

IN THE MATTER OF THE ARBITRATION BETWEEN

BAKERY, CONFECTIONARY,	)	FEDERAL MEDIATION AND
TOBACCO WORKERS AND GRAIN	)	CONCILIATION SERVICE
MILLERS UNION, LOCAL 369G,	)	CASE NO. 11-58270
	)	
	)	
	)	
Union,	)	
	)	
and	)	
	)	
THE SOUTHERN MINNESOTA	)	
BEEET SUGAR COOPERATIVE,	)	DECISION AND AWARD
	)	OF
Employer.	)	ARBITRATOR

APPEARANCES

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On December 13, 2011, in Willmar, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by issuing an oral warning to the grievant, Craig J. Gednalske.

The parties' post-hearing written arguments were received by the arbitrator on March 2, 2012.

#### FACTS

The Employer operates a sugar beet processing plant in Renville, Minnesota. The Union is the collective bargaining representative of substantially all of the non-supervisory employees of the Employer.

The grievant was employed by the Employer from 2001 till 2004; in 2007, he resumed that employment. During both periods of employment, he worked as an Electrician. In the spring of 2011, when the events occurred that gave rise to the grievance, he held the classification of Electrician, First Class.

The labor agreement in effect at the time of the events that gave rise to this grievance has a stated duration from July 23, 2007, through July 22, 2012. It recognizes the seasonal nature of the process of making sugar from beets. The time of year during which beets are processed into sugar is referred to as the "campaign" period. It runs from the start of harvest in the fall until the harvested beets have all been processed into sugar, in the late spring. Weather and the size of the harvest from year to year may vary the dates when the campaign begins and ends. The labor agreement refers to the time of the year when beets are not being processed into sugar as the "intercampaign."

During the campaign, the Employer operates the plant continuously, twenty-four hours per day and seven days per week, and most production and maintenance employees work twelve-

hour shifts -- the day shift, from 7:00 a.m. till 7:00 p.m, and the night shift from 7:00 p.m. till 7:00 a.m. During the campaign, the grievant and the other Electricians work twelve-hour shifts.

Preliminarily, I note the following. The present grievance challenges an oral warning issued to the grievant because he was absent from work during his scheduled twelve-hour shift that began at 7:00 p.m. on Tuesday, May 31, 2011, and ended the following morning at 7:00 a.m. on Wednesday, June 1, 2011 (hereafter, the "May 31 night shift"). The plant was still in continuous campaign operation, making sugar. Since 2004, the Union and the Employer have had in place a letter of understanding that establishes an Attendance Incentive Program, by which employees can obtain a bonus for good attendance through a one-year period beginning each July 23. The grievant has a good attendance record and a good discipline record, and it appears that he is not at risk of being discharged or of receiving other severe discipline in the future. If, however, the oral warning that is the subject of this grievance remains in force, the grievant's absence from work during the the May 31 night shift will constitute an "unexcused absence" and will result in a reduction of six hours' pay in his Attendance Incentive bonus for the year ending July 22, 2011.

The parties agree that Section 7.1 of their labor agreement requires the Employer to have just cause to discipline or discharge employees and that the issue presented by the grievance is whether the Employer had just cause to issue an

oral warning to the grievant because of his absence during the May 31 night shift.

The following circumstances led to the grievant's absence during the May 31 night shift. The grievant testified that he was not scheduled to work on Sunday and Monday, May 29 and May 30, 2011, and that, after these days off, his next scheduled shift was the May 31 night shift. On Monday, May 30, he drove from his home in Clarkfield, Minnesota, to Little Falls, Minnesota, where he stayed overnight. Little Falls is northeast of Renville, where the Employer's plant is located. The grievant testified that Little Falls is about a three-hour drive from the plant. Clarkfield, where the grievant lives, is about thirty-eight miles due west of the plant.

The grievant testified as follows. At about 11:00 a.m. on Tuesday, May 31, he tried to start his car so that he could begin the drive home from Little Falls. The car would not start, and he determined that, because its lights still turned on, the cause was a defective starter rather than a defective battery. He testified that he had never been to Little Falls before and that he did not know people in Little Falls who might be able to help him, but that he tried to find someone, apparently from the Renville-Clarkfield area, who would come to Little Falls to help him. On cross-examination, the grievant testified that he did not seek help from any Little Falls service garage that might have been able to tow his car in for service. He testified that he did not do so because he wanted to trailer his car back to his home.

At about 12:00 noon on May 31, the grievant telephoned the plant, and, following the usual procedure for reporting attendance problems, he left a message with the person answering the phone, explaining that he was in Little Falls and had a problem getting his car started. He also left a telephone number at which he could be called back.

At about 1:00 p.m. on May 31, Douglas G. Erickson, the Employer's Industrial Relations Manager, telephoned the grievant, and the grievant explained to Erickson that he was in Little Falls, unable to start his car or to get others to help him with the problem. Erickson testified that he told the grievant that he had tried to find another Electrician who could come in that evening to cover the grievant's May 31 night shift, but that he had been unable to do so. Erickson also testified that he told the grievant to "get in as soon as you can." The grievant testified, however, that Erickson told him, "I understand -- stuff happens." Erickson denied that he told the grievant he did not have to come to work. Erickson also testified that, after talking to the grievant, he asked Alan C. Grosklags, the Electrician who was then working on the twelve-hour May 31 day shift (from 7:00 a.m. till 7:00 p.m.) that he might have to continue working into the next shift because the grievant had called in with car trouble and might not be able to report for his shift.

The grievant testified that about 2:30 p.m., he was able to telephone his former wife. He asked her to drive from her residence in Minneota to his residence in Clarkfield, a distance

of about fifteen miles, and to hitch up the flat-bed trailer the grievant owned and drive it to Little Falls so that he could load his car onto the trailer and tow it back to his home.

The grievant testified that, at about 3:00 p.m., while he was waiting for his ex-wife, he received a telephone call from Grosklags, who said he knew of the grievant's situation and that he would have to work the grievant's shift. Grosklags told him "it's okay -- you don't have to come in -- don't worry about it."

The grievant's ex-wife arrived at Little Falls towing the flat-bed trailer at about 8:00 p.m. The grievant then used a hand winch to load his car onto the trailer. He left Little Falls at about 9:30 p.m. and arrived at his home in Clarkfield between 1:00 a.m. and 1:15 a.m. on June 1. The grievant testified that, though the plant is located en route from Little Falls to his home in Clarkfield -- about thirty-eight miles east of the plant -- he did not stop at the plant to work the remainder of his shift because he did not have his work clothes with him. The grievant testified that, when he arrived home, he thought it would not be worth changing into his work clothes and driving back to the plant because he would not arrive there until about 2:00 a.m. He had not slept since the morning.

When the grievant reported to work for his next shift, at 7:00 p.m. on Wednesday, June 1, he was told by Robert C. Fischer, Process Supervisor, that he had talked to Factory Manager Gary D. Cornelius, who decided that the grievant should receive an oral warning for his absence during the previous shift. Fischer gave the grievant a written notice of the oral warning. The next

day, the grievant discussed the discipline with Cornelius. Cornelius told the grievant that the Employer treats absences caused by car trouble as unexcused, in order to make it clear to employees that it is their responsibility to get to work. The grievant argued to Cornelius that he was being disciplined for being honest about having car trouble and that, if, instead, he had lied, saying that he was sick, he could have been excused under a policy that allows an absence for sickness to be covered by the retroactive use of a vacation day. (The labor agreement does not include a sick leave provision.)

Cornelius refused to rescind the oral warning, and on June 2, 2011, the Union grieved. The grievant testified that he did not know that, as witnesses for the Employer testified, absences caused by car trouble were almost always treated as unexcused.

Grosklags testified that he has been an Electrician at the plant for thirty-four years and that he has been a Union officer for many of those years. He confirmed the grievant's testimony that he had called the grievant during the afternoon of May 31 and told him not to worry about Grosklags' having to work two consecutive twelve-hour shifts. Grosklags did work the two consecutive twelve-hour shifts. Though Grosklags' regular schedule would have had him work the twelve-hour day shift that began at 7:00 a.m. and ended at 7:00 p.m. on June 1, the Employer was able to find a replacement for Grosklags for that shift, thus to avoid having Grosklags work three consecutive twelve-hour shifts.

The following is a summary of Cornelius' testimony. At the Union's request, the Employer has agreed to the use of a work schedule of twelve-hour shifts during the campaign. He noted, however, that the use of a schedule of twelve-hour shifts makes regular attendance especially important because it reduces the availability of other employees to fill in for those who are absent -- an effect the Union concedes is true.

Cornelius also testified that, because a twelve-hour schedule makes it difficult to fill missed shifts with off-duty employees, the Employer sometimes must fill the missed shift by asking the employee who is already working a twelve-hour shift to work a second consecutive twelve-hour shift. According to Cornelius, the Employer is concerned about working employees for twenty-four consecutive hours for several reasons --

1) because it is difficult for an employee to work twenty-four consecutive hours, 2) because working such long hours risks fatigue-caused injuries, 3) because having an employee work twenty-four consecutive hours may, as in the present case, require the Employer to find a replacement for the next twelve-hour shift in order to avoid having that employee work three consecutive twelve-hour shifts, and 4) because the Employer must pay overtime premiums to an employee who works over twelve hours -- time and one-half for the first four additional hours and double time for the next eight additional hours.

Cornelius testified that the Employer has adopted an "Employee Handbook," which sets forth unilaterally adopted work

rules, and he noted that the Handbook includes the following section, entitled, "Absences":

Your job is important, and regular attendance is an essential function of your job. You are expected to report to work on time and stay for the duration of your workday. Being absent or late -- especially when unplanned -- results in a loss of income to you, creates additional work for your fellow employees, and causes a disruption of the work. If for some valid reason you will be absent from work, notify the Cooperative at least one hour before the start of your shift or sooner if possible. In case of an absence or the possibility of being late, phone [number omitted], day or night, giving the reason for your absence. Remember an unexcused absence is a violation of the work rules and may be subject to discipline. . . .

Cornelius testified that the Attendance Incentive Program is intended to encourage regular attendance. It does excuse absences for which the labor agreement establishes a leave, whether paid or unpaid. The labor agreement does not provide sick leave, but an employee who is absent because of sickness, is permitted to use vacation to cover the absence, thus to avoid an unexcused absence that would reduce the employee's bonus under the Attendance Incentive Program. The Employer may, however, request that an absence for sickness be authenticated by a physician, and, if such authentication is not provided, the Employer may refuse to permit retroactive use of vacation to cover the absence.

#### DECISION

I address below the primary issue raised by the parties' arguments, but before doing so, I make the following rulings. I rule that, even though Cornelius made the decision to issue an oral warning to the grievant before Cornelius talked to him,

there was no prejudicial denial of due process -- because the grievant and the Union had a full opportunity to present argument and fact statements in support of the grievant during subsequent grievance processing. In addition, I find that during the telephone conversation between Erickson and the grievant on the afternoon of May 31, Erickson did not tell the grievant that he need not worry about coming to work that evening, and that, instead, Erickson told him to "get in as soon as you can."

The primary difference in the positions of the parties -- what appears to be driving their decision to incur the expense of arbitrating an oral warning -- is the following. Cornelius testified that "for the most part" the Employer does not excuse absences resulting from car trouble. He testified that during the campaign, when the plant must be operated continuously by employees who work twelve-hour shifts, regular attendance is especially important to operations. The Employer wants employees to make every effort to get to work and to know that each of them is responsible for arranging reliable transportation to work. Cornelius described, however, several past occurrences when an absence was excused because an emergency prevented transportation of an employee to work (not necessarily caused by a car's mechanical problem) -- a heavy snow storm that prevented driving and a fallen tree blocking a driveway. Cornelius testified, however, that during the intercampaign, when full attendance is not as important to operations, the Employer may use a less restric-

tive definition of what will be excused as a "transportation emergency."

The Employer argues that, as Cornelius testified, if an employee's claim of car trouble were allowed to excuse an absence, the Employer would have to examine each such claim on a case-by-case basis to determine whether the claim should justify excusing the absence. Cornelius testified that the result of such a policy would be a substantial increase in attendance problems, because, as I interpret his testimony, employees would become less diligent about finding ways to get to work despite having car trouble or other transportation problems.

The Union responds as follows. Though it concedes that an employer has the right to make reasonable work rules, it argues that any work rule must be applied reasonably, and that the Employer's blanket refusal to recognize car trouble as a basis for excusing an absence is an unreasonable application of its Handbook's rule covering Absences (hereafter, "the Absence Rule"). The Union argues that, in the present case, the Employer's refusal to treat the grievant's transportation problem as a "valid reason" for his absence was an unreasonable application of the Absence Rule.

The Union rejects the Employer's argument that, for operational reasons, it should not be burdened with case-by-case consideration of employees' claims that car trouble was a valid reason for an absence. The Union argues that the lack of such case-by-case consideration must, inevitably, result in the unreasonable applications of the rule -- because, without such

consideration, some absences caused by a "valid reason" will automatically become a basis for discipline and will be treated as unexcused.

The Union urges that, in the present case, the grievant's actions were appropriate and reasonable in the difficult circumstances in which he found himself -- noting 1) that he tried to start his car at 11:00 a.m. well in advance of the 7:00 p.m. start of his shift, 2) that he telephoned the plant at about noon to inform it of his possible absence, 3) that he found a reasonable solution when he was able to contact his ex-wife and get her agreement to drive his flat-bed trailer to Little Falls, so that he could tow his car home, 4) that he believed correctly from his conversation with Grosklags that his shift would be covered, 5) that he did not stop at the plant as he was returning home because he did not have his work clothes with him, and 6) that after he arrived home, he did not return to the plant to work the last five hours of his shift because of the length of the drive back to the plant and because he was tired.

The Employer argues that, notwithstanding the circumstances in which the grievant found himself at 11:00 a.m., eight hours before the start of his shift -- in Little Falls with a car that would not start -- he failed to make a reasonable effort to get to work. The Employer points out that the grievant could have called a service garage or a mechanic to help him repair or replace the car's starter, but that he made no effort to do so. The Employer argues that if he had taken that reasonable action, he could have resolved his problem in

time to get to work. In addition, the Employer argues that, if the grievant had asked his ex-wife to pick up his work clothes at his home rather than to hitch up his flat-bed trailer and tow it to Little Falls, she could have driven to Little Falls and returned him to the plant promptly, unencumbered by a loaded flat-bed trailer, so that he would then have missed little or none of his shift.

I resolve these arguments as follows. As the Union argues, work rules must be reasonable, and they must be applied reasonably. Any decision about what is reasonable must always be made in context. Whether a standard of reasonableness has been met is not a question that can be answered in the abstract; rather, the answer must depend upon relevant circumstances.

At least two circumstances -- the urgency that the Employer maintain continuous operations during the campaign and the difficulty in filling vacant twelve-hour shifts of absent employees -- justify a restrictive definition of what is a "valid reason" for absence. The Absence Rule informs employees that "your job is important, and regular attendance is an essential function of your job." Because, however, the rule implies that absences for a "valid reason" are to be excused, it would be an unreasonable application of the rule to treat all absences caused by transportation problems as unexcused. Therefore, a reasonable application of the rule requires that the Employer give some consideration to an employee's claim that car trouble or other transportation problem created a valid reason for being absent. Indeed, as I have noted above, though

the Employer rejects giving a case-by-case consideration to claims that car trouble should excuse an absence, the Employer has excused absences caused by transportation emergencies -- necessarily, after giving at least some case-by-case consideration to those cases.

In the present case, I rule that it is relevant to a reasonable application of the rule to consider 1) the events that led to the grievant's absence and 2) the Employer's need to apply a restrictive definition of what transportation problems will constitute a valid reason for absence, so that employees will maintain regular attendance during the campaign. The evidence shows that, though the grievant found himself in Little Falls with a difficult transportation problem to solve, he did not make a reasonable effort to resolve the problem in a way that would allow him to attend all or most of his shift. I agree with the Employer that his decision not to seek help from a service garage or a mechanic for the repair or replacement of the starter was not a reasonable response to his problem. The grievant conceded that he did not seek that help because he wanted to trailer his car home. Though he did not testify to the reason for that choice, presumably it was made to avoid the expense of a local repair.

I conclude that, because the grievant did not seek to repair his car in Little Falls, the evidence does not show that he had a valid reason for his failure to attend the May 31 night shift and that, accordingly, there was just cause to issue an oral warning for his absence.

AWARD

The grievance is denied.

May 28, 2012



Thomas P. Gallagher Arbitrator