

UNITED STATES OF AMERICA
FEDERAL MEDIATION AND CONCILIATION SERVICES
IN THE MATTER OF GRIEVANCE ARBITRATION

SHAW/STEWART LUMBER CO.,

EMPLOYER

-and-

ARBITRATOR'S AWARD

FMCA CASE NO. 121011-50218-3

EMPLOYEE DISCHARGE

TEAMSTERS LOCAL NO. 120,

UNION.

ARBITRATOR:	Rolland C. Toenges
GRIEVANT:	Craig Huffman
DATE OF GRIEVANCE:	September 9, 2011
DATE ARBITRATOR NOTIFIED:	January 5, 2012
DATE OF HEARING:	February 17, 2012
DATE OF POST HEARING BRIEFS:	March 30, 2012
DATE OF AWARD:	April 20, 2012

ADVOCATES

FOR THE EMPLOYER:

Jill L. Poole, ESQ.
Jackson Lewis, LLP.

FOR THE UNION:

Katrina E. Joseph, ESQ.
Martin J. Costello, ESQ.
Hughes & Costello

WITNESSES

FOR THE EMPLOYER:

Peggy Sweeney, Human Resources Mgr.

Gordy Bloom, Yard Manager

FOR THE UNION:

Michael Stebbins, Yard/Driver

Joseph Battaglia, Business Agent

ALSO PRESENT

Jim Bradrick, Shaw/Stewart Co.

Kevin L. Jacobson, Union Stewart

COURT REPORTER

Hart Erickson
Merrill Corporation - Minnesota

ISSUE IN DISPUTE¹

Was discharge of the Grievant for just cause under the Collective Bargaining Agreement? If not what is the appropriate remedy?

JURISDICTION

The matter at issue, regarding whether the Grievant was discharged for just cause, came on for hearing pursuant to the Collective Bargaining Agreement (CBA) between the Parties.² The CBA, Article 7, GRIEVANCE AND ARBITRATION, in relevant, part provides as follows:

SECTION 1. The Company defines a grievance as an alleged violation of specific terms of this Agreement. The Parties exclusively through this article shall address any grievance arising under the terms of this Agreement.”

SECTION 6. If the Union declines to accept the Company’s response described in Section 5 above, it may proceed to arbitration. At any step in this grievance procedure, the Union shall have the final authority with respect to any aggrieved employee covered by this Agreement, to decline to process a grievance or dispute further, if, in the judgment of the Union, the grievance or dispute lacks merit.”

SECTION 7. If the Union wishes to proceed to arbitration, it must notify the Human Resource Manager in writing within fifteen (15) working days of the day of the decision by the Company described in Section 5.”

¹ The Parties stipulated to the issue in dispute.

² Joint Exhibit #1.

“SECTION 8. If any grievance proceeds beyond the discussion set forth in Section 5, the grieving party must submit in writing all known evidence bearing on the grievance. This includes, but is not limited to, a description of the practice or matter giving rise to the dispute, relevant dates and all witnesses, along with the specific contract clause that is allegedly being violated. Failure to comply with these requirements will serve as a bar to the introduction of the evidence that was withheld by the grieving party at arbitration. Evidence that is discovered at a later date may be introduced at hearing if the party discovering the evidence gives the other party written notice of its existence at least five (5) working days prior to the arbitration.”

“SECTION 9. Failure to adhere to the time limitations set forth in this Article shall permanently bar any further processing of the grievance, including the submission of the grievance to arbitration. However, these time limits may be extended by mutual agreement of the parties on a non-precedent setting basis.”

“SECTION 10. Unless the parties agree otherwise in writing, the settlement of a grievance shall operate as a precedent or prior practice for later, similar situations.”

“SECTION 11. In the event that a proper request to arbitrate is made by the Union, either party may request from the Federal Mediation and Conciliation Service a list of seven (7) local arbitrators. Upon receipt of this panel, the parties shall have fourteen (14) calendar days to strike arbitrators. The Union shall strike the first name from the list. Arbitrator names shall thereafter be struck alternatively until one name remains. Either party may reject one panel prior to striking, in which case a new panel shall be requested. The arbitrator will be notified of his/her selection and asked to submit with his/her acceptance, the earliest available hearing dates.”

“SECTION 12. In rendering a decision, the arbitrator shall be governed and limited by the provisions of this Agreement, applicable law and the expressed intent of the parties as set forth in this Agreement. The arbitrator shall have no power to add to, subtract from, or modify any of the terms and provisions of this Agreement, and shall confine his judgment strictly to the facts submitted in the hearing, the evidence before him and the express terms and provisions of this Agreement. The arbitrator’s decision shall be final and binding upon the parties.”

“SECTION 13. Unless the parties agree otherwise, the losing party shall pay the expense of the arbitrator. Where there is no clear losing party, the cost of the arbitrator will be paid in equal amounts by both parties.”

The CBA in ARTICLE 11, DISCHARGE, provides as follows:

“SECTION 1. The Company will not discharge any employee on the seniority list without just cause and in accordance with the procedure outlined in this Article.”

“SECTION 2. No individual is eligible for employment with the Company unless that individual is qualified to operate a truck, possesses the appropriate licenses, and is considered insurable by the Company’s insurance carrier. Any employee who fails to meet any one of these three qualifications will be subject to immediate discharge.”

“SECTION 3. The Company agrees to follow, where appropriate, the principle of progressive discipline. Written warnings will be effective, for purposes of progressive discipline, for a period of twelve (12) months. A copy of the warning notices will be sent to the Union.”

“SECTION 4. If any employees believe that they have been unjustly discharged, they must follow the procedure outlined in the Grievance and Arbitration Article.”

The CBA in ARTICLE 12, COMPANY RULES AND DISCIPLINE, provides as follows:

“SECTION 1. The Company will have the sole right to establish, revise or add attendance, work, smoking, substance abuse, drug and alcohol testing, functional testing, and safety rules by which all employees must abide. The Company will also have the right to establish or revise a disciplinary policy to address employee violations of these rules. The Company rules and/or disciplinary policy will become effective seven (7) days after the Union has been notified.”

In accordance with the provisions of Article 12, above, the Employer has promulgated an attendance Policy that provides progressive discipline for “Excessive absenteeism/tardiness.”³

“ATTENDANCE POLICY – EFFECTIVE DATE 1/1/2009

“General Company Employment Policy #11 states: Excessive absenteeism, tardiness, horseplay, fighting, etc. may subject the employee to disciplinary action up to, and including termination of employment from Shaw/Stewart Lumber Company.

³ Employer Exhibit #1.

Excessive absenteeism/tardiness is defined as:

2nd call-in/tardiness/leaving early in a rolling 12 months – Verbal Warning

3rd call-in/tardiness/leaving early in a rolling 12 months – 1st Written Warning

4th call-in/tardiness/leaving early in a rolling 12 months – 2nd Written Warning.

5th call-in/tardiness/leaving early in a rolling 12 months – Termination

An employee must personally talk to a supervisor when calling in at least 1 hour prior to the start of his/her shift. If you cannot reach your supervisor you need to talk to another supervisor. Leaving a message on a phone or having another employee inform us is not acceptable.

Each day called in will count as a single “call-in”, example: an employee calls in on a Tuesday and also the next day – this will count as two separate “call-ins”.

A call-in will not accumulate if an employee brings in documentation from a clinic, urgent care, minute clinic or hospital.

Leaving Early – An employee’s time that has been pre-scheduled and approved by their supervisor – (prior to the start of the shift) – will be included. It is also approved if the employee brings in a doctor slip/emergency room documentation excusing him/her for the day.

Any employee missing three consecutive days for illness **must** bring a doctor’s slip prior to being able to return to work.

Revision Date 12.2008”

The above Policy supersedes similar policies promulgated 1/2/2006, 12/2/2006 and 11/1/2008.

The CBA also contains Article 6, MANAGEMENT RIGHTS, that provides in relevant part as follows:

“Seciton 2. Without limiting the generality of the foregoing, the Company has the right to direct employees’ work, including the right to discharge for just cause, suspend, or otherwise discipline employees; to demote, transfer or promote employees; to allocate and assign work to employees; to determine

the amount of work needed and to lay employees off because of lack of work or other business reasons.”

The Parties selected Rolland C. Toenges as Arbitrator, from a list of Arbitrators provided by the Federal Mediation and Conciliation Service, to hear and render a decision in the interest of resolving the disputed issue.

The hearing was conducted in accordance with provisions of the CBA and rules of the Federal Mediation and Conciliation Service. The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter at issue. Witnesses were sworn under oath and subject to examination and cross-examination.

A verbatim record was made of the hearing and provided to the Arbitrator and the Parties.

The Parties stipulated that the disputed matter was properly before the Arbitrator and that there were no procedural issues

BACKGROUND

Shaw/Stewart Lumber Company (Employer) supplies a wide range of building materials to residential homebuilders, remodelers and commercial building contractors in the Minneapolis/St. Paul market and surrounding area. The Employer emphasizes high quality specialized service to its customers.⁴ The Employer has some 79 employees.

Teamsters Local Union 120 (Union) represents a bargaining unit of employees in the classification of Driver/Yardman, including full time and temporary employees. These employees handle construction materials being received, stored and shipped.

⁴ Union Exhibit #2.

They are also responsible for delivering materials to job sites and are required to have the required CDL licenses for the type of vehicles operated.

The Employer and Union are Parties to a Collective Bargaining Agreement (CBA) that sets forth the terms and conditions of employment applicable to some 17 employees who make up the bargaining unit. The CBA applicable to the instant dispute is in effect from July 1, 2009 through June 30, 2014.⁵

Craig Huffman (Grievant) was employed on August 12, 2006.⁶ The Grievant worked as a Yardman and Driver. The Grievant was licensed to operate straight trucks and semi-truck trailer combinations, used to pick up and deliver construction materials at job sites. As of September 1, 2011, the Grievant was one of two employees qualified to operate the semi-tractor trailer combination.⁷ The Grievant's work schedule was from 6:00 a.m. until job completion, Monday through Friday.

The Employer promulgated an Attendance Policy in 2006 and updated it effective 1/1/2009.⁸ The Policy establishes conditions for reporting absences and progressive discipline for excessive absenteeism/tardiness and leaving early. An employee with an unexcused absence/tardiness on two occasions within a 12-month rolling period is given a verbal warning; on the third occasion a written warning; on the fourth occasion a second written warning, and on the fifth occasion is subject to termination

Employees are required to call-in a least one-hour prior to the beginning of their shift and talk to a supervisor if they are going to be absent or tardy. Similar arrangements are required If an employee is leaving early. An employee calling in

⁵ Joint Exhibit #1.

⁶ Union Exhibit #3.

⁷ Testimony of Peg Sweeney.

⁸ Union Exhibit #4.

absent or tardy due to illness/injury is required to provide verification from a clinic, urgent care facility, minute clinic or hospital upon returning to work. If an employee fails to comply with the requirements set forth in the policy, the absence/tardiness/leaving early is considered an unexcused occurrence and subject to progressive discipline.

A grace period of five (5) minutes is allowed, plus exceptions are allowed due to circumstances beyond the employee's control. The Employer is fairly lenient on the sources for medical verification.⁹

Employees were presented with a copy of the Attendance Policy with receipt being acknowledged by their signature.¹⁰

The Grievant was given notice of termination on September 2, 2011.¹¹ The Employer's charges were that the Grievant had five unexcused events within a 12-month rolling period, the latest on September 1, 2011. The Employer cited earlier unexcused events on November 2, 2010, December 21, 2010, January 5, 2011, April 5, 2011 and July 22, 2011.¹²

A grievance was filed with the Employer on September 9, 2011, alleging that the Employer violated the CBA by terminating the Grievant without just cause and other unspecified provisions of the CBA.¹³ The grievance requested that the Grievant be immediately reinstated and made whole, including all back pay, overtime, seniority and all other CBA benefits.

⁹ Testimony of Peg Sweeney.

¹⁰ Employer Exhibit #4.

¹¹ Union Exhibit #5.

¹² Employer Exhibits #6, #7, #8 & #9.

¹³ Union Exhibit #6.

Thereafter, the grievance was processed through the CBA Grievance Procedure, but without resolution. The disputed matter was then moved to the arbitration step of the CBA Grievance Procedure.¹⁴ Accordingly, the disputed matter is now before the instant arbitration proceeding for resolution.¹⁵

EXHIBITS

JOINT EXHIBITS:

J-1. Collective Bargaining Agreement, July 1, 2009 through June 30, 2014.

EMPLOYER EXHIBITS:

E-1. Attendance Policy – Effective Date 1/1/2009.

E-2. Attendance Policy – Effective Date 1/1/2007.

E-3. Attendance Policy – Effective Date 1/6/2006.

E-4. Attendance Policy – 2008, Employee Acknowledgment of receipt.

E-5. Absenteeism History of Grievant – 2006 through 2011.¹⁶

E-6. Disciplinary Notice, 1/14/2011.

E-7. Disciplinary Notice, 1/14/2011

E-8. Disciplinary Notice, 4/15/2011, with attachments.

E-9. Disciplinary Notice, 7/28/2011 with attachments.

E-10. Disciplinary (Termination) Notice, 9/2/2011 with attachments.

E-11. Disciplinary Notice, 7/31/08.

¹⁴ Union Exhibit #7

¹⁵ Union Exhibit #8.

¹⁶ The Union raised objection to admission of this document, as it referenced violations of the Attendance Policy prior to the latest 12-month rolling period. Such references from this document were not used by the Arbitrator in rendering the Award.

E-12. Doctor's Note confirming Grievant unable to work on 12/20/2011.

UNION EXHIBITS:

U-1. Collective Bargaining Agreement, July 1, 2009 through June 30, 2014.

U-2. Shaw/Stewart Lumber Co. – General Information from Website.

U-3. Shaw/Stewart Lumber Co. Bargaining Unit Seniority List.

U-4. Shaw/Stewart Lumber Co. Attendance Policy, 1/1/2009.

U-5. Employer's Notice of Termination to Grievant, 9/2/2011.

U-6. Grievance No. 09/9718, dated 9/9/2011.

U-7. Petition for Arbitration, Dated 10/11/2011.

U-8. Appointment of Arbitrator, Dated 1/5/2012

POSTION OF THE PARTIES

THE EMPLOYER SUPPORTS ITS POSITION WITH THE FOLLOWING:

- The Union is time barred from arguing the discipline issued on 12/21/10 and 01/05/11 should now be reversed.
- The Union never grieved this discipline and is now trying to circumvent the timelines of the CBA grievance procedure.
- Under the CBA, if the Union wanted to grieve this discipline, it had to do so within five (5) working days of when the employee knew, or reasonably should have known, of the occurrence-giving rise to the discipline.¹⁷
- Arbitral precedence is clear that failing to grieve the underlying discipline means the prior discipline cannot now be reversed.
- Overwhelming arbitral authority supports the Employer's contention that the Union is now time barred from arguing the previous discipline should

¹⁷ Cited is CBA Grievance Procedure, Section 3, pg. 4.

now be reversed, since the grievance was not filed within the time limits prescribed by the CBA.¹⁸

- The Grievant presented a doctor's note in an attempt to excuse absences where discipline had already been issued. If the Grievant actually thought his discipline would be reversed, he would have at least followed up, which he never did.
- As a matter of practice, the Employer does not accept doctor's notes retroactively, nor does it accept doctor's notes after discipline is issued.
- This practice was confirmed by Witness, Mike Stebbins, who testified that when he is ill, he brings in a doctor's note upon return to work because it is the established practice.
- When the Grievant received his second written warning on April 5, 2011, he did not dispute the warnings for his absences on December 21, 2010 and January 5, 2011, even though they were conspicuously referenced in the disciplinary meeting with his supervisor.
- If the Grievant or Union thought the discipline was unfairly administered, it should have been grieved then, rather than attempt to grieve it over nine months later when the Grievant was terminated.
- This last ditch attempt to reverse earlier discipline is not permitted under the CBA, nor should it stand as a basis to reinstate the Grievant.
- Even if the two warnings were reversed, the Grievant would still have five (5) occurrences, because the Employer did not discipline for two incidents of tardiness and allowed an extra occurrence on July 22, 2011, for which he could have been terminated.
- The Grievant was never told that the discipline would be reversed and was only inferred by him. When the Grievant inquired what he could do about his attendance, he was told to have a doctor's note upon returning to work.
- Witness, Mike Stebbins, who was present at the meeting, acknowledged that Supervisor Bloom did not tell the Grievant that the discipline would be reversed.
- The Grievant's termination was for just cause, based on attendance issues, as explained by Arbitrator Riker in *Quest corp.* 120 LA 338 (Riker, 2004).

¹⁸ Cited is *Naval Supply Center*, 85 LA 655 (Harkless, 1985; *Cincinnati Box & Partition Co.*, 86 LA 1119 (Warns 1985; *Perfection-Corby Co.* 88 LA 257 (Duda, Jr. 1987.

- The Employer has met the just cause standard enumerated by Riker via an overwhelming preponderance of the evidence.
- The Grievant had clear knowledge of the Employer's reasonable attendance policy, which is consistent with industry standards.
- The Grievant signed an acknowledgment that he received the Attendance Policy and should have had adequate understanding of the consequences of violating the Policy. The Grievant was reminded of the Policy each time he had an unexcused absence, which was on six (6) occasions preceding his termination.
- Arbitral precedent allows an employer to discipline and terminate an employee for violating a reasonable attendance policy.¹⁹
- The Employer has well established and reasonable Attendance Policy, which prohibits unexcused absenteeism. The Union has never before grieved any discipline administered under the Policy, or even objected to implementation of the Policy.
- The Employer's Attendance Policy serves a legitimate business interest designed to meet customer expectations.
- Due to the small size of the workforce, an employee's unexpected absence creates a domino effect within the Company and causes deliveries to be late.
- If employees are absent, it is imperative that sufficient notice be given to allow for replacement of the absent employee. The Employer must have the appropriate number of employees to insure customer expectations are met.
- The Grievant's violations of the Attendance Policy warrant his termination. The Grievant was absent 32 separate occasions since 2006 and was an ongoing issue.
- Between November 2, 2010 and his termination, the Grievant was unexpectedly absent on four (4) separate occasions, was tardy on at least four (4) occasions. The Grievant's only explanation was that he overslept because his alarm clock didn't work.

¹⁹ Cited is *Federal Home Prods.*, 120 LA 1047 (Robinson, 2005); *Saginaw Mining Co.*, 81 LA 672 (Feldman, 1983).

- It is important to note that the Grievant did not testify at the hearing, causing one to conclude that his testimony would have been unfavorable.²⁰
- The Employer followed its Attendance Policy. The Grievant was allowed numerous opportunities to correct his behavior.
- The Employer was fair about issuing discipline. The Grievant could have been discipline on three (3) separate occasions for tardiness instead of once. Further, the Employer allowed the Grievant an extra opportunity, when he wasn't terminated for his absence on July 22, 2011.
- In fact, four (4) of his six disciplinary warnings involved failing to provide a doctor's note as required to excuse his absence.
- The Grievant was well informed about the importance of abiding by the Attendance Policy. In fact, his supervisor informed him, in conjunction with his absence on July 22, 2011, that his next violation would result in termination.
- Due to the nature of the Employer's business and reliance on the Grievant to perform duties essential to success of the business, termination was the appropriate action.
- Several arbitrators have upheld discharge of employees for excessive absenteeism in situations similar to the instant case.²¹
- The Employer's administered its Attendance Policy in a fair and consistent manner, and there is no evidence to the contrary.
- In fact, in 2008 another employee failed to provide a doctor's note upon starting his shift. Although the note was presented later that same day, it was not considered timely and the employee was charged with an unexcused absence. That the matter was not grieved is evidence that the Policy is applied fairly and consistently among all employees.
- The Employer respectfully requests the grievance be denied in its entirety.

THE UNION SUPPORTS ITS POSITION WITH THE FOLLOWING:

²⁰ Cited is *Custom Cartage Service Division*, 111 LA 353 (Wolff, 1998).

²¹ Cited is *Qwest Corp., supra: Automotive Distributors, Inc, Supra: Standard Products, Co.*, 88 LA 1164 (Richard, 1987).

- Although the Union does not contend the attendance Policy is unreasonable, it was unreasonably applied and does not meet the CBA just cause requirement.
- Further, the Policy is subordinate to the CBA just cause requirement.
- The Employer failed to prove that the Policy is reasonable and was reasonably applied.²²
- The Policy does not displace the CBA just cause standard and the Employer must show that its action is supported by just cause.²³
- Work rules are subservient to the CBA and subject to challenge in how they are administered.²⁴
- A Grievant's termination under a no-fault attendance policy is subject to a just cause analysis. While the Policy may be helpful in assessing whether just cause exists, it is not determinative.²⁵
- Although there is no universally accepted definition of just cause, it is common in labor law to apply "the Seven Tests" articulated by Arbitrator Carroll R. Dougherty in 1966.²⁶
- Examination of circumstances leading to the Grievant's termination demonstrates that just cause does not exist.
- The Grievant's submission of a doctor's note for absences on December 21, 2010 and January 5, 2011, should have rendered them excusable under the Employer's Policy.
- The Policy only requires that a doctor's note be presented immediately upon return to work when the absence is for more than three (3) days.²⁷

²² Cited is: Teamsters Local No. 1145 [Allan Wade] and Honeywell International, Inc., FMCS No 060517-56317-7 (Befort, 2007)

²³ Cited is: United Steel Workers of Am., Local566 and Bobcat Ingersoll-Rand, Inc. FMCS No. 05-05800 (Gallagher, 2006).

²⁴ Cited is: Aggregate Inds., FMCS No. 05-52059-7 (Jacobowski, 2006)

²⁵ Cited is: Campbell's Soup Co. BMS 9401.12 (Ver Ploog, 1992)

²⁶ Cited is: enterprise Wire Co. 46 LA 359 (1966) & United Paperworkers Int'l Union v. Misco, Inc. 484 U.S. 29, 34 (1987)

- Although the Grievant produced the required doctor's note for his absences on December 21, 2010 and January 5, 2011, the Employer accepted it and he was never informed the note was not acceptable.
- The two days in question should be excused. Accordingly, there is no basis for the Grievant's termination under the Policy.
- The Employer imposed the most extreme form of discipline on the Grievant. Termination of employment is, using a common expression, "capital punishment." It involves the Grievant's livelihood, reputation, rights and future employment opportunities.²⁸
- The Grievant's termination was without consideration of his past record, factual circumstances, or mitigating factors.²⁹
- In discharge cases a significant quantum of proof is required to show not only that the grievant did the act alleged, but also that the act justifies the "extreme industrial penalty" of discharge.
- Discharge places a heavy burden on the Employer to support its action.
- In discharge, the Employer has a burden of proof in two areas: (1) Whether the offense as committed, and (2) whether the act, if proven, justifies termination.³⁰
- Even if the Arbitrator finds sufficient evidence of misconduct, the issue becomes whether the punishment should be upheld or modified.³¹
- There is ample authority in labor relation's jurisprudence to reduce or mitigate a penalty.³²

²⁷ Cited is: Employer Exhibit #1 & Union Exhibit #4.

²⁸ Cited is: *Charter Int'l Oil Co. and Atomic Workers Int'l Union, Local 4-227*, 75 LA 929,933 (Milentz, 1980); *N. Ohio Red Cross Blood Serv. And Mobile Unit Assistants Ass'n*, 90 LA 393, 297 (Dworkin, 1988)

²⁹ Cited is: Charter Int'l Oil, Co., 75 LA 929, 933 (Milentz, 1980)

³⁰ *AFSCME, council 5 [Idris] and State of Minn. Veterans Home*, BMS 06-PA-1225 (Toenges, 2006); *Owens & Minor and SEIU, Local 113 [Tewolde]*, FMCS 0-50713-57481-7 (Toenges, 2006); *United Food & Commercial Workers, Local 785 [Kohene] and Highland Chateau Care Ctr.*, FMCS 060608-56901-7 (Toenges, 2006)

³¹ Cited is: County of Martin, 87-1 Lab. Arb. Awards (CCH) 8329 (Toenges 1987)

- The CBA does not limit the Arbitrator from changing or modifying the penalty and it is within the Arbitrator's authority to determine the appropriate penalty.³³
- In the instant case, the Parties have stipulated that the Arbitrator's authority extends to designating a remedy appropriate to the facts, and the Arbitrator should exercise that discretion.
- Termination of the Grievant was an inappropriate penalty, particularly given the mitigating circumstances surrounding the January 2011 doctor's note and the Grievant's tenure.
- The Grievant is ready, willing and able to return to his position and there is no evidence that this incident permeates or contaminates the work atmosphere.
- The Grievant was a good worker and there has been no suggestion that he was not competent, productive or useful.
- The Grievant's attendance record does not show an employee habitually abusing sick leave and the small number of absences cannot rationally be called unreasonable.
- Perhaps, the most important purpose of this Arbitration is to help the Employer, Union and the Grievant reach a harmonious accord.³⁴
- Reinstating the Grievant to his position and making him whole for all losses serves the best interest of the Parties.

DISCUSSION

The facts of the instant matter are essentially not in dispute. The exception is whether the Doctor's Note, which was to verify that the Grievant's absence on December 21, 2010 and January 5, 2011 was due to illness, complied with the Attendance Policy (Policy). If it did, the Grievant's absence was an excusable

³² Cited is: Elkouri & Elkouri, How Arbitration Works, 953-62 (Alan Miles Ruben, ed. 6th ed. 2003)

³³ Cited is: Steele Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)

³⁴ Cited is: General Telephone Company of Kentucky, 69 LA 351 (Bowles, 1977)

occurrence. If not, the Grievant's absence was an unexcused occurrence and subject to discipline under the Policy. This is a threshold issue in the instant matter. If they were unexcused occurrences, it constitutes just cause for termination under the Policy.

DOES THE ATTENDANCE POLICY HAVE A REASONABLE NEXUS TO THE EMPLOYER'S BUSINESS INTERESTS?

The record shows that the Employer's business is supplying building materials to job sites (customers) where construction activity is taking place. It is highly important that the building materials are delivered in a timely manner. If not, the likely effect is delays and unnecessary costs to the builder, who is relying on the materials being delivered at the specified time. Further, the Employer's business is competitive. If the Employer cannot deliver the material in a timely manner, the customers will likely do business with a material supplier that can. It is axiomatic that meeting the needs of customers enhances the viability of the Employer's business and the job security of employees.

The record shows that the Attendance Policy has been in effect some six years and has been updated on several occasions. Although there has been previous discipline administered for violation of the Policy, the instant grievance is the first grievance to be filed and the only discipline involving termination.³⁵ In the 12 months preceding the Grievant's termination, the Grievant was the only employee who had a violation involving discipline.

Under the Policy, employees are required to call in one (1) hour prior to the start of their shift, if they will not be reporting for work as scheduled. In the instant case the Grievant's shift started at 6:00 a.m., which required a call-in no later than 5:00 a.m. It was particularly important for the Grievant to report for work at his 6:00 a.m.

³⁵ Testimony of Peg Sweeney.

stating time. The Grievant's primary assignment was to drive the semi-tractor trailer, used to deliver material to job sites. The Grievant was only one of two employees qualified to drive this equipment and customers expected the delivery to be made first thing in the morning.³⁶

The record shows that the delivery trucks are loaded to be ready for immediate delivery first thing in the morning. If the driver is late, it means that the delivery will not be made according to the customer's expectations. The Grievant was one of two employees licensed to operate the semi-tractor trailer. If the Grievant was late or absent, the Yard Manager either had to cancel or delay one of the semi-truck trailer deliveries. In the alternative, the Yard Manager ordered reloading material from the semi-truck trailer onto straight trucks, that other employees were licensed to operate. In either case one or more deliveries would not be made, or not made on schedule, plus the Employer's costs would likely be increased due to operational inefficiencies.³⁷

IS IT REASONABLE TO BELIEVE THAT GREIVANT SHOULD HAVE UNDERSTOOD HIS OBLIGATIONS UNDER THE ATTENDANCE POLICY?

The Policy has been in effect at all times during the Grievant's employment. The record shows that the Grievant acknowledged being given a copy of the updated Policy on December 10, 2008.³⁸ The record also shows that the Grievant has had considerable experience under the Policy. The Grievant has had unexcused

³⁶ Testimony of Peg Sweeney and Gordy Bloom.

³⁷ Testimony of Gordy Bloom.

³⁸ Employer Exhibit #4.

absences numerous times, prior to the instant matter, and disciplined on a number of occasions for its violation. The record also shows that the grievant had reason to understand the consequences, for he had been previously disciplined for failing to provide a doctor's slip and did not grieve.³⁹

DOES THE EVIDENCE SHOW THAT THE GRIEVANT COMMITTED FIVE VIOLATIONS OF THE POLICY, WITHIN A 12-MONTH PERIOD, SUBJECTING HIM TO TERMINATION?

Administration of the Policy calls for discipline based on violations that have occurred in the most recent 12-month period. In the instant case this would cover any violations occurring between September 2, 2010 and September 1, 2011.

The record shows the Grievant having been charged with the following Policy violation during this period:⁴⁰

1. November 2, 2010 – called in sick, no doctor's note (unexcused).⁴¹
2. December 21, 2010 – called in sick, no doctor's note (Unexcused - verbal warning).⁴²
3. January 5, 2011 – called in sick, no doctor's note (unexcused - written warning).⁴³

³⁹ Employer Exhibit #11.

⁴⁰ The Grievant's absence on 12/20/2010 was excused with a doctor's note.

⁴¹ Employer Exhibit #6.

⁴² Employer Exhibit #7

⁴³ Employer Exhibit #7.

4. March 30, 2011, tardy 43 minutes; March 31, 2011, tardy one hour 14 minutes; April 5, 2011, tardy.24 minutes. Although these were three separate occurrences under the Policy, the Employer treated them as one (2nd written warning).⁴⁴
5. July 22, 2011 – tardy, 43 minutes (final written warning – although Policy called for termination as it was the fifth violation, a final warning was given in consideration of the Grievant’s longevity).⁴⁵
6. September 1, 2011 – called in sick at 6:19 a.m. - one hour nineteen minutes late (Termination).⁴⁶

HAS THE ATTENDANCE POLICY BEEN ADMINISTERED IN A UNIFORM AND CONSISTANT MANNER?

The evidence shows that the Employer and Union have administered the Attendance Policy in a uniform and consistent manner. Even though the Policy has been in effect for over five years, with numerous violations, the instant grievance is the first on record. Since 2003, there have been seven grievances and only one other arbitration (2003), none of which were related to the Attendance Policy.⁴⁷

There is no evidence that the Grievant has been treated differently under the Policy than any other employee. The record shows that the requirement to provide a doctor’s slip upon return to work has been consistently applied. Another employee

⁴⁴ Employer Exhibits #1 & #8.

⁴⁵ Employer Exhibit #9 & Testimony of Peg Sweeney.

⁴⁶ Employer Exhibit #10.

⁴⁷ Testimony of Peg Sweeney.

received discipline for failing to provide the doctor's slip upon return to work, even though the doctor's slip was provided later the same day.⁴⁸

The Union argues that the Policy requiring a doctor's slip prior to being able to return to work does not apply in the instant case, because the Grievant was not absent on three consecutive days. Witness Sweeney testified that the reason for a doctor's slip is to verify the reason for the absence and to determine if the employee is sufficiently fit to safely resume work duty. The hearing record shows that the requirement for a doctor's slip upon reporting for work has been a requirement for *all* absences, when the stated reason is illness. There is no evidence of any exceptions.

SHOULD THE GRIEVANT'S ABSENCES ON DECEMBER 21, 2010 AND JANUARY 5, 2011 HAVE BEEN EXCUSED?

The record shows that the Grievant called in sick on December 21, 2010 and again on January 5, 2011, but did not have a doctor's slip for these dates. The Grievant provided a doctor's slip for his absence on December 20, 2010, but it only applied to that day.⁴⁹ Therefore, the Employer treated the Grievant's absences as unexcused and subject to discipline under the Policy – a verbal warning for December 21, 2010 and a written warning for January 5, 2011.

The record shows that, on January 14, 2011, there was a meeting with Yard Manager Gordy Bloom, Stewart Mike Stebbins and the Grievant regarding Blooms concerns about the Grievant's attendance. During this meeting, the Grievant inquired to the effect: "what do I need to do about this?" The Yard Manager's response was to the effect: "it's just like all the time, you've got to bring in a doctor's slip"⁵⁰. As noted

⁴⁸ Employer Exhibit #11.

⁴⁹ Employer Exhibit # 12.

⁵⁰ Testimony of Gordy Bloom.

earlier, it is the understanding coming out of this meeting that is central to the instant dispute.

The Yard Manager's position is that his response was in reference to future absences. Mike Stebbins' testified at the hearing, that he understood the Yard Manager's statement pertained to the Grievant's absence on December 21, 2010 and January 5, 2011. Under Yard Manager Bloom's position, that his statement pertained to future absences, the verbal and written warning for the December 21, 2010 and the January 5, 2011 absences stands. Under Mike Stebbins's position, the written warning for the Grievant's December 21, 2010 and January 5, 2011 absences would be excused, if the Grievant provided a doctor's verification for those absences.

Peg Sweeney, who investigated this matter, testified that both Gordy Bloom and Mike Stebbins said separately that they understood Bloom's remark to apply to future absences. Bloom's response was to the effect; "Yes, I told him he needed to bring a doctor's note, but it was for the future, if he wants to stay out of trouble in the future, just as I have told him consistently." According to Sweeney, Stebbins's response was to the effect; "Yes, I heard the conversation and agree that it was for future absences."⁵¹

Stebbins's earlier testimony differed from Sweeney's, with respect to the January 14, 2011 meeting, where he, Bloom and the Grievant were present. Stebbins's first recollection was that the Grievant inquired to the effect: "what he needed to do to take care of the write up." Stebbins's first recollection was that Bloom in effect responded; "you need to bring in a (doctor's) note to take care of it." Stebbins testified that when Sweeney asked him earlier about his understanding, he told her; "I didn't know what Gordy (Bloom) meant by it."⁵²

⁵¹ Testimony of Peg Sweeney.

⁵² Testimony of Michael Stebbins.

On cross-examination, Stebbins acknowledged his testimony was based on what he understood and that Bloom did not say; "Yes, to take care of that write-up." Stebbins further acknowledged that Bloom's statement was; "Just bring in a note" and did not include any reference to consideration of reversing prior discipline.⁵³

The record shows that the Grievant brought in a doctor's note on or about January 17, 2011. Bloom gave the note to Sweeney, who considered it untimely (after the fact) and unacceptable. Sweeney also noted it was from a different doctor than had provided a note for the Grievant's absence the previous day (December 20, 2010).⁵⁴

The record shows that after Sweeney rejected the Grievant's note of January 17, 2011 as untimely, neither she nor Bloom informed the Grievant it was unacceptable. The record also shows that the Grievant did not follow-up to find out if the note would remove the prior discipline.

Even though there was no communication between the Employer and the Grievant clarifying the effect of the January 17, 2011 doctor's note, the Grievant would have known, when receiving a second written warning on April 16, 2011, that the prior discipline had not been removed. This would also have been the case on July 28, 2011, when the Grievant received a final warning for being tardy on July 22, 2011.

When the Grievant was tardy again on July 22, 2011, Bloom gave him a final warning. Bloom stressed to the Grievant that, if he had something going on in his life or something that's scheduled, he needs to talk to a Human Resource person to figure what's going on. Bloom made it clear that the warning was very final and the Grievant should talk to somebody higher up than himself, if he had something personal going on. The Grievant then wanted Bloom to tell Human Resources that

⁵³ Testimony of Michael Stebbins.

⁵⁴ It is noted that the doctor's note the Grievance brought in on January 17, 2011 is not in evidence.

he was scheduled to start at 7:00 a.m., rather than his actual 6.00 a.m. starting time to avoid discipline, to which Bloom refused.⁵⁵

The Employer argues that, if the Grievant disagreed with his December 21, 2010 and January 5, 2011 absences not being excused based on the doctor's note of January 17, 2011, he had the right to file a grievance. The Employer argues that the Grievant would have know these absences were not excused when he received a second written warning in March 2011 and again when he received a final warning in July, 2011. The Employer further argues that the Grievant waived his right to grieve this matter by failing to file a timely grievance.

FINDINGS

Although the understandings of Gordy Bloom and Mike Stebbins, with respect to what was meant by Gordy Blooms July 14, 2011 statement, is accepted as being in good faith, the Arbitrator finds the preponderance of evidence supports Gordy Bloom's explanation. Both Sweeney and Bloom provided consistent testimony. On cross-examination, Stebbins recanted his testimony that Bloom had made specific reference to bringing in a note "to take care of it."

- The purpose of requiring a doctor's statement, when an employee is absent due to illness or injury, is not only to verify the employees unfitness to perform their duties on the day of absence, but to also insure that the employee is fit to resume their duties upon return to work.⁵⁶
- In the instant case, the Grievant claimed illness on December 21, 2010 and January 5, 2011; however, did not provide a doctor's note until January 17,

⁵⁵ Testimony of Gordy Bloom.

⁵⁶ Testimony of Peg Sweeney.

2011. It must be assumed that the Grievant did not have the doctor's note earlier or he would have provided it. This raises question of how would the doctor know, weeks later, that the Grievant was not fit to work on December 21, 2010 and January 5, 2011? Further, how would the Employer know if the Grievant was fit to resume his duties, if the doctor's slip was not presented at the time the Grievant returned to work?

- These questions are sufficiently obvious that Mike Stebbins and the Grievant should have recognized an untimely doctor's slip would not comply with the Attendance Policy and should have sought clarification from Bloom. In an ideal situation, it would have been best if Bloom had explained to the Grievant that he could not accept the untimely doctor's statement. However, under the circumstances, the Arbitrator finds the greater burden for clarification rested with the Grievant. As noted earlier, the Grievant would have known when disciplined in March 2011, and again in July 2011, that the December 21, 2010 and January 5, 2011 were not excused and could have filed a grievance at that time.

The Arbitrator finds the Employer's Attendance Policy to be based on a reasonable business purpose designed to enhance the viability of the Employer's business and the job security of employees.

The Arbitrator finds that the Grievant had sufficient opportunity and experience to understand his obligations under the Attendance Policy.

The Arbitrator finds that the evidence supports termination of the Grievant due to his violations of the Attendance Policy, up to and including termination. In fact the Grievant was allowed more violations than prescribed under the Policy. The

Greivant's three violation on March 30, March 31 and April 4, 2011 were treated as one.⁵⁷ The Policy specifically provides:

"Each day called in will count as a single 'call in,' example an employee calls in on a Tuesday and also the next day – this will count as two separate 'call ins.'"

Technically the Grievant's violation on July 22, 2011 was the fifth and called for termination at that time, but was treated as the fourth, inconsideration of the Grievant's longevity. Even if the Greivant's absences on December 21, 2010 and January 5, 2011 were excused, The Grievant still had at least five violations, which under the Attendance Policy called for his termination.

The Arbitrator finds that the Attendance Policy has been administered in a uniform and consistent manner, as evidenced by the instant grievance being the only grievance during the six-year existence of the Policy.

The Arbitrator finds that the preponderance of evidence supports the Employer's position that Gordy Bloom's statement, with respect to the January 17, 2011 doctor's slip, is not to be interpreted as excusing the Grievant's absences on December 21, 2010 and January 5, 2011. Further, the Grievant would have known these absences were not excused based on later discipline and could have filed a grievance.

The Union argues that, even if discipline may be warranted in the instant case, termination is overly severe and the Arbitrator should modify it. Even though the Arbitrator may agree, it is not within the Arbitrator's authority to impose his own sense of fairness over what the Parties have agreed upon and have mutually accepted through practice. In the instant case, to render a decision contrary to that prescribed by the CBA and the duly established Policy would exceed the Arbitrator's

⁵⁷ The Policy specically provides that: "Each day

authority. The Parties have agreed, as set forth in the CBA, Article 12, Section 1, that the Company has the sole right to establish attendance rules by which employees must abide:

“Section 1. The Company will have the sole right to establish, revise or add attendance, work, smoking, substance abuse, drug and alcohol testing, functional testing and safety rules by which all employees must abide. The Company will also have the right to establish or revise a disciplinary policy to address employee violations of these rules. The Company rules and/or disciplinary policy will become effective seven (7) days after the Union has been notified. [Emphasis Added]

Article 7, Section 12 of the CBA, sets forth the Arbitrator’s authority:

“Section 12. In rendering a decision the arbitrator shall be governed and limited by the provisions of this Agreement, applicable law and the expressed intent of the parties as set forth in this Agreement. The arbitrator shall have no power to add to, subtract from or modify any of the terms and provisions of this Agreement, and shall confine his judgment strictly to the facts submitted in the hearing, the evidence before him and the express terms and provisions of this Agreement. The arbitrator’s decision shall be final and binding upon the parties.” [Emphasis Added]

The evidence shows that the attendance policy has been duly established per the parties CBA and specifically provides attendance requirements, progressive discipline and termination for just cause when five (5) unexcused absences have occurred within a running twelve-month period. The Policy has been in existence for some six years and has been acceptable to both Parties. For the Arbitrator to award no discipline, or a different discipline than what the Policy prescribes, would be adding to, subtracting from or modifying what the Parties have mutually established.

AWARD

The Grievance is denied.

The Employer had just cause to terminate the Grievant as prescribed by the Attendance Policy.

CONCLUSION

The Parties are commended on the professional and through manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 20th day of April 2012 at Edina, Minnesota.

ROLLAND C. TOENGES, ARBITRATOR