

discharging the grievant, Lon D. Holman. Post-hearing briefs were received by the arbitrator on January 27, 2009.

FACTS

The Employer operates a commercial printing business in Minneapolis, Minnesota. The Union is the collective bargaining representative of eighteen non-supervisory employees of the Employer -- those who work in three departments, the Bindery, Shipping and Fulfillment Departments.

The grievant was hired by the Employer in August of 2005, and he was discharged from his employment on September 3, 2008. At that time, he was classified as a J-1, and he worked in the Bindery Department. Throughout his employment, he sometimes worked each of the three shifts that were operated, but usually he worked the first shift, from 6:30 a.m. through 2:30 p.m., or the second shift, from 2:30 p.m. through 10:30 p.m.

Below is set out a notice, dated September 3, 2008, from Jeffrey A. Gray, the Employer's Vice President of Manufacturing, addressed to "Local 1-B" and "To Whom it may concern," in which Gray stated the reason for the grievant's discharge:

Lon Holman was terminated from his employment yesterday, September 2, 2008 for failure to notify the company in writing of his intent to miss an extended period of work. Page 25, Section 28 [of the parties' labor agreement] clearly states that the employee must request the time off in writing. Not only did this not happen but no [company officer] was ever notified of his intent to miss work. Imagine our surprise as we scheduled and accepted work from our clients only to find Lon would be out and the only people who knew were his fellow union peers. . . .

On September 4, 2008, Gray sent the following email to the Union:

Effective today, September 4, 2008, Lon Holman is no longer an Ambassador Press employee. His direct violation of the union contract, page 25, section 28, in failing to notify Ambassador Press in writing as to his time off has led to this decision. Please direct all inquiries and concerns to our attorney regarding this matter.

Section 28(a) of the parties' labor agreement is set out below:

- a. An employee desiring a leave of absence from the job, not in the excess of ninety (90) days must first make the request of the Employer in writing, stating the reason for the leave of absence, and the date of return. If granted by the Employer, approval of thereof must be in writing, in triplicate; one (1) copy will be given to the Union, one (1) copy of which will be given to the employee, and one (1) copy of which will be retained by the Employer. Seven (7) days prior to the date of their return set forth in the written leave, the employee shall notify the Employer in writing of their intention to return. Failure to comply with this provision shall result in loss of seniority standing. In case of emergency or other causes requiring special consideration, reasonable extension of the leave may be granted. However, the Employer and the Union must be notified and agree prior to the expiration of the leave if such extension is desired, with prior notice given as required in the first sentence.

On September 10, 2008, Howard D. Fisk, Vice President of the Union, sent Gray, by mail and by fax, a grievance alleging that the discharge of the grievant violated Section 27 of the parties' labor agreement. That provision is set out below:

An employee may be discharged for just cause provided written notice thereof is given immediately to the employee and a copy sent immediately to the Union. Disputes over discharge shall be subject to the grievance and arbitration provisions of Section 3, except that any notice of protest must be filed with the Employer within seven (7) calendar days after the date of the Union's receipt of the written notice as required in this section.

Gray testified as follows. He is the supervisor of the Bindery Department, where the grievant worked. From Thursday,

August 28, through Wednesday, September 3, Gray did not work because of vacation, weekend leave or holiday leave for Labor Day, Monday, September 1. When he returned to work at about 7:00 a.m. on the morning of Wednesday, September 3, he saw that the grievant was not punched in for the day. At that time, he thought that the grievant was supposed to be working the first shift, though he found out later that the grievant was scheduled to work the second shift during the holiday shortened week that began on Tuesday, September 2. Gray checked the messages on the call-in phone that the Employer uses to monitor last minute absences for illness or other cause and found that the grievant had not left a message. Gray checked the vacation schedule and found that the grievant was not scheduled for vacation.

At about 7:30 a.m., Gray asked Thomas J. Anderson, the lead worker in the Bindery, if the grievant had reported to him the reason he was not at work. Gray testified that, in response, Anderson told him that the grievant would be out for about two weeks for surgery and that Anderson was surprised that Gray did not know about the impending absence because Anderson had told the grievant to notify management about it.

Gray testified that the grievant did not notify him of the expected date of his surgery and subsequent absence -- though he also testified that in about mid-July of 2008, the grievant told him that at an unspecified time he would have to have surgery to repair a knee injury that occurred playing softball. Gray told the grievant "that's fine," but that he should be sure to give some notice when the surgery would occur.

At about 8:00 a.m., on September 3, Gray asked Harold D. Engle and his father, Edward Engle, the Executive Vice President and President of the Employer, if the grievant had informed either of them that he would be absent for his impending surgery, and both said that the grievant had not. Gray tried to telephone the grievant, using the telephone number on file in the Employer's records, but found that the number was no longer in service. Gray then telephoned Fisk and told him that the grievant was absent without having notified management in violation of Section 28(a) of the labor agreement. At about 11:30 a.m. on September 3, Fisk called Gray back and told him that the grievant was out for surgery and that the Union had been unaware that he would be out. Fisk also provided Gray with the grievant's new telephone number.

During the Employer's case-in-chief, Gray did not testify that he telephoned the grievant during the afternoon of September 3, using the new telephone number Fisk had provided to him that morning, but it became apparent after the grievant testified and played a voice-mail recording of the call that Gray did make such a call. As I interpret the evidence, this omission from Gray's first testimony was not intentional, but occurred because he had forgotten the sequence of events.

The grievant testified as follows. In 1985, he suffered an injury to his left knee while playing football. Since then, he has reinjured the same knee several times and has had surgery several times. In the spring of 2008, he reinjured the knee while playing softball. He described the knee after that injury

as being very painful. After consulting with his physician, he told Gray in June or July of 2008 that he was going to need time off for surgery. Gray told him to try to put off the surgery because operations were very busy.

The grievant was treated with cortisone shots in June, July and August, but the knee continued to cause him substantial pain. On August 26 or 27, his physician tentatively scheduled the surgery for September 3, at 7:00 a.m., subject to his passing a preoperative physical examination on August 28. On August 27, he told Anderson that he was tentatively scheduled to have the surgery on September 3, and he also told Thomas Linde, a Union Steward, and James Coy, the second shift Lead Worker. The grievant testified that he would have told Gray on August 27 about the surgery, but decided not to do so then because a heated argument arose among Coy, Harold Engle and Gray, and he thought that telling Gray then would "add fuel to the fire."

The grievant testified that he did not tell Gray about the impending surgery on the days following August 27, i.e., August 28 through September 2, because, as I have described above, Gray was not working. The grievant testified that he told Anderson that the surgery was definitely scheduled for September 3. As I describe below, Anderson testified that he told the grievant to inform management that the surgery would occur on September 3, but the grievant testified that Anderson did not tell him to inform anyone other than Gray.

The grievant underwent the surgery as scheduled, at 7:00 a.m. on September 3, and, after time to recover from the effect

of a general anesthetic, he went home at about 11:00 a.m., took pain medication and went to sleep. At 2:45 p.m., Gray called and left a voice-mail message for the grievant telling him that he must call Patty -- apparently an assistant to the Engles -- and send "paperwork or documentation of the knee surgery within twenty-four hours or be out of a job." The grievant testified that, after listening to the message, he called Gray back at about 3:00 p.m. and that Gray told him "it's out of my hands; it's now between the Union and management" and that Gray refused to discuss the matter further.

According to the grievant, he then called Fisk, and Fisk told him he must send the Employer medical documentation within twenty-four hours or he would be out of a job. At about 4:30 p.m. on September 3, Gray received by fax from the Union a claim form needed for the grievant to seek short-term disability insurance payments, and at about the same time Gray received a faxed document entitled, "Injury Support Form." The latter document, which was prepared by Twin Cities Orthopedics, the grievant's physicians, stated "No work from 9-3-08 to 9-17-08" and "Return to Clinic 9-17-08."

Harold D. Engle testified that he saw the grievant many times during the grievant's shift on September 2, but that the grievant failed to inform him that he would be off work for an extended period. Gray came to Engle on the morning of September 3 and told him that the grievant had not come to work and that no one had been given notice of his absence. Engle testified that he decided that the grievant had abandoned his job. He

denied that he had ever discussed with Gray the idea of providing the grievant a twenty-four hour grace period. Engle was not aware that the grievant was scheduled to work the second shift with a starting time of 2:30 p.m. rather than the first shift on September 3, and he was not aware that the grievant had previously notified Anderson of the September 3 surgery and recovery period. Engle testified that, even if he had known about that notice to Anderson, the grievant would still have been discharged because employees must inform Gray, him or his father.

Anderson, whose testimony was presented by the Employer, testified as follows. He is a lead worker and a member of the Union without authority to supervise employees or to grant them time off. He testified that, in 2007, employees were informed that, even if they notified him about impending absences, they still must inform Gray. According to Anderson, a written statement of that policy was given to employees with their paychecks in 2007, and it was posted on bulletin boards. No such written policy was presented in evidence. The grievant testified that he never received such a change of policy and that he understood that Anderson was the appropriate person to speak to about an impending absence. Anderson testified that the change of policy he was referring to related to the discharge of Theresa Helm. On cross-examination, he conceded that Helm was discharged in 2006 for repeated poor attendance as she accompanied her son as he made many court appearances.

The Union introduced a memorandum dated November 6, 2006, that changed the call-in policy. This memorandum directed

employees to ask Anderson if they had any questions about the call-in policy. The Union argues that Anderson's testimony confuses the change in the call-in policy with the one he described as relating to compliance with Section 28(a). Anderson conceded that Helm was discharged for poor attendance and not for failure to comply with Section 28(a).

Anderson testified that, about two weeks before the surgery, the grievant told him it would occur soon. He also testified 1) that, on Tuesday, September 2, 2008, the grievant told him, "I'm having surgery tomorrow," 2) that Anderson responded, "Make sure you let Jeff [Gray] know," 3) that the grievant came back to him later that day and told him that Gray was not in, and 4) that Anderson then told the grievant "be sure you let somebody from management know."

James W. Stegbauer, Secretary-Treasurer of the Union, testified as follows. He was employed by the Employer as a J-1 Cutter from 1994 till 2005, when he left to take a position with the Union. He has represented the Union in labor agreement bargaining. In 2000, after falling and breaking a bone, he was required to have surgery. He was off work for twenty-six weeks during his recovery. The Employer did not require him to comply with Section 28(a) of the labor agreement as a pre-requisite to taking that time off. Stegbauer testified that he knows of no employee who has been required to comply with Section 28(a) to take a medical leave, and, in his testimony, Fisk agreed.

Stegbauer testified that he interprets Section 28(a) as a provision that applies to requests for a general leave of

absence, and not to a need to take time off for a medical cause. Gray testified, however, that employees have been required to comply with Section 28(a) before a medical leave, though he did not identify any.

The Employer presented evidence describing the discipline imposed on the grievant during the twelve months preceding his discharge. On September 6, 2007, Gray issued an oral warning to the grievant for an incident described in a written notation as follows:

I was called in for a press problem and observed [the grievant] on his cell phone, while punched in, for about 1/2 hour. This is in violation of company work rules.

Gray testified that the Employer has a policy prohibiting employees from using cell phones during working hours; he also testified that when the grievant received this warning, he told Gray "it wouldn't happen again."

On March 10, 2008, Gray issued an oral warning to the grievant for poor performance, described as "sheet size varies from cutting. Remoist runs off edge of sheet." Gray testified that he talked to the grievant and all other employees engaged in cutting about this cutting problem.

On May 5, 2008, Gray issued an oral warning to the grievant for poor attendance. Gray's written notation of that action appears below:

To: File
From: Jeff Gray

[The grievant] has again asked [the Employer] if he could leave work today. His girlfriend had an emergency and he

needed to leave. I issued a verbal warning regarding attendance. [The grievant] has missed 4 days of work in 4 months. I explained to [him] that [the Employer] now has to call in other employees to do his job on overtime. I informed [the grievant] that if he misses any more time within the next 90 days he will receive a written warning followed by a suspension.

Although the grievant testified that he did not receive a copy of this notation, he did not deny Gray's testimony that Gray had given him the oral warning described in this note.

On July 2, 2008, Gray issued the following written warning to the grievant:

This is a written warning regarding your current attendance through June 30, 2008. As you and I have discussed, you have missed seven (7) days due to illness and you have been tardy five (5) times in this same twelve month time frame. Please see the attached twelve month attendance calendar that I included with this note. The five tardies do not include a few emergencies that arose due to family issues that you experienced. As I said when we spoke, [the Employer] would understand and forgive the missed/tardy times for that time period. However, seven days sick in twelve months is almost three times the company average.

Going forward from today, you must demonstrate an ability to be more reliable in your work attendance. [The Employer] cannot schedule and produce the necessary work to meet our clients needs if we are unsure if you will make it to work or not. Please address this issue as soon as possible or face future suspension and or termination due to poor attendance.

On July 30, 2008, Gray issued the following warning to the grievant:

This is a follow up to the meetings we had throughout the day. I am informing you that the confrontational behavior that occurred today between you and Rob Fink is totally unacceptable and will not be tolerated by [the Employer]. When this type of situation happens it creates a hostile work environment for the employees and as an employer we cannot allow this to happen. Any future confrontations with any employee will be just cause to either suspend you for three days or end your employment at [the Employer].

Gray issued a similar warning to Fink for his participation in the confrontation. The grievant testified that after this incident he and Fink got along well.

DECISION

The parties' primary arguments, which I describe more fully below, are the following. The Union argues that, irrespective of the leave of absence provisions in Section 28(a), the Employer must have just cause to discharge the grievant, as required by Section 27.

In response, the Employer makes two primary arguments. First, it argues that the grievant failed to comply with the requirements of Section 28(a) and that his failure to do so was the last incident in his negative attendance and discipline record, thus establishing just cause for his discharge. Second, the Employer argues that, by force of the language of Section 28(a) alone, the grievant's failure to comply with the requirements of Section 28(a) established the Employer's right to declare his "loss of seniority standing" -- the equivalent of a discharge for just cause.

Interpretation and Application of Section 28(a).

The parties disagree about the meaning of Section 28(a). The Union argues that it has never been used as the Employer would use it here -- to require that an employee who is disabled while recovering from surgery or other medical treatment is subject to loss of employment for failure to comply with its provisions.

The Union also argues that, even if Section 28(a) is construed to apply to medically required leaves, the grievant's several discussions with Gray and Anderson should be deemed substantial compliance with its requirements. The Union urges that those efforts -- the grievant's July discussions with Gray and Anderson when he was told to give notice when the surgery would occur and then his oral notice to Anderson of the particular date of the surgery when he found that out -- show a literal compliance with Section 28(a) and a good faith recognition of the Employer's interest in meeting its staffing needs. The Union argues that the reason the grievant did not also inform Gray of the particular date of the surgery was reasonable -- that he intended to do so between August 28 and September 2, but was unable to tell him because Gray was on vacation.

The Employer argues that Section 28(a) is worded broadly to apply when an employee wants a leave of absence of ninety days or less for any reason and that, therefore, the provision should be construed to apply even when the reason the leave is needed is to allow recovery from medical treatment.

The Employer argues that the grievant's general discussion with Gray in July was insufficient to meet the implied purpose of Section 28(a) -- to permit the Employer to meet its staffing needs on the particular days an employee would be on a leave of absence. The Employer also argues that the section requires the making of a written request, not mere oral notice, and that even if, arguendo, oral notice were deemed sufficient compliance with the notice provision, the only oral notice of

the particular date of the surgery was given to Anderson, who was not a management agent authorized to receive such notice.

The Employer also argues that, on September 2, when the grievant found that Gray was not available, he could have given notice of the surgery to Harold Engle, who was available during the grievant's shift that day and that the grievant should have done so after he notified Anderson and Anderson told him that he should also notify "management."

I make the following rulings. . . For ease of reference, I repeat the six sentences of Section 28(a) below, followed by my comments about its meaning:

- a. An employee desiring a leave of absence from the job, not in the excess of ninety (90) days must first make the request of the Employer in writing, stating the reason for the leave of absence, and the date of return. If granted by the Employer, approval of thereof must be in writing, in triplicate; one (1) copy will be given to the Union, one (1) copy of which will be given to the employee, and one (1) copy of which will be retained by the Employer. Seven (7) days prior to the date of their return set forth in the written leave, the employee shall notify the Employer in writing of their intention to return. Failure to comply with this provision shall result in loss of seniority standing. In case of emergency or other causes requiring special consideration, reasonable extension of the leave may be granted. However, the Employer and the Union must be notified and agree prior to the expiration of the leave if such extension is desired, with prior notice given as required in the first sentence.

The first two sentences relate to the process of initiating a leave of absence. As the parties note in their arguments, the kind of "leave of absence" is not specified. The first two sentences also refer to a written "request" for the leave and to the Employer's written "approval" of the leave, thus indicating that more than a unilateral notice of the

intention to take leave is required -- though I note that the last sentence of the section, in the phrase, "with prior notice given as required in the first sentence," describes the pre-leave process as one requiring only notice.

As I interpret the section, its third, fourth, fifth and sixth sentences relate to the employee's return from leave, including the fourth sentence of the section, which I have underlined. Though it can be argued that the term, "this provision," which appears in the fourth sentence, refers to the entirety of Section 28(a), it seems more likely that the writers of the section intended it to refer to the process of returning from leave, i.e., to the third, fifth and sixth sentences, which, taken together, show the importance of notification by the employee of any delay in the expected "date of return." So interpreted, the "loss of seniority" that would ensue from a failure to comply would occur only for non-compliance with the return-from-leave process. Though this interpretation is not clear, it is at least as plausible as the other possible interpretation -- that non-compliance with any part of the section will result in loss of seniority.

For the following reasons, I rule that, in the circumstances of this case, the challenge to the grievant's discharge should be measured by the just cause standard established in Section 27. First, as discussed just above, it is not clear that Section 28(a) establishes loss of seniority as the consequence of a failure to comply with the pre-leave process. Second, even if this ambiguity is set aside and it is assumed that Section 28(a) does establish loss of seniority as the

consequence of such a failure to comply with the pre-leave process, it is not clear that the grievant failed to comply with that process, except perhaps in an insignificant way -- that he did not make his request for leave in writing. The evidence shows 1) that in July the grievant told Gray that, at an unspecified time, he would need surgery and time off to recover, 2) that Gray said, "that's fine," thus responding to the notification as if it were a request, and 3) that Gray asked the grievant to delay the surgery and to be sure to give some notice when the surgery would occur, thus accepting oral communication in the leave-request process.

Third, it is not clear that Section 28(a) was intended to establish processes that apply to absences related to medical treatment. Gray's testimony contradicts that of Stegbauer, who testified that he knows of no instance of an employee being required to comply with Section 28(a) preceding an absence for medical treatment. As the Union notes, Stegbauer cited as a particular example his own medically related absence for twenty-six weeks without being required to comply with Section 28(a).

Thus, 1) because it is not clear that the grievant failed to comply with the pre-leave process described in Section 28(a), 2) because it is not clear from the language of the section that the parties intended it to result in loss of seniority for failure to comply with the pre-leave process, and 3) because it is not clear that the parties intended the section to apply to absences required for medical treatment, I apply Section 27

rather than Section 28(a) to determine the merits of the grievance.

Section 27 -- Just Cause.

In the following discussion, I give a fair summary of what is substantive* "just cause" as defined in American labor law. The essence of the employment bargain between an employer and an employee (or a union representing an employee) is that the employer agrees to provide the employee with pay and other benefits in exchange for the agreement of the employee to provide labor in furtherance of the employer's enterprise. When the employer and the employee (or a representing union) have also agreed that the employer may not terminate the employment bargain except for "just cause," they intend that discharge will not occur unless the employee fails to abide by his or her bargain to provide labor in a manner that furthers the employer's enterprise.

In previous cases, I have used the following two-part test of "just cause," which derives from that intention:

An employer has just cause to discharge an employee whose conduct -- either misconduct or a failure of work performance -- has a significant adverse effect upon the enterprise of the employer, if the employer cannot change the conduct complained of by a reasonable effort to train or correct with lesser discipline.

Under this two-part test, an employer must establish

1) that the conduct complained of has a serious adverse effect

* This discussion does not address issues of "due process," i.e., issues relating to the fairness of the procedure an employer may use in reaching the decision to discharge.

on the employer's operations and 2) that the employer has attempted to prevent repetition of the conduct by training and corrective discipline, thus seeking to eliminate any future adverse effect from the conduct before taking the final step of discharge.

The first part of this test requires a determination whether particular conduct is significantly adverse to the enterprise. Above, I have discussed and ruled on the Employer's arguments 1) that the grievant was required to comply with Section 28(a), 2) that he failed to do so, and 3) that his failure so to comply should result in his "loss of seniority" through the operation of Section 28(a) alone.

The Employer also argues that, irrespective of the operation of Section 28(a), the grievant's conduct in informing the Employer of his impending surgery and recovery period was inadequate and disruptive to the Employer's operations and that, that conduct, when considered with his previous record of discipline, establishes just cause for his discharge under Section 27.

I agree with the arguments made by the Union -- that the way in which the grievant informed the Employer of his impending surgery and recovery period was not misconduct. The grievant made a reasonable effort to inform Gray and Anderson. He informed them in July of his future need for the surgery, and he informed Anderson of the particular date of the surgery. In doing so, he believed he was providing the proper person with that information, as he had done in the past. When Anderson told him on September 2 to inform Gray, the grievant tried to do

so, but, because Gray was still on vacation, he could not do so. The evidence is conflicting with respect to what Anderson told the grievant when the grievant returned and informed Anderson that Gray was not in. Anderson testified that he told the grievant to inform others in management, but the grievant denied that Anderson had so instructed him. This evidence is not sufficiently conclusive to support the grievant's discharge.

I conclude that, because the grievant made a good faith effort to inform the Employer of his impending absence, in a manner that he reasonably thought to be sufficient, his conduct was not misconduct and that, accordingly, the Employer did not have just cause to discharge him.

Remedy.

The evidence shows that the grievant obtained other employment on September 22, 2008, the day after he was released by his physician to return to work. The evidence also shows that, if the grievant had not been discharged, he would have been laid off on November 14, 2008, when the Employer reduced its staff because of a decline in business. In the award below, I retain jurisdiction to determine any issues that may arise concerning back pay and, as the Union requests, possible bumping rights that may affect back pay.

AWARD

The grievance is sustained. The Employer shall reinstate the grievant to his employment without loss of seniority and with back pay -- offset by the amount the grievant earned or

should have earned from other employment." I retain jurisdiction to determine issues that may arise concerning the amount of back pay the grievant is entitled to recover, including any issues that relate to the layoff of November 14, 2008, and whatever bumping rights he may have had, assuming that he would have been laid off on that date.

May 15, 2009



Thomas P. Gallagher, Arbitrator