



## FACTS

The Employer publishes a daily newspaper with a large circulation, serving Minneapolis, Minnesota, and the nearby metropolitan area. The Union is the collective bargaining representative of most of the non-supervisory employees of the Employer who work in the Employer's Mailroom. The Mailroom is a large area where printed pages are assembled into newspapers, which are then bundled and otherwise prepared for delivery. The Mailroom is in the Employer's Heritage Center, a large building where the presses operate.

The labor agreement that establishes the terms and conditions of employment for these Mailroom employees was executed by the Employer and the Minneapolis-St. Paul Mailers Union, Local 4 of the Teamsters Union. The agreement has a duration from June 1, 1998, through June 30, 2009. In 2007, the Union, Teamsters Local 120, merged with Local 4 and thereby became the collective bargaining representative of these employees.

The grievant's most recent period of employment by the Employer began on October 22, 2003. He was previously employed by the Employer from time to time for periods unspecified in the evidence, once starting in 1983 and once starting in 1996. For the period of employment that began in 2003 and ended with the discharge now at issue, the grievant was classified as an "irregular trainee" -- an employee with non-journeyperson status. His primary duties were to work as a Machinist, maintaining and repairing the heavy machinery used in the Mailroom.

On April 17, 2007, the grievant suffered a knee injury while working. Thereafter, he was unable to work because of the

injury, and he made a claim for worker's compensation. After a surgical reconstruction of his knee on May 25, 2007, his doctors prescribed a course of physical therapy. On September 13, 2007, the grievant returned to work in the Mailroom on a light duty assignment with a work shift from 7:00 a.m. to 2:30 p.m., Monday through Friday.

The Employer follows a policy of permitting those on light duty to attend medical and physical therapy appointments during the work day with pay, provided that the needed appointments cannot be scheduled during hours the employee is not working. If the employee attends such appointments during the work day, the Employer's policy requires that he or she return to work after the appointment.

The grievant attended physical therapy appointments between the time of his surgery on May 25 and his return to work on September 13. Upon his return to work, the grievant informed David Paciorek, Mailroom Safety Foreman, who monitored the work of those on light duty, that he had physical therapy appointments he would have to attend. The evidence shows that, from the time the grievant returned to work on September 13, he had fourteen physical therapy appointments scheduled on work day mornings and that he attended two of them and cancelled the others, thus:

<u>Date of Appointment</u>	<u>Attended or Cancelled</u>
September 13	Cancelled
September 18	Cancelled
September 19	Cancelled
September 20	Cancelled
September 21	Cancelled
September 24	Attended
September 26	Cancelled
September 28	Cancelled

<u>Date of Appointment</u>	<u>Attended or Cancelled</u>
October 1	Cancelled
October 3	Attended
October 5	Cancelled
October 8	Cancelled
October 10	Cancelled
October 12	Cancelled

The Employer presented evidence that all of these physical therapy appointments were scheduled during the grievant's work day, that he left work to attend them and did not return to work. Paciorek testified that in early October he became concerned about the grievant's frequent appointments and his failure to return to work. Paciorek asked Tonya Dunagan, the Employer's Worker's Compensation Administrator, to investigate. The investigation, part of which was conducted by a representative of the Employer's Worker's Compensation insurance carrier, determined that the grievant attended only two of the fourteen appointments, as shown above, that he left his light duty assignment to attend all of them, that the two he attended took about a half hour, that he did not return to work after leaving and that he was paid for a full seven-hour shift on each day he left to attend the fourteen appointments.

On October 12, 2007, Dunagan informed the grievant that his therapy appointments must be scheduled to begin after 2:00 p.m. On October 15, 2007, Paciorek reviewed procedures for attending medical appointments with all Mailroom employees then on light duty, about seven employees.

On October 31, 2007, the grievant and a Union representative met with representatives of the Employer, including Stephen J. Walstead, Human Resources and Labor Relations Manager, and Kristie E. Alberty, Director of Post-Press Operations. Walstead

testified as follows about his discussion with the grievant at that meeting. He asked the grievant where he was on the days that his appointments were cancelled, and the grievant said he had no recollection. Walstead then questioned the grievant about his whereabouts on each particular day, and the grievant then told Walstead that he did not leave the building, but was "on the floor." Walstead asked the grievant to explain where he was on each day, but the grievant gave no explanation. At the end of the meeting, Walstead told the grievant he was suspended, pending a decision about his status.

After the meeting, Walstead met with Paciorek and asked him if the grievant could have been in the building on the days when he cancelled his appointments, and Paciorek told him that, if the grievant said that he was in the building, he was lying. Walstead met with Alberty and members of upper management, and the decision was made to discharge the grievant. Walstead testified that he accepted Paciorek's account rather than the grievant's because he thought it was not plausible that, on all of the days that the grievant cancelled appointments, he stayed in the building and was not noticed.

On November 16, 2007, Alberty, sent the grievant a letter notifying him of his discharge, parts of which are set out below:

This letter is to inform you that your employment with Star Tribune has been terminated effective immediately, based on our investigation and conclusion that you have engaged in repeated violations of the Star Tribune Standards of Conduct and neglect of duty. . . .

We have now completed our investigation. Based on the investigation, we have concluded that you told Mr.

Paciorek on numerous occasions that you were leaving the work area to attend medical-related appointments, but that you did not in fact attend at least twelve of such appointments. Your absence from the work area was authorized by Mr. Paciorek only for the purpose of attending the medical-related sessions; absence for other reasons was unauthorized.

Further, you were paid for all hours during the period of September 13, 2007 through October 12, 2007, yet you were only on the worksite available for work a few hours each day throughout the entire period. You did not sign out early for your unauthorized absences; therefore your time records overstated the amount of time actually worked or on approved leave for appointments. Your statements that you never left the building are unsupported by our investigation, since you were clearly absent from your light duty assignment. Only after you were confronted by Ms. Dunagan regarding the timing of your therapy visits and only after Mr. Paciorek re-informed the light duty program employees of the procedures for attending medical related visits did your attendance meet expectations. We separately learned that you told the rehabilitation counselor that you missed appointments because your son died in an accident. During the October 31 meeting, Mr. Walstead asked about your son. You initially denied telling the rehab therapist your son had died, but later stated that you meant that a friend's son had died.

The fact that your practice of stating that you were going to an appointment, then not attending the appointment, continued day after day for approximately one month, and the fact that you denied that this practice occurred, is a gross neglect of duty and a gross violation of the Standards of Conduct expected of Star Tribune employees. Your conduct has violated the company's requirements that an employee regularly attend work and that absences must be authorized. Providing a false reason for an absence means that the absence is not authorized since it is based on false statements. This is a cause for termination. Also, you have accepted pay under the false pretense that you were attending authorized physical therapy when you were not. Finally, the repeated nature of these unauthorized absences and continued acceptance of pay for such unauthorized absences is of such a magnitude as to warrant immediate termination. Therefore, as a result of these serious violations of the Company Standards of Conduct and neglect of duty, your employment has been terminated effective immediately. . . .

Though, as I describe below, the arguments of the parties raise other issues, their primary dispute centers on issues of

fact -- whether, as the Employer argues, the grievant left the work site, falsely representing that he did so to attend medical appointments he did not attend, or, as the Union argues, he did not leave the work site on many of those occasions and remained available for work, or he left with permission because of pain.

#### DECISION

First. The parties disagree about the standard to be used in determining whether the Employer violated the labor agreement by discharging the grievant. The text of the agreement does not expressly provide that "just cause" is required for discharge. The Union argues, however, that the Employer should be held to that standard because it has accepted it in past administration of the agreement and has expressly stated such acceptance in its processing of at least one past grievance.

The Employer argues that the standard for discharge is expressly set out in Section 19A of the labor agreement, thus:

The foreman may discharge (1) for incompetency; (2) for neglect of duty; (3) for violation of office rules, which shall be conspicuously posted . . . A discharged employee shall have the right to challenge the fairness of any reason given for his discharge. . . .

The Employer argues that the grievant violated the following "Standards of Conduct," published in the Employee Handbook and the following Office Rules, posted in the Mailroom:

Standards of Conduct. . . . When an employee accepts employment with the Star Tribune, he/she also accepts certain responsibilities, as follows:

Regular Attendance is essential to good performance of an individual and the Star Tribune as a whole. Unauthorized absenteeism and tardiness can cause serious losses to

both employees and the Company and can place a heavy burden on co-workers. Consequently, the following are among the actions that may result in disciplinary action, up to and including immediate discharge:

- Tardiness and/or unauthorized absence;
- Leaving work early without supervisory approval;
- Unauthorized absences from the work area or route, etc.;
- Failure by an employee to notify his/her supervisor directly of an absence at least by the beginning of the scheduled workday.

[The Standards of Conduct also prohibit "dishonesty or falsification of Company records of any kind."]

Office Rules. [Any Mailroom employee] who commits any of the following offenses shall be subject to discipline including possible discharge:

3. . . . Without the consent or excuse of the foreman or supervisor:
  - (a) Failing to report for scheduled work.
  - (b) Being repeatedly tardy in reporting for work.
  - (c) Leaving work before the completion of the shift or work day.
  - (d) Leaving or remaining away from normal working area on other than Company business during working hours.
  - (e) Washing up before the regular shift has ended.
5. . . . willfully falsifying time cards or any Company reports. . .
7. Neglect of duty or insubordination. . . .

In argument, the Union presented a previous arbitration award in a proceeding between these parties. That award was issued by Arbitrator John J. Flagler on May 30, 2003 (Federal Mediation and Conciliation Service Case No. 03-04624) and was decided under the provisions of the same labor agreement that now binds the Union and the Employer. The Union argues that the Employer's written post-hearing brief in that discharge case assumed that "just cause" was the appropriate standard for deciding whether the grievant was properly discharged and that Arbitrator Flagler decided the case using that standard.

I rule that, though the labor agreement does not expressly state that "just cause" is the standard upon which a discharge must be based, the parties have accepted that standard in practice. Though Section 19A does not use the words, "just cause," it provides that a "discharged employee shall have the right to challenge the fairness of any reason given for his discharge." It may be that the Employer's past acceptance of the just-cause standard derives from an understanding that the requirement of Section 19A -- that "any reason" for discharge must be based on "fairness" -- is the substantial equivalent of the just-cause standard, i.e., that any cause for discharge must be just.

Second. As I have noted above, the primary dispute in this case requires resolution of issues of fact. The Employer alleges 1) that the grievant, while on a light duty assignment, left the work site on numerous occasions during the work day, representing that he did so for the purpose of attending medical appointments, 2) that he did not attend those appointments, 3) that, nevertheless, he accepted pay for the hours he was absent from the work site, and 4) that his conduct was a false taking of pay in violation of the Employer's Standards of Conduct and Office Rules, justifying his discharge.

The Union's primary defense to these allegation is based on the grievant's testimony that he did not attend the medical appointments because he cancelled them, but remained at the work site available for work. In addition, the grievant testified that on some of the occasions when he left the work site, he did so with permission because of pain he was experiencing.

The following is a summary of the evidence on the issues of fact thus raised. Most of that evidence comes from the testimony of Paciorek and the grievant.

Paciorek testified as follows. He is a member of the Union's bargaining unit. He has known the grievant for several years and has had a good relationship with him. His normal workshift is from 7:00 a.m. through 2:30 p.m., Tuesday through Saturday. His duties as Dayshift Mailroom Safety Foreman include inspecting the work site to maintain a safe work environment and monitoring those on light duty to keep their work assignments within medical restrictions. Those on light duty report to him for work assignments. When an employee is first assigned to light duty, he meets with the employee and gives him or her a printed list of "light duty responsibilities":

1. Check the Mailroom floor for anything that needs to be put away or can be discarded.
2. Check the make up lines to make sure there are one small gray cart for recycling and one small yellow container for waste between each make up line.
3. Check to make sure there is one small yellow waste container between the Ferags on the "Drum" and one large yellow waste container on the other end of the Ferag.
4. Check the electrical panel barricades on the west wall to make sure that nothing has fallen into or been put in between the electric panels and the barricade.
5. See if the dock foreman needs any help flagging skids or stamping skid flags.
6. Go through the Idab comic carts and save the good comics.
7. Help do returns if the Ferags are running.
8. Keep the copy machine room clean.
9. See if the chairman needs any help.
10. When requested they also can do various jobs for the Medical and other departments.

Paciorek testified that, at that first meeting with an employee assigned to light duty, he also goes over requirements

for attending medical appointments. He tells the employee that medical appointments should be scheduled for off-duty hours, but that, if an appointment has to be scheduled during the work day, the employee is required to check out with Paciorek, to return to work after the appointment and to check in with him. The employee is paid for the time away from work.

Paciorek testified that he met with the grievant when he began his light duty assignment on September 13 and instructed him in these light duty requirements. In addition, he testified that he met with the grievant each morning just after the start of the shift on the days that they were both working, Tuesday through Friday. These meetings were part of a routine meeting with the day shift employees who were on light duty -- about seven of them. According to Paciorek, the grievant told him that he had to leave work each day between about 9:00 a.m. and 10:30 a.m. to attend appointments -- usually medical appointments, though he said two were with his worker's compensation attorney. Paciorek testified that at the designated time the grievant came to him and said he was leaving. He testified that the grievant did not return from these appointments and check in with him. He also testified that employees are required to punch in on a time clock at the start of the shift, but are not required to punch the clock at the end of the shift or when they leave for and return from medical appointments.

As noted above, in early October, Paciorek, concerned about the frequency of the grievant's appointments and his failure to return to work, asked Dunagan to investigate.

Soon after he called Dunagan, the grievant stopped telling him he had appointments that would require him to leave work.

Paciorek testified that, during the period from September 13 through early October, the grievant left every day when they were both working, Tuesday through Friday, that he checked out with him before leaving and that he did not return. Paciorek denied the grievant's representation, described below, that he remained at work on most of the days he cancelled appointments. Paciorek testified that, if the grievant had remained in the building, he would have seen him.

On cross-examination, Paciorek conceded that he has duties to perform other than monitoring those on light duty. He usually does his safety checks in the morning, and he sometimes has fill-in duties in payroll and on the dock. He testified that he routinely discarded notes he took showing the times light duty employees checked out and in for appointments, but he testified that he did not keep such a record relating to the grievant. On re-direct examination, Paciorek testified that none of his other duties prevents him from monitoring those on light duty.

The grievant testified as follows. He has not been disciplined before. He injured his knee in 1983 and then injured the same knee on April 17, 2007. When he first made a worker's compensation claim after the injury of April 17, the Employer's insurance carrier accepted the claim, but eventually discontinued benefits on the ground that the grievant's disability was at least partly the result of the 1983 pre-existing

injury. With the aid of an attorney, the grievant contested the discontinuance of benefits through several stages of adjudication and appeal. After his surgery, he received physical therapy with regular appointments scheduled in advance. He still had fourteen such appointments scheduled when he returned to work on September 13. His attorney advised him that, if he did not prevail in his appeal of the discontinuance of worker's compensation benefits, the insurer would not pay for his therapy appointments and he would be required to pay for them. His therapist told him that he should not cancel all of the appointments in advance. His attorney told him that it was possible that he would receive notice at any time that he had prevailed in his appeal, thus reinstating his benefits. For that reason, on the advice of his attorney, he cancelled the appointments one at a time, immediately before each was set.

The grievant testified that he kept two appointments with physicians, but cancelled another after his benefits were discontinued. He also testified that he kept two appointments with his attorney after September 13. He testified that he was in constant pain, that sometimes the pain was so great that he asked Paciorek if he could leave work and that Paciorek told him he could leave. The grievant denied that Paciorek told him he was required to return to work after his appointments until Paciorek did so a few days before October 31, 2007.

The grievant testified that he kept all of the appointments that were paid for by the insurance carrier and that, when he cancelled other appointments, he stayed at work. He testified

that there was not always enough light duty work available to stay busy and that, when there was not, he would sometimes go to the "pump house" -- the name given to a room on the third floor of the building where employees can exercise. In addition, the grievant testified that sometimes, when there was no light duty work to do, he sat in the building's lobby and that Paciorek knew that. He testified that the building has a paging system, but that pages cannot be heard in parts of the building. He did not hear his name being paged at any time after his September 13 return to light duty work.

On cross-examination, the grievant conceded that, when Walstead questioned him on October 31 about his absences, he did not tell Walstead that he sometimes left the building with Paciorek's permission because of pain. On re-direct examination, the grievant testified that there were three such occasions when he left with Paciorek's permission because of pain and that none of them occurred on the days of his therapy appointments. He explained that he did not mention to Walstead the times he left because of pain because Walstead questioned him for particular details only with respect to the days he had therapy appointments.

Eugene Mickens, a Mailer-Machinist, testified that he was on day shift light duty during September of 2007. He gave the following description of the way Paciorek monitors those on light duty. When he first reported for light duty, he met with Paciorek and gave him medical documents that described his restrictions. Mickens denied that Paciorek held a morning

meeting every day with those on light duty. He also testified that when he went to his therapy appointments, he did not return to work and that Paciorek did not require him to do so until mid-October when, at Dunagan's suggestion, Paciorek told the light duty employees they must return.

On rebuttal, Paciorek denied that the grievant had asked for permission to leave because of pain.

I resolve the conflicts in the evidence as follows. I accept the essential parts of Paciorek's account as credible -- 1) that, between September 13 and early October, the grievant told him early in the shift on the days of the week both were working, Tuesday through Friday, that he had medical or legal appointments he had to attend during the morning, 2) that on each of those days at the time the grievant had designated for the appointment, he came to Paciorek and said he was leaving for the appointment, 3) that the grievant left the building and did not return, and 4) that the grievant did not on any occasion during that period ask for and receive permission to leave because of pain. The records of the center where the grievant had scheduled his physical therapy show that he cancelled twelve of fourteen appointments that were scheduled between September 13 and October 12.

I do not credit the grievant's account for the following reasons. As Walstead testified, it is not plausible that on all of the occasions between September 13 and early October when the grievant cancelled his therapy appointments, he remained in the building, but was not noticed by Paciorek.

The Union points out that Paciorek's testimony about the grievant's daily departures for appointments is not supported by a written record. Paciorek testified that he did not keep notes about the grievant's departures though he does keep notes about such departures for some employees on light duty and discards them quickly. I agree that a written record would help in the decision about credibility.

Nevertheless, Paciorek's testimony -- the evidence that is available -- is credible and sufficient. The grievant's testimony that he remained in the building on the occasions when he cancelled his appointments is inconsistent with Paciorek's testimony that the grievant told him early in the shift about his appointments and then checked out with him before leaving. In order to accept the grievant's testimony that he remained in the building on the occasions of the cancelled appointments, I would have to reject Paciorek's testimony that the grievant notified him of the appointments each day and then checked out as he left the building to attend them. The evidence shows clearly that in early October Paciorek informed Dunagan of his concerns about the frequency of the grievant's appointments and his failure to return to work. This evidence of Paciorek's early concern, contemporaneous with the events, supports Paciorek's testimony. To credit the grievant that he stayed in the building on the days he cancelled his appointments, I would have to find that in early October Paciorek fabricated the basis for his report to Dunagan about his concerns, that he continued this fabrication during the subsequent investigation and during

his testimony at the hearing. Nothing in the evidence suggests a reason why Paciorek would have falsely reported to Dunagan about these concerns or why he would testify falsely about them.

I find, therefore, that, as alleged in the notice of discharge, the grievant left work on numerous occasions between September 13 and early October, 2007, after falsely reporting that he was leaving for appointments related to his treatment, thus causing the Employer to pay him for hours not worked that were not excused under the Employer's light duty policy.

Third. The Union argues that, despite this finding, the grievant, with no prior discipline, should not have been discharged and that under the principles of just cause, he was entitled to progressive discipline for a first incident of misconduct. The Employer argues that the misconduct of the grievant should be considered gross misconduct for which discharge is appropriate without requiring progressive discipline.

Progressive discipline provides employees with an opportunity to correct misconduct that is not seriously adverse to an employer's operations, but an employer should not be required to risk repetition of serious misconduct. An employer should not be required to use corrective lesser discipline when, as here, an employee knowingly and repeatedly misrepresents the hours for which he is entitled to be paid.

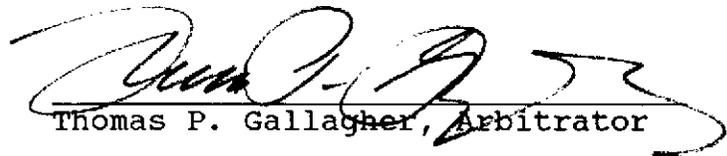
If the grievant had merely failed to return to work after actually attending his therapy appointments, the argument for progressive discipline would be more tenable. In such a case,

it might be argued that the grievant's behavior resulted from ignorance or confusion and not from an intention to obtain unentitled wages through misrepresentation. Here, however, there is no such mitigating circumstance. I conclude that the Employer had just cause to discharge the grievant.

AWARD

The grievance is denied.

January 28, 2009

  
Thomas P. Gallagher, Arbitrator