

**In the Matter of Arbitration
Between**

Spartech Plastics, Inc)	FMCS Case No. 060104-52505-7
)	
“Employer”)	Hearing Site: Mankato, MN
)	
and)	Hearing Date: 10/23/06
)	
)	Brief Submission Date: 12/08/06
International Brotherhood of)	
Teamsters, Local Union No. 120)	Award Date: 01/20/07
)	
“Union”)	Arbitrator: Mario F. Bognanno
)	

JURISDICTION

Pursuant to relevant provisions in the parties’ 2005-2008 Collective Bargaining Agreement the Issue in this case was heard on October 23, 2006, in Mankato, Minnesota. Appearing through their designated representatives, the parties waived the Agreement’s article 10 requirement that a decision must be issued within fifteen (15) days of the hearing date. Further, the parties stipulated that the Issue is properly before the undersigned for a final and binding decision.

Both parties were given a full and fair opportunity to present their cases; witness testimony was sworn and cross-examined; and exhibits were introduced into the record. A verbatim transcription of the hearing was made. On or about December 8, 2006, the parties filed timely post-hearing briefs. Thereafter, the matter was taken under advisement.

Arbitrator-Intern Richard J. Dunn attended the hearing under the auspices of the State of Minnesota, Bureau of Mediation Services Arbitrator Training Program. In his capacity as Intern, Mr. Dunn prepared a mock draft of an award.

However, the instant Award was drafted and decided solely by the undersigned Arbitrator of record.

APPEARANCES

For the Employer:

Ms. Mary L. Hubacher, Attorney at Law

Mr. David Gorenc, Corporate Vice President

Mr. George Radcliff, III, Quality Assurance Manager

Ms. Marci Ferguson, Human Resources Manager

Mr. Bryan Haugen, Plant Manager

Mr. Jan Moen, Production Supervisor

For the Union:

Mr. Martin J. Costello, Attorney at Law

Mr. Dennis Penkaty, Grievant

Mr. Anthony Ray Schmitz, Union Steward

Mr. Tim Maxey, Business Agent

I. FACTS AND BACKGROUND

The International Brotherhood of Teamster, Local Union No. 120 represents approximately 70 employees who work in the Maintenance, Production and Warehouse Departments at Spartec Plastics, Inc. (Joint Exhibit 1 and Union Exhibits 1 and 3). In addition to operating international facilities, the Employer has operations in several U.S. states, including a facility in Mankato, MN. The Employer manufactures thermoplastic sheet and roll stock, polymeric compounds, and/or custom engineered plastic products. (Employer Exhibit

1).The Employer and Union are parties to a Collective Bargaining Agreement effective April 27, 2005 through April 27, 2008. (Joint Exhibit 1).The effective dates of their immediately preceding Agreement are April 27, 2002 through April 27, 2005. (Joint Exhibit 2).Mr. Dennis Pankaty, the Grievant, was hired by the Employer on October 14, 1980, to work as a Table Employee and later as an Operator. (Union Exhibits 3 and 9(B); and Tr. p. 83). On November 1, 2005, he was terminated for unacceptable "Attendance." (Union Exhibit 9(B)).

The Grievant was absent from work on December 22 and 23, 2004. These absences were unexcused and the Grievant did not "call in".¹ Accordingly, under article 15.4 of the 2002/2005 Collective Bargaining Agreement, the Grievant was assigned 8 points – 4 points for each day – under the controlling provisions of the parties' No Fault Seven (7) Point Absentee and Tardy Program. (Joint Exhibit 2).² According to this program, for accumulating 7 or more "no fault" points, an employee is subject to dismissal. However, in this case, on January 6, 2005, the Employer entered into a Last Chance Agreement with the Grievant. (Employer Exhibit 7).Therein, it states that "...any more infractions of any kind during the next 12 months ...will result in termination." Said agreement was signed by Ray Washington, a former Plant Manager, Jay Moen, Production Supervisor, Anthony Ray Schmitz, Union Steward and by the Grievant.

¹ Normally, the Grievant would request vacation days immediately preceding Christmas. But he inadvertently failed to request off December 22 and 23, 2004, when he submitted his 2004 vacation request on April 5, 2004. (Employer Exhibit 3). Moreover, he failed to correct this oversight on September 15, 2004, when he requested off the day before Thanksgiving. (Employer Exhibit 4). Believing that he had requested/received off December 22 and 23, 2004, it did not occur to the Grievant that he needed to call in these absences. (Tr. pp. 85 – 89).

² The Grievant already had one (1) point for an unexcused absence on November 10, 2004. (Employer Exhibit 12). Combined with the additional 8 points, he had a total of nine (9) accumulated no-fault points as of December 23rd.

On October 25, 2005, the Grievant clocked into work at 11:48 p.m., which was 48 minutes past his scheduled clock-in time. The Grievant had called in to advise the Employer that he would be late.³ Nevertheless, because he was “Tardy more than 5 minutes and less than 3 hours,” under the prevailing language of article 15.4 of the 2005/2008 Collective Bargaining Agreement, he was assessed ½ point, for an accumulated total of 8.5 points under the no-fault program. (Joint Exhibit 1 and Employer Exhibits 8 and 9). On November 1, 2005, the Grievant was dismissed for exceeding the point limit under the No Fault Seven (7) Point Absentee and Tardy Program and for violating the Last Chance Agreement. On November 1, 2005, the Union challenged the Employer’s dismissal of the Grievant by filing a grievance, requesting that he be immediately reinstated with back pay, overtime, benefits and seniority. (Union Exhibit 10). The Employer denied the grievance and the matter was subsequently appealed to arbitration, pursuant to article 9 of the Collective Bargaining Agreement. (Union Exhibit 11 and Joint Exhibit 2).

Relevant to the unfolding of the above-discussed facts, are events centered on the negotiations of the 2005/2008 Collective Bargaining Agreement. Among other things, both the Employer and Union proposed amending article 15.4 of the Agreement. (Employer Exhibit 2). The Union wanted to loosen the absence/tardy penalties by proposing to increase the number of accumulated points that could result in dismissal from 7-to-12. (Employer Exhibit 2).

³ Testimony and documented evidence support the conclusion that the Grievant was late for the start of his 11:00 p.m. shift only because his car battery was dead and he needed to call the auto service to jump the battery. Otherwise, he would have been at work, on time. Apparently, his wife left the car’s ignition in the on-position after having driven it, draining the battery’s energy. (Tr. pp. 99 – 101); Employer Exhibits 8 and 9).

The Employer bargained for the opposite outcome by proposing to tighten said penalties by (1) reducing the point threshold for dismissing employees from 7-to-4; (2) eliminating the “grace period” that allowed an employee to be up to 5 minutes late for work without being considered tardy; (3) charging ½ point for being tardy by more than 5 minutes but less than 3 hours, as opposed to being tardy by more than 5 minutes but less than 6 hours; (4) charging 1 point for leaving work after having worked less than 3 hours, as opposed to leaving work after having worked less than 6 hours; (5) charge ½ point for leaving work after having worked more than 3 hours, as opposed to leaving work after having worked more than 6 hours; (6) changing the “Absent with no call” language to “Absent with no call prior to the beginning of the shift” and charging the penalty point count from 1-to-3 points; (7) amending articles 15.4a and 15.4b to reflect the intent of items (2), (3) and (4) above, and add article 15.4i that would read: “Off going employees must stay at work until the oncoming employees arrive”. In addition, the Employer wanted incidences of paid sick leave folded into the no-fault program.

After several bargaining rounds, the parties ultimately agreed on a new No Fault Seven (7) Point Absentee and Tardy Program, which including special provisions for treating sick leave. (Employer Exhibit 2). Moreover, the fact that the Program’s title remained the same under both the 2002/2005 and 2005/2008 Collective Bargaining Agreements suggests that the parties ultimately agreed to retain the 7-point threshold for dismissals. For comparison sake, both the new

and old language of article 15.4 is quoted below, obviating the need to describe in detail the changes that were negotiated.

Article 31 of the Collective Bargaining Agreement allows qualified employees to earn 64 hours of paid sick leave per year, which is credited to the employee's sick leave bank on December 1 of each year. Under the terms of the 2002/2005 Agreement, the employee may bank a maximum of 240 accumulated sick leave hours. Further, paid sick days were not considered to be an unexcused absence under the no-fault program, which exacerbated the attendance problem, at least from the Employer's perspective. (Joint Exhibit 2). The 2005/2008 Collective Bargaining Agreement changed the relationship between the no-fault program's unexcused absences and paid sick leave. Generally speaking, during the 12-month period beginning on December 1 of each year, the new program excused the first 3 incidents of absence that are covered by paid sick leave. Thereafter, however, any further paid sick leave absences are subject to penalty under the no-fault program. The parties verbally agreed to implement the program retroactively to December 1, 2004, rather than on April 27, 2005, the effective date of the 2005/2008 Agreement.

There are two (2) overarching and contested aspects to this case. First, the fact that the parties' 2005/2008 Agreement commenced on April 27, 2005, while the implementation of the new no-fault program was made retroactive to December 1, 2004, created a coordination/equity problem. Namely, some employees may have already used paid sick leave to cover unexcused absences by April 27th, which was permissible under the 2002/2005 Agreement, while other

employees may not have used any of their paid sick leave. To correct this imbalance, Employer witnesses David Gorenc, Corporate Vice President, testified that when the parties verbally agreed to implement the no-fault program on December 1, 2004, they also verbally agreed that (1) employees who experienced more than 3 paid sick leave incidents during this 5-month period, would not be charged points for the pre-April 27, 2005 overage but would be charged points for any subsequent and chargeable⁴ absences thereafter, including absences covered by paid sick leave; and (2) employees with less than 3 paid sick leave incidents during this 5-month period, would be permitted to use the shortfall to cover post-April 27, 2005 absences as paid sick leave incidents without being charged points under the no-fault program.⁵ (Tr. pp. 23 –25).

However, Union witnesses Tim Maxey's, Business Agent, and Mr. Schmitz's recollection of this verbal agreement differed from Mr. Gorenc's in one critical respect. The former testified that the parties also agreed that the first 3 incidents of any chargeable absence that occurred between December 1, 2004 and April 27, 2005, would not be assessed points under the no-fault program. (Tr. pp. 113 - 114 and Tr. pp.132 – 139). Mr. Gorenc repeatedly denied any such agreement. (Tr. pp.26 – 29). Clearly, under the Union's version of the parties' verbal agreement, the 8 points the Grievant was charged for unexcused absences on December 23 and 24, 2004, should have been waived; and, if they

⁴ In addition to the first 3 incidents of paid sick leave absences, approved vacation days and FMLA days are exempt from the no-fault program under the 2005/2008 Agreement.

⁵ After the exhaustion of the referenced "shortfall", program points would be assigned for any subsequent (post-April 27, 2005) and chargeable absence, including absences covered by paid sick leave. Under this scenario, it is implied that employees with exactly 3 incidences of absences covered by paid sick leave would not be charged program points for these absences, but points would be assigned for any subsequent and chargeable absence.

had been the Union notes that the Grievant's October 25, 2005, episode of tardiness that resulted in ½ point would have been insufficient to warrant termination under article 15.4 of the Collective Bargaining Agreement.

Second, the Union argues that the Last Chance Agreement is invalid and, therefore, cannot support the Grievant's dismissal. According to the Union, under the facts of this case, the only person with agency authority under article 2 of the Collective Bargaining Agreement – Union Recognition – was Mr. Maxey and he was neither a party to administration of the Last Chance Agreement, nor was a copy of same given to him. The Company demurs, arguing that the Last Chance Agreement fully explicates its terms/duration; both the Grievant and Mr. Schmitz signed it; and, by contract-authorized authority, Mr. Schmitz was an appropriate Union representative.

II. STATEMENT OF THE ISSUE

Was the Grievant's dismissal in violation of article 15.4 of the Collective Bargaining Agreement and/or the Last Chance Agreement? If so, what is an appropriate remedy?

III. RELEVANT CONTRACT PROVISIONS/LAST CHANCE AGREEMENT

2005 – 2008 Collective Bargaining Agreement

Article 15 Discharge, Suspension or Reprimand

Section 15.1 The Employer shall not discharge or suspend any employee without just cause.

Section 15.2 In the event a written reprimand is to be entered in an employee's record, the employee and Job Steward will be notified and a copy of the reprimand will be furnished to the employee involved with a copy to the Union.

Section 15.3 After twelve (12) months from the date of an infraction, written reprimands will be removed from an employee's record.

Section 15.4 A standard "No-fault Seven (7) Point Absentee and Tardy Program" shall apply as follows:

<u>Area</u>	<u>Points</u>
1. Absent and Unexcused with call-in prior to beginning a shift	1 point
2. Absent with no call	4 points
3. Tardy less than 5 minutes	0 points
4. Tardy more than 5 minutes and less than 3 hours	½ point
5. Leave early with less than nine (9) hours worked	1 point
6. Leave early with more than nine (9) hours worked	½ point
7. Leave work without permission	5 points
8. Failure to punch in or out	½ point
9. Absent with call-in after the beginning of the shift	1½ points
a. "Tardy more than five (5) minutes" means at work on or before three (3) hours.	
b. "Absent" means at work after three (3) hours.	
c. Employees will be given a written account when receiving a point. Both the supervisor and the employee will initial the account.	
d. Employees will serve a three (3) day suspension when a sixth (6 th) point is given.	
e. Employees will serve only one (1) suspension before a discharge, unless the employee reaches four (4) points after serving the suspension.	
f. Employees will be discharged when they receive seven (7) point or more.	
g. Points shall be deducted one (1) year from occurrence.	
h. FMLA does not count as an unexcused absence.	
i. Off-going employees must stay at work until the oncoming employees arrives for a period not to exceed two hours.	
j. After December 1 of each year, the first three absence incidents will not be penalized with absentee points if all absent hours are paid as available sick hours. An incident is a continuous period of absence for the same reason provided that doctor's note indicating that the absence was for a medical reason if the absence is three days or more. If sick hours are exhausted during one of these three non-penalized absences any remaining non-penalized incidents are forfeited. During any incident in which sick hours are exhausted any remaining time spent away from work during that incident will be unpaid but will continue to be exempt from absentee points provided that a doctor's note is	

provided if the absence extends to three days or more. After the non-penalized incidents are exhausted further absences are subject to the absentee policy. Any incident which is approved as FMLA will not count as a non-penalized incident. Unused non-penalized incidents may not be "carried over" to the following year.

- k. A tardy may be regarded as one of the three non-penalized incidents at the employee's choice as long as the employee has sick hours to cover the missed time and chooses to be paid with those sick hours. Otherwise, the tardy will be penalized with ½ point and the incident will not count as one of the three allowable non-penalized incidents.
- l. After the three non-penalized incidents are exhausted, multiple-day absences will count as one absence incident as long as a doctor's slip is promptly provided showing all the days of absence are due to a medical reason. If paid sick time is not used for any portion of the absence when a doctor's slip is required for the second day and beyond. If paid sick time is used for only the first day of a multiple day absence then a doctor's slip is also required for the second day and beyond. If paid sick time is used for any portion of the second day of a multiple day absence (assuming that paid sick time is used for the entire first day of such absence) then a doctor's slip must only be provided for the third day and beyond. In any of these cases, if a doctor's slip is not provided, each day counts as a separate incident.

Section 15.5 All write-ups, including absentee violations must be issued within ten business days of the infraction.

(Joint Exhibit 1).

2002 – 2005 Collective Bargaining Agreement

Article 15 Discharge, Suspension or Reprimand

Section 15.1 The Employer shall not discharge or suspend any employee without just cause.

Section 15.2 In the event a written reprimand is to be entered in an employee's record, the employee and Job Steward will be notified and a copy of the reprimand will be furnished to the employee involved with a copy to the Union.

Section 15.3 After twelve (12) months from the date of an infraction, written reprimands will be removed from an employee's record.

Section 15.4 A standard “No-fault Seven (7) Point Absentee and Tardy Program” shall apply as follows:

<u>Area</u>	<u>Points</u>
1. Absent and Unexcused	1 point
2. Absent and no call	4 points
3. Tardy less than 5 minutes	0 point
4. Tardy more than 5 minutes	¼ point
5. Leave early with less than six (6) hours worked	1 point
6. Leave early with more than six (6) hours worked	¼ point
7. Leave work without permission	5 points
8. Failure to punch in or out	½ point
a. “Tardy” more than five (5) minutes” means at work on or before six (6) hours.	
b. “Absent” means at work after six (6) hours.	
c. Employees will be given a written account when receiving a point. Both the Supervisor and the employee will initial the account.	
d. Employee will serve a three (3) day suspension when a sixth (6 th) point is given.	
e. Employees will serve only one (1) suspension before a discharge, unless the employee reaches four (4) points after serving the suspension.	
f. Employees will be discharged when they receive seven (7) points or more.	
g. Point shall be deducted one(1) year from occurrence.	
h. FMLA and paid sick days do not count as unexcused absences unless the company requests a doctor’s note for the third consecutive sick day and you do not bring one in. In that case you will be assessed 1 point for the third consecutive day only.	

Section 15.5 All write-ups, including absentee violations must be issued within ten (10) business days of the infraction.

(Joint Exhibit 2).

January 1, 2005, Last Chance Agreement for Dennis Penkaty

On December 22nd & December 23rd, 2004, Dennis failed to call into work resulting in a No Call No Show which according to the Union Contract Article 15 an “absent with no call” is an automatic four (4) points for each day missed. This results in Dennis receiving on this day a total of nine (9) points. Even though Spartech Plastics has the right to terminate Dennis, we decided to give him a last chance letter.

Dennis has agreed to the nine (9) points but waived termination and any more infractions of any kind during the next 12 months beginning as of this day January 6th, 2005, will result in termination. This is to be considered a one-time event and not a precedent.

This letter is to serve as the last chance letter signed by all parties listed above (sic) and is acknowledgement of agreement.

/signatures; date/

(Employer Exhibit 7).

IV. EMPLOYER'S POSITION

Initially, the Employer argues that the Letter of Understanding is a valid and enforceable contract that it was fully and fairly aired among the concerned parties and signed by the Grievant and Mr. Schmitz. In addition, the Employer contends that Mr. Schmitz is a sophisticated Union representative, with ten (10) years of experience as a Job Steward and a member of the Union's bargaining committee, who was acting within his authority under article 6.1 of the Collective Bargaining Agreement – Job Stewards⁶ – and consistent with the Steward's role under the parties' grievance procedure.

Further, citing arbitral precedence, the Employer contends that the Arbitrator's role in this matter is limited to establishing whether the Grievant violated the terms of the Last Chance Agreement and, if so, to enforce said Agreement. Arguing consideration, the Employer points out that it gave up the contractual right to immediately terminate the Grievant in exchange for an agreement by the Grievant to abide by the Letter of Understanding's terms, which set forth specific conditions to be met for a specific time period. The

⁶ Article 6.1 states that the duties of a Job Steward entails, "[T]he investigation and presentation of grievances in accordance with the provisions of the Collective Bargaining Agreement." (Joint Exhibit 1).

Employer notes that on October 25, 2005, the Grievant was tardy from work in violation of article 15.4, part 4, of the no-fault program, and that per the Last Chance Agreement the Grievant specifically agreed that "...any more infractions of any kind during the next 12 months beginning on this day January 6, 2005, will result in termination." (Employer Exhibit 7).

Still further, the Employer argues that even in the absence of the Letter of Understanding, the Grievant's termination must stand because it is undisputed that he had accumulated 9 points of unexcused and countable absences under the parties' no-fault program as of December 23, 2004, and then on October 25, 2005, he was given another ½ point for being tardy. Noting that by October 25, 2005, one (1) of the Grievant's original 9 points had lapsed, the Employer observes that by that date the Grievant had a total of 8½ points, which clearly exceeds the no-fault program's 7-point threshold for dismissal. Inasmuch as article 15.4, part g, of the negotiated no-fault program prescribes that "Employees will be discharged when they receive seven (7) points or more", the Employer urges that the Arbitrator must uphold this agreement as written. (Joint Exhibit 1).

Next, the Employer objects to the Union's contention that the standards for "just cause" must apply in this case. Such a contention, the Company argues, contradicts the clear language of article 15.4, which states that "Employees will be discharged when they receive seven (7) points or more". (Joint Exhibit 1). The Employer notes that specific language like this subordinates the more general "just cause" language.

Finally, the Employer contends that while it proved by sufficient evidence that the alleged violations of the No Fault Seven (7) Point Absentee and Tardy Program and Last Chance Agreement did occur, the Union's defenses to the contrary must fail for lack of sufficient proof. For these reasons the Employer urges that the grievance be denied.

V. UNION'S POSITION

The Union initially claims that the Grievant's dismissal lacks "just cause" because it was not adequately preceded by warning or corrective measures and it failed to give consideration to the Grievant's past record and his long tenure with the Employer. In addition, citing arbitration precedence, the Union argues that Grievant's dismissal cannot be determined on quantitative (i.e., "points") grounds alone; that it is also essential that the Arbitrator weight the causal facts and circumstances of the alleged violations; and that in this case the December 22 and 23, 2004, absences were inadvertent and unintentional, and the October 25, 2005, tardiness episode was of minor consequence, reasonably explicated and the Grievant made a good-faith effort to report to work on time. Moreover, the Union avers, the no-fault program's rules and penalties are not reasonable and, for this reason, the Program cannot be treated as a strict substitute for "just cause".

Further, the Union notes that the no-fault program is aimed at employees who are habitually absent and tardy, and not at employees like the Grievant who are reliably at work and punctual. Moreover, the Union asserts that the Grievant's termination is not supported by the language in the No Fault Seven (7) Point

Absentee and Tardy Program because, by agreement with the Employer, his first 3 incidents of absence should have been waived on the date the new program was implemented. Fidelity to this implementation agreement, the Union argues, implies that the Grievant would have had only 5½ absence points under the program on October 25, 2005, and, thus, he would and should not have been terminated.

Next, Union claims that the Last Chance Agreement is unenforceable. The Union argues that article 2 of the Collective Bargaining Agreement – Union Recognition⁷ – provided that the “Union” is the sole bargaining agent for the employees and, therefore, precludes the Employer from entering into individualized agreements with employees, without Union notification and concurrence. The Union points out that Mr. Maxey was neither notified of nor sent a copy of the Last Chance Agreement. Continuing, the Union argues that when the Last Chance Agreement was issued, bargaining unit employees could use paid sick days to avoid receiving points for an unexcused absence and for being tardy, and the Grievant had every reason to believe that this policy would continue when he signed the Last Chance Agreement. As the Union’s spokesperson at the 2005/2008 negotiating table, Mr. Maxey knew that this policy would change but he not given the opportunity to provide the Grievant protective representation when the Last Chance Agreement was signed. Further, absent any knowledge of the existence of the Last Chance Agreement, Mr.

⁷ In relevant part, article 2 provides, “The Employer recognizes the Union as the sole collective bargaining agent for the employees ...for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other terms and conditions of employment. (Joint Exhibit 1).

Maxey was also ill prepared to provide the Grievant protective representation during the 2005/2008 renegotiation of article 15.4 of the Collective Bargaining Agreement.

Finally, the Union contends that the facts of this case simply cannot support the Employer's decision to terminate the Grievant's employment: this penalty is too severe. For this reason and the other reasons discussed, the Union urges that the grievance be sustained.

VI. OPINION

The post-hearing briefs filed by the parties' legal representatives present well-researched, well-crafted and persuasive arguments, all of which the undersigned has given serious consideration. However, in the end, the undersigned's review of the record evidence leads him down a different analytical path than that taken by either of the parties' advocates.

We begin this analysis with a review of the central facts of the case and subsequent developments. First, prior to the commencement of 2005/2008 negotiations, the parties were aware of the fact that excessive absenteeism continued to create operating problems at the Mankato facility. Thus, the parties spent considerable time negotiating numerous amendments to the No-Fault Seven (7) Point Absentee and Tardy Program, agreeing to a significantly tighter no-fault program and to newly limit the number of absences covered by paid sick leave that would be exempt from the program. Second, the parties agreed to implement the revised no-fault program on December 1, 2004, and not to retroactively assign points for sick leave use that occurred between the date of

implementation and April 27, 2005, even if the number of paid sick leave absences exceeded three (3). Third, the Employer strongly contests the Union's testimony that the parties also agreed to expunge points from employee files for the first 3 no-fault attendance violations to have occurred during this timeframe. Finally, the Grievant was indeed a no-call, no-show on December 22 and 23, 2004, and he was tardy on October 25, 2005, arriving at work 48 minutes late.

Next, as a result of his December 2004 unexcused absences, the Employer considered terminating the Grievant's employment, but instead gave him an ultimatum, namely: either accept the terms of the Last Chance Agreement or be dismissed. Article 15.4, part f, provides that "[E]mployees will be discharged when they receive seven (7) points or more". (Joint Exhibit 2). This language seems to suggest that the Employer was within its right to discharge or more specifically, to consider discharging the Grievant. After all, the Grievant had accumulated 9 no-fault attendance points. The Union disagrees, however. Pointing to the "just cause" language in article 15.1, namely, that "[T]he Employer shall not discharge or suspend any employee without just cause", the Union argues that the Employer cannot apply article 15.4, the No Fault Seven (7) Point Absentee and Tardy Program, as if it is somehow exempt from the application of "just cause" standards like those outlined by professor Carroll R. Daugherty in *Enterprise Wire Co.*, 46 LA 359 (1966). The Union summarizes its position by simply stating that the no-fault program is not a "substitute" for just cause.

However, this proposition is an overstatement. While it is true that the standards of "just cause" generally apply in matters of discipline and discharge,

and oftentimes to attendance-related disciplinary situations where the attendance policy in question was unilaterally promulgated by the employer, it does not apply in this and similar instances. In this case, the Union and Employer did in fact negotiate a “substitute” set of disciplinary standards with regard to attendance and tardiness misconduct. As previously quoted in its entirety, article 15.4 is a lengthy and quite specific statement as to the type of unexcused absence and tardy events covered by the no-fault program, the number of attendance points assigned for each type of events, and the accumulated point threshold that may result in an employee’s dismissal. Therefore, under the specific language of the instant Agreement it is clear that whenever the misconduct under consideration has to do with (1) attendance at work article, 15.4 applies, and (2) all other types of misconduct, article 15.1 applies. Additionally, the parties to this proceeding know that when arbitrators are forced to choose between broad language like the “just cause” provision in article 15.1, and specific language like the “no-fault” program in article 15.4, the latter usually controls, as it does in this case. To summarize, the terms of article 15.4, part f, were jointly negotiated and parties must be held to their bargain, which, in this case, is that “Employees will be discharged when they receive seven (7) points or more.”

Further, it is important to address another point at odds with the Union’s contentions in this case. The attendance/tardy program described in article 15.4 is a no-fault policy, which means that points are applied for absences and for episodes of tardiness, regardless of their causal circumstances and the employee’s work record and tenure, all of which would be relevant considerations

under a “just cause” review. In this case, the parties negotiated to eliminate the “just cause” benefit in regard to disciplinary action for attendance and tardiness. The undersigned would be faithless to his duty as the reader of the Collective Bargaining Agreement if he was to ignore the “quantitative” aspects of article 15.4.

Nevertheless, the record evidence does imply that the Employer did consider the circumstances resulting in the Grievant’s December 2004 absences, including his tenure and favorable work record, because the Employer did not summarily dismiss the Grievant on January 6, 2005: the Employer’s determination was not based solely on the numeric aspects of article 15.4, part f. Instead, the Grievant was presented with the above-noted ultimatum. The Grievant chose to accept the Last Chance Agreement, which indicated that he would be discharged for “... any more infractions of any kind...” (Employer Exhibit 7; emphasis added). And in doing so, the Grievant forfeited his article 15.2 right not to be discharged “...without just cause.” (Joint Exhibits 1 and 2). To surrender the contract’s “just cause” rights is a benefit lost. Thus, the administration of the Last Chance Agreement is a form of discipline, the Employer’s argument to the contrary notwithstanding.

The Grievant signed the Last Chance Agreement and so did Job Steward Schmitz. Both men acquiesced to its’ terms, which explains why neither filed a grievance over its issuance. Both men considered the alternative, namely, the Grievant’s dismissal, to be more odious, and neither man proposed alternative options. Nevertheless, the Union challenges the validity of the Last Chance

Agreement, arguing in essence that Mr. Maxey should have been a party this transaction because he, not Mr. Schmitz, is the Union's authorized bargaining agent in such matters. The Employer disagrees with the Union on this point and, in the opinion of the undersigned, the Employer is correct. Article 6 – Job Stewards – and article 9 – Grievance Procedure – specifically identify the “Job Steward” as the Union's (1) authorized representative in matters relevant to “[T]he investigation and presentation of grievances...” and (2) spokesperson at step 1 and step 2 of the grievance procedure, respectively. If Mr. Schmitz is properly authorized under these articles of the Collective Bargaining Agreement to “settle” grievances, he is certainly authorized to do what he can to prevent the prospective occurrence of same. The undersigned concludes that the Last Chance Agreement is a valid instrument.

At this point in the analysis, it is also important to clarify that just as the No Fault Seven (7) Point Absentee and Tardy Program embodies disciplinary standards for attendance-related misconduct that are different from the “just cause” standards, which in this case, apply to all other types of misconduct, the same is true with respect to the Last Chance Agreement. The latter does not strictly fall under the umbrella of “just cause”. As in this case, a Last Chance Agreement is usually thought of as a special increment to “progressive discipline” where all concerned parties agree that any further misconduct by an employee will not be tolerated, and upon its execution the usual just cause standards do not apply.⁸ Typically, the only standard the arbitrator considers is whether the

⁸Adolph M. Koven and Susan L. Smith, *Just Cause: The Seven Tests*. Washington, D.C.: Bureau of National Affairs, Inc., 2nd ed., 1992, pp. 64 – 65.

employee in question is shown to be guilty of misconduct under the last-chance arrangement.

For being 48 minutes tardy on October 25, 2005, the Grievant was assigned ½ point under the no-fault program. In turn, the Employer dismissed the Grievant for violating article 15.4's 7-point dismissal threshold, and because of the ½ point "infraction" the Employer dismissed the Grievant for violating the Last Chance Agreement. For two (2) reasons, the undersigned concludes that the Grievant violated neither the Collective Bargaining Agreement nor the Last Chance Agreement.⁹

First, while the undersigned dismissed the Union's argument that the Last Chance Agreement is invalid, he does find merit in the argument that if Mr. Maxey had been sent a copy of the Last Chance Agreement, he would have addressed the Grievant's case when the 2005/2008 no-fault program was being negotiated. Mr. Maxey credibly testified to the following:

Q. Were you aware of the last chance agreement?

A. No.

Q. How does that affect your negotiations of this contract that the Company had not sent that (sic) to you and you weren't aware of the situation that that would put Dennis in?

A. Well, if I had had any knowledge of the last chance agreement, I probably would have negotiated something around that last chance because I understand what a predicament that would have put Dennis in, because now all of a sudden he is on a last chance agreement, and now he can't take sick days without being fired, according to that last chance agreement anyhow. I never would have agreed to allow the employer to give up the sick days if I had known that that last chance agreement was in existence.

⁹ As will become apparent, it is not necessary to resolve whether or not the parties agreed to waive the first 3 incidents of absence between December 1, 2004 and April 27, 2005.

(Tr. 143 – 144).

From the Grievant's point of view, in January 2005, the Last Chance Agreement was a low risk proposition as related to attendance-based misconduct because paid sick leave was being used to absolve absence or tardiness events under the no-fault program. This is particularly the case since nothing in the record suggests that the Grievant has a problem with attendance and tardiness. In fact, the Grievant testified that he believed that this policy would continue. (Tr. p. 93). Of course, whether the Employer would have agreed to "red circled" the Grievant's case during 2005/2008 negotiations, at the Union's insistence, is unknown. What is known, however, is that the Last Chance Agreement is a form of discipline, and that article 15.2 of the Collective Bargaining Agreement requires that the Employer should have sent a copy of the Last Chance Agreement to Mr. Maxey.¹⁰ Upon its receipt, he may have filed a "union grievance", challenging the Letter of Understanding in January 2005, or he might have taken it up during the renegotiation of article 15.4, as he said he would. Regardless, he and the Grievant should have been copied and neither was. Indeed, Mr. Maxey testified that he otherwise routinely received documents like this. (Tr. p. 129). This violation of article 15.2 cannot be treated as merely a clerical error of academic consequence. Rather, this Employer violation may have worked to the Grievant's detriment, having the effect of compromising the standing of the Employer's decision to dismiss the Grievant.

¹⁰ Article 15.2 states, "In the event a written reprimand is to be entered in an employee's record...a copy...will be furnished to the employee involved with a copy to the Union." (Joint Exhibit 2).

Second, although disciplinary actions under article 15.4 of the Collective Bargaining Agreement and Last Chance Agreement are not subject to the usual tests of “just cause”, this does not mean that the Grievant’s tardiness on October 25, 2005, automatically warranted perfunctory dismissal. As noted earlier in this analysis, the Employer exercised discretion when it chose not to dismiss the Grievant under article 15.4, part f, on January 6, 2004. For whatever reason, Mr. Washington found “wiggle” room in that article. The same latitude exists under the Last Chance Agreement. Being 48 minute tardy is such a minor offense that it cannot be considered an “infraction” as that word is used in the Last Chance Agreement. Certainly, it is of far less consequence than the Grievant’s no-call, no-show absences on December 22nd and 23rd, 2004 that resulted in the Last Chance Agreement, not in his dismissal. Additionally, the record does not suggest that the Grievant was involved in any misconduct of any kind between January 6, 2005 and October 25, 2005, and that only nine (9) weeks remained until the Last Chance Agreement expired. Whether Mr. Washington intended his use of the word “infraction” to include such a matter of inconsequence is unknown. But the undersigned doubts it and concludes that he did not.

The point is that although the standards of “just cause” are not applicable under the terms of the no-fault attendance programs and Last Chance Agreements, the use of managerial common sense and proportionately remain pertinent. Special agreements like the no-fault attendance policy and Last Chance Agreement have their limits, particularly when the misconduct in question is clearly *de minimus*.

VII. AWARD

For the reasons discussed above, the Employer's dismissal of the Grievant is a violation of article 15.4 of the Collective Bargaining Agreement and Last Chance Agreement. The misconduct alleged in this case is so minor as to demand a deviation from the strict application of the controlling agreements' terms. Accordingly, the Employer is ordered to reinstate the Grievant to his former position, with no loss of seniority, and to make him whole with respect to both wages and benefits.

Issued and ordered on this 20th day of
January 2007 from Tucson, AZ.

Mario F. Bognanno, Arbitrator

