

IN RE ARBITRATION BETWEEN:

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 1145

and

HONEYWELL

DECISION AND AWARD OF ARBITRATOR

FMCS CASE # 09-57879-3

JEFFREY W. JACOBS

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December 31, 2009

IN RE ARBITRATION BETWEEN:

IBT #1145,

and

DECISION AND AWARD OF ARBITRATOR
FMCS CASE # 090619-57879-3
Randy Dyson grievance matter

Honeywell.

APPEARANCES:

FOR THE EMPLOYER:

Susan Hansen, Attorney for the Employer
Steve Kelly, Supervisor
Casey Chiles, Human Resources Department
Dave Hanson, HR Labor Relations Manager
Chuck Bengston, Labor Relations Mgr.
Terry Kent, Health Services Mgr.

FOR THE UNION:

Amanda Cefalu, Attorney for the Union
Milt Nordmeyer, Sec'y Treasurer #1145
Randy Dyson, grievant

PRELIMINARY STATEMENT

The hearing in the matter was held on November 20, 2009 at 9:00 a.m. at the Honeywell Offices in Coon Rapids, MN. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on December 18, 2009 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement effective January 31, 2007. The grievance procedure is contained at Article 18. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service.

ISSUES

The parties stipulated to the issues as follows: Was the grievant Randy Dyson discharged for just cause? If not what shall the remedy be?

EMPLOYER'S POSITION

The Employer took the position that there was just cause for the grievant' termination based on the number of hours of absences he had in the preceding 2 months prior to his discharge. In support of this position the Employer made the following contentions:

1. The Employer asserted that the grievant was terminated for accumulating more than 60 hours of unexcused absences pursuant to the No-Fault absentee policy in place. The Employer noted, as discussed more below, that the grievant and the Union acknowledged that the grievant did in fact accumulate more than the threshold number of hours to warrant termination under the Policy and have no real defenses to the discharge other than a plea for leniency.

2. The Employer noted that it runs a very lean operation and does not overstaff or have extra people around in case someone is gone. Absenteeism is expensive and disruptive to the workplace that causes more work for the co-workers who do come to work and could potentially cause interruption of production and the loss of customers. Accordingly, the Employer has a No-fault attendance policy in place, which is well known, well accepted and understood by the employees and the Union alike that allows for liberal exceptions but has very defined and strictly enforced consequences if people are absent. In fact the policy is specifically referenced in the management rights clause of the labor agreement and was the subject of negotiations for the current agreement.

3. The policy adopted February 1, 2006, provides in relevant part as follows:

Absenteeism is expensive, disruptive and places an undue burden on co-workers and the Company. An important measure of an individual's job is the ability to be regularly present and to arrive on time for all scheduled shifts including accepting overtime.

The policy is intended to encourage regular and timely attendance and to provide a process so that absenteeism problems are treated consistently, objectively and uniformly.

This Attendance Policy is a No Fault policy and supercedes all previous policies regarding time and attendance. ...

C. An employee's lost hours will be tallied on a rolling twelve (12) month period. The following consequences will normally apply based on cumulative hours lost in the immediately preceding 12-month period:

Cumulative hours lost	Company Response
32	Oral counseling
41	Written reprimand
48	Three (3) day unpaid suspension
56	Ten (10) day unpaid suspension
60	Discharge

4. The Employer argued that these consequences are well known and accepted by the Union and the affected employees. It has been consistently enforced over time and there has never been any exceptions or “leniency” given to those who violate its terms. The Employer argued that if one starts making exceptions for hard luck cases there will be no end to that, as virtually everybody would have some sort of “valid” excuse for missing work and the policy would become meaningless.

5. The Employer also pointed out that the parties specifically discussed this policy during negotiations for the current labor agreement and placed a provision regarding this very policy in the Management rights clause, Article 4 section 3 as follows: “Without prejudice to the Company’s managerial right to design and implement work rules, the Company shares its decision not to alter the terms of the 2006 A-2 attendance policy [the policy at issue in this matter] to be more restrictive during the term of this 2007-2010 Agreement.”

6. The Company pointed out that the Company wanted to make this policy even more restrictive than it currently is but agreed in concert with the Union not to do so. The flip side of that was that everyone at the bargaining table fully understood that violation of the terms of the Policy.

7. The Employer countered the Union's claim regarding the legitimacy of the Time and Attendance Policy itself by citing several prior awards between these two parties. In *Honeywell International v IBT 1145*, FMCS case # 0605-55832-7 (Flagler 2007) the arbitrator specifically rejected the very argument raised by the Union here and held that “any argument that the “no fault” nature of the Honeywell attendance policy is per se arbitrary lacks merit. Comparable no-fault policies are now common in industry and have and have been held to be reasonable by an overwhelming majority of arbitrators.” The Employer also cited *Honeywell International v IBT 1145*, 0605-55317 (Befort 2007) for a similar if not identical proposition.

8. The employer further cited a case involving almost identical facts where the arbitrator also sustained the discharge. In *Honeywell International v IBT 1145*, B-68 (Bellman 2005) the arbitrator was faced with an employee who had also run out of time under the Policy and had to miss work due to an emergency gas leak in his home. The employee in question had been terminated once before but reinstated by an arbitrator. The employee continued his poor attendance and was terminated again, this time apparently for the gas leak incident. In upholding the termination, Arbitrator Bellman noted that the employee had not learned his lesson and that he should have managed his time better to take account of the very thing that led to his discharge. The employer argued that Mr. Dyson has not learned his lesson either despite the 2005 termination and last chance agreement, referenced below. Under these circumstances termination is the only reasonable solution to this continuing problem.

9. The Employer pointed out that pursuant to the provisions of Article 15, there is a very liberal amount of time available and many exceptions to the unexcused absence policy. Here though the grievant did not fit into any of those exceptions, a fact not disputed by the Union either at the hearing nor at any of the grievance steps in this matter. The grievant is granted 30 days of vacation, which can be used for whatever purpose the grievant likes and does not count toward the hours listed above leading to disciplinary action under the Policy. Here however, as he has in the past, the grievant literally used up all of his vacation time within a few weeks thus leaving himself with no margin for error and no available days in case of an emergency or some other reason to be absent from work.

10. The grievant has a long history of using all his vacation and a long history of staying just under the number of hours resulting in serious discipline. The Employer submitted a copy of the grievant's record to demonstrate not only his long history of absenteeism but also that he was slated for termination once before in 2005 but as given essentially a last chance then; just as he is asking for now.

11. The incident that led to his discharge occurred on November 17, 2008 grievant missed 8 hours of time and that caused him to go over the 60-hour threshold in the rolling 12-months prior to that time. The Employer introduced a document that demonstrated graphically how those hours were used. See Employer Exhibit 3.

12. Moreover, he knew exactly where he was on that continuum. He had been given a written reprimand and several 3-day suspensions during the rolling year prior to his discharge. His supervisor told him when he got all of these disciplinary warnings and suspensions where he was and provided him with documentation that showed him exactly how many hours he had accumulated under the Policy. The grievant chose however to use all of his available leave days which left him without any days or hours to use. In case of an emergency

13. The Employer asserted too that the grievant did not dispute that he had more than 60 hours (61.45 hours of lost time) and that he acknowledged at all of the steps that this results in discharge under the policy.

14. The Employer further asserted that there is no evidence of disparate treatment here and that this policy has been consistently and strictly enforced. While it is sad that the grievant's choices with respect his leave time indirectly led to this result the Employer asserted that "leniency" isn't called for under these circumstances given the grievant's dismal record and would undermine the efficacy of the policy. It would potentially also undermines the clear terms of the labor agreement noted above and the arbitrator should enforce the policy per its terms and sustain the discharge.

The Employer seeks and award upholding the discharge and denying the grievance in its entirety.

UNION'S POSITION:

The Union took the position that there was not just cause to discharge the grievant under these circumstances. In support of this the Union made the following contentions:

1. The Union pointed out that the grievant is a 30-year employee with a good work record. The Union argued that even though the grievant has accumulated more than 60 hours of absences he only went over that figure by an hour and 45 minutes. The Union argued that this was a trivial transgression and that the Employer should not be allowed to terminate such a long-term employee for such a small amount of time.

2. The Union also argued that the A-2 policy does not require that the employee who has gone over the 60 hours is terminated. The language says only that the stated consequences in the matrix “will *normally* apply based on cumulative hours lost in the immediately preceding 12-month period.” (Emphasis added). The Union argued that the terms of the policy provide for some discretion to determine whether discharge is appropriate even though a person may have more than 60 hours.

3. The Union assailed the policy itself and argued that a no fault policy applied in the wooden way the Employer suggests runs afoul of the notion of just cause. The Union cited Elkouri as follows: “[a] number of employers have adopted no-fault attendance policies which provide for discipline and discharge due to excessive absenteeism regardless of the reasons for such. Many arbitrators have concluded that such policies must conform to ‘just cause’ provisions in a collective bargaining agreement.” Elkouri and Elkouri, *How Arbitration Works*, 6th Ed, at page 888.

4. The Union argued that the policy as applied is unreasonable and inconsistent with a true just cause analysis. The Union asserted that even if the employer had the inherent managerial right to establish the policy, that right does not negate the requirement that just cause must exist to impose discipline, especially a discharge.

5. The Union asserted that the employer is applying its Time and Attendance policy in a Draconian way and argued that each case must be judged on its own unique facts, rather than by resort to whether the employee violated the “Black letter” of some unilaterally imposed policy. While the Time and Attendance policy may be helpful in determining just cause it should not supplant it and is not determinative of just cause.

6. Moreover, any just cause analysis requires a review of the penalty for any stated violation. Here, the grievant is a long time employee who was faced with having to take his wife to the hospital following a serious medical emergency. The Employer seeks to now impose the supreme industrial penalty because the grievant had to take his wife to the hospital.

7. The Union argued that the policy in effect prior to Policy A-2 was somewhat more liberal than the policy in effect now and that the grievant may have assumed he had more hours he could use before being terminated under the newer, far more strict policy.

8. The grievant also indicated that he frequently uses his available leave time to take care of his wife and that some of the hours he used up in the summer of 2008 were for that purpose. The Union claims that his wife’s medical condition is beyond her and his control and that he needs time to help take care of her.

9. The Union argued further that the grievant has an absolute right to take his vacation whenever he chooses to do so and it now being penalized for exercising his rights under the labor agreement. The Union noted the repeated references by Honeywell managerial employees to the grievant’s use of vacation and asserted that the employer is attempting to shift the burden of proof back to the employee by so doing. This is not allowed since the Employer retains the burden of proof at all levels of any disciplinary inquiry. The arbitrator should not allow this evidence to be considered and reject the Employer’s attempt at character assassination through the use of the grievant’s use of vacation.

10. The Union introduced medical records regarding the grievant's wife's condition. She had to be hospitalized after passing out on the highway on her way to work. The grievant's wife also worked for the Employer and the two took separate cars into work on November 17, 2008. As the grievant was following her in that day her noticed her car stopped on the side of the road.

11. He turned around and found her unconscious and took her immediately to her regular doctors at the Fairview Lakes Medical Center. See Union Exhibit 2. These records support the grievant's version of the facts that his wife suffers from sudden spells where she passes out. The Union argued that the Employer is being particularly heartless by terminating a person who was simply taking his wife, who had passed out on the highway, to the hospital and them remaining with her through the day while the doctors ran various tests and treated her for this illness.

12. The Union argued too that the penalty here is particularly harsh and should be reduced to a lesser penalty. The Union pointed out that the grievant has never had a 10-day suspension imposed, as the penultimate level of discipline provides. The Union further argued that the degree of discipline, like the discussion above of whether there was a violation of the policy, is also subject to the case by case analysis under a just cause inquiry. This too should not be woodenly applied and the arbitrator should consider all factors relative to the grievant's situation and not simply look to the chart of the Time and Attendance Policy. The Union argued that if ever there was a situation that calls out for an exception to the Draconian application of the A-2 Policy it would be this one and asks that the arbitrator reinstate the grievant to his former position.

The Union seeks and award sustaining the grievance and reinstating the grievant with full back pay and accrued contractual benefits.

MEMORANDUM AND DISCUSSION

The facts of this case were virtually undisputed. The grievant is a long-term employee with the Employer and has been employed there for approximately 30 years. He does have a long history of attendance problems however and the record showed that in 2005 there was some consideration of firing him then. See, February 2, 2005 letter contained in Employer Exhibit 7. The Union and the Employer agreed to reinstate the grievant pursuant to an agreement dated 12-12-05. The parties agreed pursuant to that document that there was just cause to terminate him at that time but the parties decided to essentially show the grievant much the same sort of leniency he is requesting now by reinstating his employment then.

The terms of that settlement also indicated that if the grievant “fails to meet the standards within the Attendance Policy or violates any other Company policy which causes him to exceed the number of allowable active demerits, Mr. Dyson’s employment with the Company will be terminated.”

The attendance policy changed in February 2006 and has been in place ever since. It was clear, despite some argument that the grievant may have been assuming that he was still somehow subject to the older policy in place prior to that time, that the Union and the grievant were well aware of the terms and the implications of the new A-2 Policy. The Union and the Employer specifically negotiated language in the current labor agreement that makes reference to the policy. See Joint Exhibit 1 at Article 4 section 3 cited above. There was apparently some discussion about making the policy more restrictive and the union and the Employer agreed not to do that during the life of the current agreement. The Union must therefore have known what the terms of that policy were and how they were to be applied.

Moreover, Mr. Kelly testified credibly that he discuss the terms of the policy several times with the grievant. The record shows that the grievant was given a written reprimand and three separate 3-day suspensions for accumulating unexcused absences under the A-2 Policy. He further testified that each time he met with the grievant to impose these disciplinary notices and suspensions he discussed specifically how many hours the grievant had under the policy and where he was in terms of further discipline. He warned the grievant about how close how was to being terminated and specifically advised him of how precarious his situation was in the event he missed any further unexcused time.

Initially the question of how this policy should be applied must be addressed. The union claimed that the Time and Attendance Policy cannot and should not be applied to supplant the just cause analysis. The Union also asserted that the terms of the as applied here effectively negates a just cause analysis and should be rejected by the arbitrator.

The employer however effectively countered this argument by reference to prior awards between these two parties. In the Flagler and Befort awards cited above both arbitrators dealt with the question of the legitimacy of the Policy and both rejected the Union's argument. In addition, Arbitrator Bellman in his award also rejected the claim that the policy was not a legitimate exercise of the employer's rights and further rejected the notion that it was inconsistent with a just cause analysis.

The Employer further showed that there are a variety of ways to miss time yet not accumulate hours under the Policy. For example, disciplinary suspensions do not count toward those hours. The time the grievant missed for his work related injury do not count either.¹ The record showed by very clear and convincing evidence that the Employer advised the grievant of the number of hours he had accumulated under the policy and what would happen if he continued to miss time.

¹ The record showed that the grievant missed several months due to a work injury, see Employer Exhibit 3, yet none of these hours counted toward his accumulated hours under the A-2 Policy. Neither did any of the vacation hours he took, apparently almost all at once, count toward those hours either.

Further, the Union did not dispute that the grievant had accumulated more than 60 hours under the policy. He in fact accumulated 61 hours and 45 minutes under that policy due to the last 8 hours he missed on November 17, 2008. The Union did not take issue with the way the hours had been calculated nor with the categorization of hours as reflected on Employer Exhibit 3. Thus, there was no question that the grievant had missed more than 60 hours under the policy.

The grievant's claim here is that he was faced with a medical emergency when he found his wife unconscious on the highway on the way to work on November 17, 2008. He was compelled then to take her to the hospital and stay with her while the doctors treated her. There was no question on this record that this is exactly what happened. The Employer did not dispute that fact either and acknowledged that the grievant's wife, who also works for the Employer, has a medical condition that causes her to pass out on occasion.

The grievant's claim here is that he could not control his wife's medical condition and that when faced with the choice of going to work or staying with his wife who was passed out and needed to be hospitalized he made the only obvious choice. There is little question that from a moral standpoint, the grievant made the correct choice.

The question though is whether any of this matters under the clear terms of the A-2 Policy. Regrettably, for the grievant, it does not. The Employer showed that it has a well-established, well communicated and accepted policy on absenteeism. The evidence showed too that the A-2 Policy has been applied strictly and that exceptions are not given. The Employer showed that this is due to the needs of production and the fact that to remain competitive it must maintain a very "lean" staffing.

This is a No-Fault absentee policy that allows for certain thresholds of accumulated unexcused absences before discipline is meted out. The record also showed that there is a wide variety of ways that absences can be excused. It was shown too that the grievant's wife is on an approved medical leave due to her medical condition and that those hours do not count toward the thresholds in the attendance policy.

As noted above, there was no dispute that the grievant had accumulated more than 60 hours under the Policy. Further, he had been given ample warning of the number of hours he had accumulated in the rolling 12 months prior to November 17, 2008. A review of the matrix introduced by the Employer shows that he indeed used up all of his vacation, some 30 days worth, between June 1, 2008, when it was granted to him under the labor agreement, and early August. Further, the grievant had been given 3 separate suspensions for 3 days each during that same period, including one within a few days of November 17, 2008. This was shown to be due to the rolling nature of the hours under the Policy; as hours that counted toward discipline under the Policy “fall off” after 12 months expire on those hours, the grievant accumulated more and stayed between 48 and 56 hours.

The Union claimed that the Employer is tacitly penalizing the grievant for use of his vacation. The evidence did not support this assertion however. There was no evidence that the discipline was meted out because of his use of vacation but rather because the grievant had no hours under the Policy to cover the time he needed when his wife became ill. It should also be noted that there was no dispute that the time he took on November 17, 2008 counted toward the discipline levels under the Policy.

The grievant used up all of his available annual vacation almost immediately after he got it thus leaving no hours to take care of an emergency needs. The evidence shows that under the terms of the labor agreement employees are given a lump sum of 30 days vacation on June 1st of each year. These hours can be used up as the employee chooses any time during the year.

The grievant at first indicated that he needed to use up the vacation in order to care for his wife and that this was why he used it up so soon after getting it. The record did not support that assertion either. Later in the hearing he indicated that he went camping during the summer and that was the reason he used up all of his vacation. On this record, the latter appeared to be true. It should be noted that if indeed the grievant needed to use vacation to take care of his wife the record would likely show a different pattern of vacation usage. It would be more likely than not that the grievant would need time on a consistent basis throughout the year, yet the record does not show that.

On this record, the most reasonable inference to be drawn from the evidence is that the grievant decided to use all of his vacation during the summer and “play the float” for the rest of the year by using up a few hours here and there hoping that he did not get to the 60 hour threshold.

There was no evidence that the Employer punished the grievant for his choices for vacation usage per se. Rather, it was clear that the Employer noted that the grievant did not have any vacation time left to cover the time he had to take off on November 17, 2008 but that if he had been more judicious about his choices he should have saved some for just this exigency.

The bottom line here is that the grievant gambled with his job and lost. The record showed that he was well aware of where he was under the A-2 Policy and took time off that would result in something less than termination. He got caught on the horns of a dilemma when his wife became ill and did not have enough hours to cover that time.

The Union argued that this is a situation that cried out for leniency and that the arbitrator should create an exception to the Policy for this grievant this time. There are two problems with this argument. First, the grievant has already had such a break before. In 2005 the grievant was terminated under an even more lenient policy and was reinstated pursuant to the settlement agreement noted above. Under these circumstances there is simply no basis for such a break again.

Second, there are no grounds on this record to create an exception for the grievant. There was no evidence that the Employer of disparate treatment or that the Employer has ever created an exception for anyone else. Indeed, the record shows that the Employer has applied the terms of this policy strictly and that the Union knows that. The Employer argued that it cannot make exceptions to the policy or it will negate it. There is some merit to that assertion. There is truth to the old adage that today’s favors become tomorrow’s demands. Once exceptions are created, even for compelling reasons, the Policy will cease to be effective.

Further, the potential for abuse, i.e. charges that exceptions were granted to employees whom supervisors “liked” and denied to those they did not could become rampant. Creating policies for the exceptions to the policy would become the order of the day. The Employer has prodigiously sought to avoid that and has applied this Policy even-handedly and consistently. It is not for an arbitrator to create something in the labor relationship that does not exist and that the parties have worked to avoid. Accordingly, the grievance must be denied.

AWARD

The Grievance is DENIED.

Dated: December 31, 2009

Jeffrey W. Jacobs, arbitrator

IBT #1145 and Honeywell award