

IN THE MATTER OF THE ARBITRATION BETWEEN

TEAMSTERS UNION,)	FEDERAL MEDIATION AND
LOCAL 120,)	CONCILIATION SERVICE
)	CASE NO. 11-57234
)	
)	
Union,)	
)	
)	
and)	
)	
ASSOCIATED MILK PRODUCERS, INC.,)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

For the Union:

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For the Employer:

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On June 29, 2012, 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 discharging the grievant, Rodolfo C. Garcia. The last of

written post-hearing argument was received by the arbitrator on July 24, 2012.

FACTS

The Employer (sometimes, "AMPI") is a dairy marketing cooperative with about 3,000 members whose farms are located in Wisconsin, Minnesota, Iowa, Nebraska, North Dakota and South Dakota. Each year it processes more than five billion pounds of milk produced by its members into dairy products at thirteen plants, including one located at Dawson, Minnesota (the "Dawson Plant"). There, the Employer produces cheese, cheese sauces, dried milk powder, whey and puddings -- processing about one million pounds of milk per day,

The Union is the collective bargaining representative of about 100 non-supervisory production and maintenance workers employed at the Dawson Plant.

The grievant was first employed by the Employer on February 17, 1996. For the first thirteen years of that employment, he worked as a Batch Blender on the night shift, from 9:00 p.m. till 7:00 a.m. In November of 2009, he successfully bid for a day-shift job as a Caser, working from 6:00 a.m. till 2:30 p.m. A Caser works as one of a small team in the Aseptic Department of the Dawson Plant. The Caser Team selects from a variety of labels, places them on appropriate cans of puddings and sauces, then packs the cans into cases and places pallets of cases into storage for later shipment.

On January 28, 2011, Richard Johnson, Superintendent of the Dawson Plant, issued a notice to the grievant, terminating

his employment. The notice of discharge states the following basis for his discharge:

[The grievant] has had several warnings about his attendance. During the last warning, he was told that the next time would result in termination. On 1/21/11, [he] called in at 7:01 am leaving a message that he overslept.

On February 2, 2011, the Union grieved the grievant's discharge, alleging that the Employer did not have just cause to discharge him and that other employees with similar attendance records had not been discharged, thus indicating that his discharge was based upon unfairly disparate treatment. The Union did not pursue the allegation of disparate treatment in presenting evidence or in argument.

The parties' arguments make the following provisions of their labor agreement relevant:

ARTICLE 4 - DISCHARGE

Section A. Discharge: The Employer may not discharge any employee except for just cause.

Section B. Progressive Discipline. The Employer will use progressive discipline in all cases where appropriate. . . . Any written warning will not be used by the Employer in a discharge case after twelve (12) months from the date of the warning except by previous agreement with the Union. . . .

ARTICLE 18 - COMPLETE AGREEMENT

This Agreement represents the complete agreement between the parties and shall supersede in their place all prior agreements and understandings, oral or written, expressed or implied, between the parties hereto and shall constitute the entire agreement between the parties. Past practices, procedures and understandings may be changed by management unless specifically prohibited by the provisions of this Agreement. This Agreement may be amended in any of its provisions by mutual agreement of

both parties. If agreements are made after the effective date of this Agreement, they must be in writing and signed by the Company and the Union as parties to this Agreement.

ARTICLE 19 - MANAGEMENT RIGHTS

Except as specifically limited by the express provisions of this Agreement, the management of the plant, including but not limited to, the right to hire, promote, demote, direct the working forces, schedule employees, discharge for cause, maintain discipline, require observance of reasonable plant rules and regulations, maintain efficiency of employees and to determine the equipment utilized, days and hours of production and the methods and type of services provided, shall be the sole and exclusive function of management.

Mark A. Tastad, Manager of the Employer's Dawson Division, testified as follows. The Employer uses the "Kronos" system to record the attendance of employees, requiring them to punch in and punch out on the Kronos time-clock. On December 22, 2000, Dawson Plant Superintendent Johnson sent a memorandum to department heads that described the Employer's attendance policy:

If an employee calls in to notify AMPI that he/she is going to be late or absent for any reason other than what is covered in the sick leave or funeral leave policy, this is an attendance problem. Examples of this are: car won't start, flat tires, car break down, unexcused sick leave, oversleeping, etc. Again, AMPI will not tolerate misuse of this policy. After three call-ins over a 365 day period, the first step of progressive discipline needs to be administered. Progressive disciplinary action needs to be followed according to the contract.

Tastad testified that, to correct poor attendance, the Employer followed this general statement that progressive discipline would be used, as required by the labor agreement. He also testified that, in 2009, the Employer adopted a more formal attendance policy -- one that he referred to as a "point system," a description that I interpret to be what is commonly

called a "no-fault" attendance policy. Tastad testified, however, that, after the Union grieved the use of the new attendance policy, the Employer withdrew it and returned to the use of the less formal system that was generally described in Johnson's memorandum of December 22, 2000. Thus, on January 22, 2010, Tastad wrote to Mike Klootwyk, the Union's Vice President, informing him that the Employer "will move forward using the attendance policy practices that were in place prior to the Point System policy that was posted on August 1, 2009" and that the Employer would continue to use coaching and progressive discipline to address attendance problems.

Tastad testified that on March 1, 2009, the Employer adopted the latest version of its Employee Handbook, which contains its work rules. Sections 104, 116, 118 and 504 of the Employee Handbook are cited by the parties as relevant here. He also testified that the grievant received a copy of the Employee Handbook on March 16, 2009.

Part of Section 104 of the Employee Handbook is set out below. Because Section 104 refers to Section 118, my description of Section 118 also appears below:

Section 104. Tardiness. Any employee who expects to report late for work on a work day must notify his/her supervisor, by phone, and advise them as to what time he/she expects to arrive. It is not acceptable to leave messages in voice mail. You must speak directly to your supervisor or the person in charge of your department. . . . Repeat episodes of tardiness will result in corrective action. One minute late is considered to be tardy. All incidents of absence and tardiness will fall under the company attendance policy and points will be assigned based on frequency and severity. Section 118 explains the attendance policy.

At Section 118 of the Employee Handbook, the only text is the following:

An official copy of the "Attendance Policy" is to follow. Please insert it here when it has been distributed.

As I interpret this statement in Section 118, it refers to the "point system" that was rescinded after the Union grieved it, as described by Tastad in his testimony.

Parts of Section 116 of the Employee Handbook are set out below:

Section 116. Disciplinary Procedures. [Section 116 begins with three paragraphs that relate to serious misconduct, such as theft, for which discharge without progressive discipline may be appropriate. There follows a paragraph relating to violation of safety procedures, after which the following paragraphs appear:]

There are other offenses, such as excessive tardiness, excessive incidents of calling in sick, or consistently asking to leave early, which constitute less serious offenses. These offenses will be monitored and dealt with at the department level, until at which time the supervisor needs assistance from human resources, the plant manager, and/or possibly the employee assistance group (EAP).

The company recognizes that certain types of misconduct are correctable, while others are not. Please refer to the AMPI corporate policy NCR 11. Our policy is to handle attendance and performance problems in such a way as to help the employee change the disruptive behavior. [Emphasis appears in the original.] As with serious offenses, management retains the absolute right to determine which part, or all, of the following disciplinary procedures will be followed in accordance with the facts and circumstances of each case. Following is an example of our constructive disciplinary action procedure:

First and Second Occurrence - counseling interview and verbal warning.

Third Occurrence - a documented written warning with a copy put in the personnel file. This could include a

referral to the EAP. Once a referral is made through the Employee Assistance Program, the employee is required to follow all EAP recommendations in order to satisfactorily correct the behavior.

Fourth Occurrence - depending on the facts and circumstances of each case: a documented written warning, an unpaid suspension (days may vary), discharge, and/or referral to EAP.

Subsequent Occurrences - Discharge/Termination.

. . . .

Section 504 of the Employee Handbook is entitled, "General Work Rules. It includes a list of twenty-one kinds of misconduct, two of which -- "Excessive absenteeism" and "Unauthorized absence from work station during the work day and failure to follow attendance policy" -- are relevant here.

Tastad also testified that it is important to the Plant's operations to have all employees report to work at the start of the shift. If an employee does not report on time, it may be necessary for the supervisor to make changes in personnel that reduce production. He also testified that the Employer, in its discipline for attendance problems, distinguishes between reporting for work fifteen or fewer minutes after the start of the shift, which the Employer refers to as a "tardy," and reporting for work more than fifteen minutes after the start of the shift, which the Employer refers to as a "late." The Employer does not discipline for "tardies" until an employee accumulates six such occurrences -- because being late for fifteen or fewer minutes causes less disruption to operations.

During the twelve months preceding the grievant's discharge, his record of attendance and the discipline resulting from that record was as follows:

Date	Minutes Late	Discipline
02/04/10	26	
03/12/10	30	
04/12/10	30	
06/09/10	35	Documented Verbal Warning
06/23/10	37	Written Warning
07/29/10	45	
08/05/10	18	Written Warning
09/13/10	25	1 Day Suspension
10/01/10	52	
11/08/10	52	3 Day Suspension
01/21/11	72	Discharge

Tastad also testified that during the year preceding the discharge, the grievant was "tardy" on five occasions -- by 12 minutes, by 11 minutes, by 14 minutes, by 10 minutes and by 4 minutes. He was given a "verbal warning" after the last of these (on December 22, 2010) -- presumably because at that time it was the sixth "tardy" within the previous twelve months.

On the last occurrence -- the one that led immediately to the grievant's discharge -- he punched in at 7:12 a.m., 72 minutes after the start of his shift. He told his supervisor that he had had trouble starting his car, though, in the call-in message, he said that he had overslept.

DECISION

The Employer argues that it had just cause to discharge the grievant after giving him, through warnings and other progressive discipline, many opportunities to correct his behavior. None of the discipline that preceded the discharge was grieved, and the grievant, in his testimony, conceded the accuracy of his attendance and discipline record, as established by the Employer's evidence.

John M. Fieber, the grievant's immediate supervisor, testified that he supervises about sixty employees in the Aseptic Department where the grievant worked after he bid on and was awarded the day-shift job as a Caser in November of 2009. Fieber testified that the grievant bid on that job even though the day-shift job paid less than his previous night-shift job. Fieber signed each notice of discipline the grievant received and discussed with him the cause of his being late; most occurrences were caused by oversleeping. The grievant lives about four miles from the Dawson Plant.

Fieber testified that when an employee is late, efficiency is reduced and the morale of co-employees suffers. During a discussion he had with the grievant in October of 2010, Fieber suggested that the grievant return to the night shift, but the grievant told him that he did not want to work nights any longer because he wanted to have more time to spend with his family.

On January 26, 2011 (five days after the late arrival of January 21, 2011, that led to the grievant's discharge and two days before he was discharged) the grievant wrote the following letter addressed to Tastad, Johnson and two other management employees:

I really appreciate all you guys have done for me! The whole Management Crew! I honestly don't know why I didn't take advantage of the options offered to me on our previous meetings. And don't know what to say but know that this matter of my attendance has been a huge problem to the Company and the Crew I work with. They shouldn't have to wonder if I'm here or not! I should be dependable without question! I spoke with Wade and he said he was willing to call me! Beside the fact of the matter I

shouldn't have let this issue come to this but here we are! And with all due respect I ask for one last attempt to correct my problem! Without sympathy but professionally for the Company and to gain the respect I've lost to my peers and management. Tho the last 14 plus years of nights did make an impact on my mental state of mind, but that is no excuse for excessive late/tardies that I have accumulated over the past year! I too would like to thank AMPI's management for also helping me thru my addiction of alcoholism. I needed the encouragement plus the support from you all and my family for the better! Thanks for taking time off your daily tasks to address my problem.

The grievant testified that he had worked on the night shift for thirteen years and that he bid for the day shift job because he wanted to spend time with his family. He also commented on the reference he made to his alcoholism in the letter that he sent to management. He testified that he has been "sober" for six years. The grievant testified that, as he had asked in the letter, he wanted a last chance to show that he can attend work on time.

The Union argues that, because the Employer's attendance policy is a work rule, it is subject to the requirements of the labor agreement and, therefore, that the Employer must show, not merely that its attendance policy was violated, but that there was just cause to discharge the grievant, as required by Article 4, Section A, of the labor agreement.

The Union also argues that the evidence does not show that the grievant was aware of the Employer's attendance policy and that, therefore, he should not be discharged, in the absence of notice that his late attendance could lead to his discharge.

In addition, the Union urges that the penalty of discharge is too severe under the circumstances of this case -- that the grievant was a long-term employee and that, having

worked on the night shift for thirteen years, he had some trouble adjusting to the morning start of his new day-shift job.

I make the following rulings. First, the attendance policy is a work rule, as the Union argues, and, therefore, it is subject to the requirement in Article 4, Section A, of the labor agreement that the Employer must show just cause for the grievant's discharge.

Second, it is an implied condition of any employment relationship that an employer is entitled, in exchange for the wages and benefits it provides, to have employees in attendance during working hours, so that the operations of the enterprise can proceed without unreasonable disruption. If an employee fails to fulfill that implied condition, the employer has just cause to discharge the employee after a reasonable effort to correct poor attendance. The Union argues that there is no evidence that the grievant received a copy of Johnson's letter of December 22, 2000, which stated in general terms the Employer's policy of using progressive discipline to correct poor attendance. I rule that during the course of progressive discipline for his poor attendance in the year before his discharge, the grievant obtained such knowledge. In addition, the grievant should be held to the knowledge implied by his employment relationship that he was obliged to attend work during the hours of his shift.

Third. I make the award described below for the following reasons. The grievant's record of poor attendance despite progressive discipline would ordinarily be sufficient to sustain the decision to discharge him. Two considerations,

however, justify a slight lessening of the discipline -- his long-term employment and the difficulty he had in adjusting to day-shift hours after many years on the night shift. The award provides the grievant with an opportunity to show, as he represented in his testimony and in his letter to management, that, if given a chance to return to work for the Employer, he will eliminate his poor attendance and will appear promptly for work as scheduled.

The award that the grievant be reinstated to his employment is made conditional. If the grievant fails to attend in accord with the conditions stated in the award, his reinstatement will end without the opportunity to grieve just cause issues. By force of this award, the parties will not be required to re-litigate just cause issues if the grievant does not abide by the conditions of his reinstatement.

AWARD

The grievance is sustained in part. For as long as the grievant abides by the conditions stated below, the Employer shall reinstate the grievant to his employment -- i.e., continue his employment, without loss of seniority, but without back pay and benefits.

During the first year after the grievant's reinstatement, he must punch in on the Kronos system at or before the start of his shift, with the following exceptions. During that first year, his reinstatement will not end on the first or second occasion that the grievant punches in "late" (sixteen minutes or more after the start of his shift), but his reinstatement will

end the third time during the year that he punches in "late" (sixteen minutes or more after the start of his shift). Each time the grievant punches in fifteen or fewer minutes after the start of his shift, he will be considered "tardy," and an accumulation of three occasions when he is "tardy" during that first year will be considered a chargeable "late" occasion.

During the second year after the grievant's reinstatement, he must punch in on the Kronos system at or before the start of his shift, with the following exceptions. During that second year, his reinstatement will not end on the first, second or third occasion that the grievant punches in "late" (sixteen minutes or more after the start of his shift), but his reinstatement will end the fourth time during the year that he punches in "late" (sixteen minutes or more after the start of his shift). Each time the grievant punches in fifteen or fewer minutes after the start of his shift, he will be considered "tardy," and an accumulation of three occasions when he is "tardy" during that second year will be considered a chargeable "late" occasion.

During the third year after the grievant's reinstatement, the conditional nature of his reinstatement will end, and he will be subject to the same progressive-discipline standards that the Employer follows for other employees under Article 4, Section A, of the labor agreement.

September 7, 2012


Thomas P. Gallagher, Arbitrator