language is preferred ... Because the rule is not dependent on the meaning attached by the parties, it is applied when the intention of the parties cannot be ascertained by use of the primary principles of interpretation, and therefore should not be applied if there is no discovered ambiguity.” Elkouri, 6<sup>th</sup> Ed at 477-478. While this principle is generally used as a last resort, it has some application here.

There is a latent ambiguity in the language that is not easily rectified through use of other contract interpretation principles, bargaining history or extrinsic evidence. There was also apparently little discussion of this situation in bargaining and the evidence suggests that the parties simply did not deal with this scenario. On these facts this principle has considerable appeal.

Neither interpretation of this language leads to an absurd or nonsensical result here. The Company claims that requiring that points drop off from a 1<sup>st</sup> warning could result in a situation where employees abuse the policy by waiting until a year after the 1<sup>st</sup> warning to begin showing up late etc. since they would know that the points would drop off. They could under those circumstances continue to get warning after warning and it would be very difficult to terminate them. Still though the policy would allow discharge if the employee's attendance is bad enough that he/she accumulates 61 points within on year. That frankly appears to be what the policy is aimed at given the repeated references to points dropping off after one year.

There are certainly scenarios where that could happen even if the one-year limitation were enforced to drop off the points from the 1<sup>st</sup> warning. As Mr. Pendergast explained, if points began accumulating on January 1<sup>st</sup> and the employee reached 21 points on December 1<sup>st</sup> of that year, those points would stay on until June 31st of the following year. It is certainly conceivable that the employee could accumulate enough points in that year to warrant further discipline or even discharge. Interpreting the language in light of its intended purpose, i.e. to curb excessive absenteeism, the reading urged by the Union would still accomplish that purpose under a scenario like that.

The arbitrator was mindful of the difficulties this determination may create in trying to administer this policy, as it was clear that this policy is difficult enough to administer as it is. This decision must be based on the parties' language, several well-worn contract interpretation principles and the facts presented. It was apparent that this scenario was not one that the parties had ever discussed and was likely unanticipated when they negotiated the language. No one ever considered what would happen under these precise circumstances. Trying to divine what the parties "meant" under those circumstances where both interpretations are valid, reasonable and work toward the stated purpose of the language, albeit in slightly different ways, is daunting at best. Here though based on the foregoing the Union's interpretation seems most justifiable. Obviously, the parties themselves can negotiate something different if the policy becomes too cumbersome to apply easily.

Here though, since the grievant did not have 61 accumulated points as of March 20, 2008 due to the drop-off of the August 2006 points, there was insufficient cause under the policy to terminate his employment. Accordingly, the grievant must be reinstated with full back pay, subject to mitigation for any unemployment compensation benefits or other government benefits paid or salary earned in the interim, and accrued contractual benefits. The Union also requests that the grievant's record be amended to reflect a 1<sup>st</sup> level warning on his record. The evidence supports this request based on the facts presented. Had the August 2006 points dropped off in August 2007, the warning level would be below that required for a 2<sup>nd</sup> level warning as of March 2008.

### **AWARD**

The Grievance is SUSTAINED as set forth above. The grievant is to be reinstated within 5 business days of this award, with full back pay, subject to mitigation for any unemployment compensation benefits or other government benefits paid or salary earned in the interim, and accrued contractual benefits. Further, the Company is ordered to amend its records to reflect the grievant has a 1<sup>st</sup> level warning on his record.

Dated: September 27, 2008

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Jeffrey W. Jacobs, arbitrator

DCI and Boilermakers award