

**ARBITRATION DECISION**

**IN RE**

Spartech Plastics, Inc.  
Mankato, Minnesota

and

FMCS #06-53316-7

Teamsters Local 120, IBT

**DISPUTE:**

Employee Loren Takle discharge - Grievance 9153.

Arbitrator:  
Daniel G. Jacobowski, Esq.  
January 2, 2007

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ARBITRATOR: Daniel G. Jacobowski, Esq.

DISPUTE: Employee Loren Takle discharge - Grievance 9153.

**JURISDICTION**

APPEARANCES: Union: St. Paul Attorney Martin J. Costello of  
Hughes & Costello.

Employer: Attorney Mary L. Hubacher of Davis & Kuelthau,  
Brookfield, WI.

HEARINGS: Conducted on July 26 and September 28, 2006 at the  
Mankato Holiday Inn, on this contract dispute, pursuant to the  
provisions and stipulations of the parties under their  
collective bargaining agreement. The contract decision time was  
waived. Briefs were received November 6, 2006.

**DISPUTE**

ISSUE: Did the company have just cause for its discharge of  
grievant Loren Takle under the contract No-Fault Absentee and  
Tardy Program? If not, the appropriate remedy?

CASE SYNOPSIS: Article 15 of the contract prohibits discharge  
without just cause. The same article also provides for a  
discharge upon attainment of seven points under the No Fault  
Absentee and Tardy Program. The grievant was discharged upon  
his attainment of seven points, almost all tardies. They  
overlapped both contract terms, during which the current  
contract was negotiated. The union claims that the discharge  
failed to meet the requirements of just cause and should be  
revoked.

CONTRACT      PROVISIONS      APPLICABLE/CITED      (underlining      by  
arbitrator):

**CURRENT CONTRACT EFFECTIVE  
APRIL 27, 2005-APRIL 26, 2008**

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:

Area	Points
1. Absent and Unexcused with call-in prior to beginning of the 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	1/2 point
5. Leave early with less than nine (9) hours worked	1 point
6. Leave early with more than nine (9) hours worked	1/2 point
7. Leave work without permission	5 points
8. Failure to punch in or out	1/2 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 <sup>th</sup> ) 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. Points shall be deducted one (1) year from occurrence.
- h. FMLA does not count as an unexecuted absence.
- i. Off-going employees must stay at work until the oncoming employee 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 attendance 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 a 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 attendance 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 attendance policy. Any incident which is not 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 not 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 a 1/2 point and the incident will not count as one of the three allowable non-penalized incidents.

1. 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 that all days of absence are due to a medical reason. If paid sick time is not used for any portion of the absences then a doctor's slip is 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."

**PRIOR CONTRACT EFFECTIVE  
APRIL 27, 2002-APRIL 26, 2005**

"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:

Area	Points
1. Absent and Unexcused	1 point
2. Absent with no call	4 points
3. Tardy less than 5 minutes	0 points
4. Tardy more than 5 minutes	1/2 point
5. Leave early with less than six (6) hours worked	1 point
6. Leave early with more than six (6) hours worked	1/2 point
7. Leave work without permission	5 points

8. Failure to punch in or out 1/2 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. Employees will serve a three (3) day suspension when a sixth (6<sup>th</sup>) 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. Points shall be deducted one (1) year from the 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."

#### **BACKGROUND - FACTS**

The company operates a number of plastic plants around the country. The Mankato plant produces plastic sheet products. The grievant started in 1998 and was employed as a material handler, one for each shift. He operated a forklift delivering supplies to the production work stations. He worked the 12-hour night shift from 6:00 p.m. to 6:00 a.m.

On July 27, 2005 the grievant was given notice of discharge for his accumulation of seven points under the no fault program, primarily for his tardies, which overlapped the two contract periods.

Prior to his discharge, during March and April of 2005 the parties negotiated terms for the new contract effective April 26, 2005. Negotiations were concluded in mid April. A number of changes in the no fault program were negotiated, but for purposes of our dispute, the main substantial change was in the exclusion of paid sick leave time from the point system. Under the prior contract, all attendance incidents for which the employee received paid sick leave were excluded. Under the new

contract, only the first three days of paid sick leave incidents were excluded. Otherwise the points for tardies in particular remained essentially the same. Likewise the provision for suspension after six points and discharge after seven points remained the same. One dispute between the parties is the claim of the union that later in implementation discussions, the company had agreed to the union's request that the first three incidents for points be excused. This the company denied with the claim that the exclusion was only for the first three incidents of paid sick leave as provided in the new contract. It was noted that the reference to paid sick leave is based on another contract provision which provides sick leave pay of 64 days each year.

The company case. The company based the discharge on the accumulation of seven points under the no fault program. It listed the following 14 incidents.

8/11/04 Tardy (1/2 point)	4/7/05 Tardy (1/2 point)
9/19/04 Tardy (1/2 point)	4/17/05 Tardy (1/2 point)
9/22/04 Tardy (1/2 point)	5/1/05 Tardy (1/2 point)
10/15/04 Tardy (1/2 point)	5/9/05 Tardy (1/2 point)
11/4/04 Tardy (1/2 point)	5/10/05, 5/13/05, 5/14/05
2/19/05 Tardy (1/2 point)	Suspension served
3/1/05 Tardy (1/2 point)	6/10/05 Forgot to punch out
4/2/05 Tardy (1/2 point)	(1/2 point)
	7/19/05 Tardy (1/2 point)

The union admits and does not dispute the occurrences, but claims that alone does not constitute just cause. The company justified the discharge based on the provision and the negotiated contract with the union, as distinct from a separate company policy. It noted that attendance was a particular problem at the Mankato plant, which the company sought to address and correct in the recent negotiations. It cited that absenteeism with tardies is disruptive, and other employees have to fill in. It noted that the grievant was the only material handler on his shift.

It noted that his poor attendance was noted in his many past evaluations which he himself even noted needed improvement, although the company admitted that otherwise his performance evaluations were good. The company noted that each time he had a no fault incident his supervisor would call it to his attention, particularly when the points became closer to discipline. It noted that in 2002 the grievant was given a last chance letter after seven points, as a one time event and not a

precedent, in an agreement with the grievant and the union. The company also noted that prior to May 2005 they excluded from points four incidents for which he took paid sick leave time. On May 9, 2005 he was given a three-day suspension for his accumulation of six points, which he accepted and did not grieve.

The company admitted that there was another employee who sometime earlier had also been given a last chance letter and allowed to work beyond seven points. However, the company noted that employee has since been discharged upon receipt of additional point, and it noted that both last chance letters were given by a prior manager no longer with the company. The current manager stated that he does not show such leniency and strictly applies the seven points as provided in the contract.

On several of the company records of his absence call-ins it was he was sick, or not feeling well and one noted a migraine. At a discussion with his suspension, he made brief reference to his alarm clock. At the discharge meeting, there was no discussion or explanation by him as to reasons, and the company simply noted his seven points, with the union request for another last chance letter which the company refused. In response to questions by the union at the hearing on an FMLA, the company stated that it had never been discussed nor raised by the grievant but that it was prominently posted on the bulletin board which the grievant admitted seeing and being aware of.

The union case. In cross exam of the company witnesses, union counsel elicited or noted the following matters. That on the suspension and termination notice forms given the grievant, the company checked off the space for poor attendance, rather than the space for tardies, whereas in reality the accumulated points were primarily for tardies. (The company countered that the time and hours missed for the tardies did constitute poor attendance.) That in deciding for discharge, the company did not review his very good performance evaluation nor investigate his record. That it did not show leniency to the grievant, as had previously been given the grievant in his 2002 last chance letter, and to another employee allowed to continue working after seven points with a last chance letter. (Also since discharged for further points.)

The business agent who was chief negotiator for the union acknowledged that that in the negotiations the company wanted to tighten up the attendance policy because attendance was a problem affecting the operation of the plant when people weren't

at work. In the negotiations proposals were exchanged back and forth. Negotiations concluded on April 13, 2005, approved by the membership on April 25, and the new contract terms effective April 27. He stated that in later discussions for the new language and implementation, the company agreed to remove the first three attendance violations since December 2004, since the new contract date was some five months since. (The company denied this at the hearing.) He admitted that there was nothing in writing to verify that concession. He noted the other employee who was allowed to work after seven points although since discharged after a further accumulation. He acknowledged that the main change in the contract was the reduction of paid sick leave from the points to a limit of the first three. He felt that when it comes to a discharge, the employer should look at the total record and circumstances and not just the simple number of points accrued.

The grievant gave extensive testimony regarding his absences and tardies. He noted that he lives about nine miles from work. He does not drive and relies on a taxi. There is only one cab company in Mankato. He normally calls for a cab one hour prior to start time. Usually it takes the cab 20 minutes each way which allows 20 minutes for some delay. He recalls three occasions when the cab came late, two of which caused him to arrive late.

He explained that over the years many of his absences and tardies were due to his migraine headaches, a condition he has had since childhood. He described them at length. Their intensity and frequency and occurrences can vary. Earlier in life they were more intense. More recently the intensity has diminished but the frequency has increased. At times when he awakens with it will cause him to be late for work. He usually can tell when they begin to recede and will call in when he anticipates being late. According to the time cards shown, many recorded several hours late, some only a few minutes. The last point entry for July 19, 2005 recorded six minutes late.

He did not dispute the tardies noted in the accrual of the seven points. He recognized that there were four other dates of absences in the prior months that were not given points since he took sick leave. Among them, one was for a migraine, and the others were for sickness. He stated that on nights that he would come in late it would be from waking up with a migraine. However, he acknowledged that for the tardies noted, not all were from a migraine, though several were. He stated that his supervisors were well aware of his migraines. When he was tardy

they frequently asked him why. He was not aware of any lost production due to his tardies.

In 1982 with another employer, he was sent to the Mankato Clinic where he received a doctor's note confirming his complaints of migraines and given a prescription for Midin. He stated that it is not used anymore and since then far superior drugs have been developed. He understands that migraines are not curable, and there is nothing a physician can do. Treatment is only for symptoms not a cure. He routinely takes Ibuprofen and sometimes Advil. However, it takes some time before their effect reduces the migraine. He stated that the company has never discussed nor advised him to apply for FMLA. He has no idea if he would be covered by FMLA.

Under cross by company counsel, he acknowledged that he has sought no medical treatment since 1982. He has never filed an FMLA claim and acknowledges that FMLA information is posted at the plant. He stated that he had only one tardy attributed to his alarm clock.

#### **ARGUMENT**

THE COMPANY: In brief summary, the company argued the following main points in support of the discharge. 1. The no fault absentee policy is part of the negotiated agreement and its clearly defined penalties must be upheld by the arbitrator. The program is not a unilaterally work rule of only the company. It clearly states that employees will be discharged when they receive seven points or more. Where defined in the collective bargaining agreement, the arbitrator is precluding from revising the punishment imposed. 2. The union does not dispute the incidents nor the accumulation of the seven points. The grievant was aware of the consequences of his actions and that termination could result from failure to improve his attendance. He had already received a three-day suspension in May, and was specifically warned by his supervisor. 3. The grievant was not entitled to a second last chance agreement. He already had the benefit of such a last chance agreement earlier, specifically designated as non-precedential. The fact that another employee also had a single last chance agreement is of no merit since he was also terminated the next time he violated the policy.

4. The union assertion that just cause applies misconstrues the clear language of Article 15.4 which states that accumulation of seven points is cause for discharge. It is a long held rule of construction that general language like Article 15.1 must give

way to more specific terms contained within the agreement. Here, just cause requires only that the final tardy of July 19 was properly assessed as a violation within the meaning of Article 15.4. 5. The union has failed to meet its burden of proving its defenses. 6. The company never agreed to remove points for the first three occurrences after December 2004, it specifically denies this claim of the union. The union challenge is untimely since it did not claim this at the time of the three-day suspension. Also there is no evidence nor anything in writing regarding this claim of the union, which is inconsistent with the company goal and negotiated terms to reduce and improve attendance problems. 7. The union has failed to demonstrate any valid question regarding the application of FMLA. Employees have an obligation to assert their FMLA rights and the grievant never raised a question or submitted a request for FMLA consideration. He has not seen a medical provider since 1982. He admitted he was aware of the FMLA notice of rights poster at the company. He never submitted any medical evidence which would indicate he suffered from a serious health condition. He has taken no affirmative steps to seek treatment or certification of his condition. 8. The company also cited cases claimed to be supportive of its position. 9. Respectfully, the arbitrator is asked to sustain the discharge.

THE UNION: In brief summary, the union argued the following main points for revocation of the discharge. 1. The employer did not have just cause to terminate the grievant. It imposed the most extreme form of discipline. The discharge was without warning, corrective measures or progressive discipline. In discharge cases the employer must prove that the employee committed a dischargeable offense, and that the act justifies termination. 2. The attendance policy is not a substitute for just cause. There was no investigation of the factors typically applied for the termination of just cause. The attendance policy is not a substitute for just cause. The policy was not negotiated by the union but was unilaterally implemented. Article 15.1 requires just cause. The attendance program improperly quantifies just cause to discipline and ultimately terminate. The union rejects the notion that just cause can be quantified into a seven point no fault policy. Just cause requires individualized application to the particular circumstances.

3. The grievant was entitled to intermittent leave under FMLA. He had a serious medical condition over an extended period of time. FMLA provides application even if the employee does not receive medical treatment. It permits intermittent leave on a

reduced schedule. The grievant's migraine conditions existed and caused most of his tardies. The burden is on the employer to recognize circumstances when FMLA may be invoked. The employer failed in this duty and raised no discussion with the grievant about it. 4. The first three incidents of the grievant should be removed from the penalty according to the agreement the union claims was reached with the company. 5. Individual justice to the grievant and to the future relationship between the union and the employer require that the discharge be revoked. The conduct was not sufficiently serious to justify the discharge. Respectfully, the discharge should be revoked and a suitable modification of the penalty be ordered. The union cited cases it claimed supportive.

#### **DISCUSSION - ANALYSIS**

Upon full review of the facts and arguments in this case, I find that the evidence establishes that the employer was justified in its discharge of the grievant, and that the union has failed to prove its burden of challenge. I so find based upon the following factors and reasons.

1. The union's challenge falls into four main areas. One, that the no fault program and seven point discharge penalty is still subject to the 15.1 just cause provision. Two, that the discharge fails to satisfy just cause elements. Three, that the employer failed to exclude the first three infractions agreed for implementation after the negotiations. Four, that the employer failed to apply the FMLA to his migraine condition. These are next reviewed in greater detail.

2. The position of the union in effect is that the seven point discharge penalty does not stand alone but is superseded by or subject to the 15.1 just cause provision. I find that the union's claim is faulty and is not persuasive. The no fault program is not a unilateral company policy but rather a mutual program negotiated by the parties and in the collective bargaining agreement itself. The just cause provision is a broad general standard that is applicable any type of infraction or reason for discharge. It is immediately followed by the extensive 15.4 no fault program which is the only item noted for termination in that article. In effect, it means that the program and seven point penalty constitutes just cause.

3. Even if the traditional just cause considerations are examined or applied to this case I find no mitigation applicable supporting a revocation of the discharge. Rather, the no fault

program and penalties and its application incorporate many of such traditional just cause elements, as next discussed.

4. The grievant had full notice and awareness of the program and was adequately warned in its applications to him. First is his 2002 last chance letter, where the seven point last chance letter given him in 2002. Next were the supervisory discussions and warnings to him each time he accrued an infraction under the point system. This included his need for attendance improvement in his six month evaluations which he himself acknowledged, and was highlighted by the prior recent suspension. The leniency shown the grievant and another discharged employee by the last chance letters do not jeopardize the company application of the seven point penalty discharge here given. The leniency was under a prior manager. The letter given the grievant stated that it was a one time event not precedential. In the recent negotiations for the current contract, management emphasized that attendance was a problem and that it sought to propose new terms to tighten up absence and tardy allowances.

5. The union argued that the discharge was too severe when some tardies were for only a few minutes and in particular the last for only six minutes. The union argument fails and is not persuasive. It fails to taken into account that the discharge was not only on the last tardy but based upon an accumulation. Further, the record shows that many of his tardies were of several hours duration.

6. Further, on the severity issue, the penalties were established in the contract, and the arbitrator has no authority to change or modify the contract. The union's argument that the listed penalties included the failure to punch in or out and is therefore not a tardy is inconsequential. It was included in the contract and it is related to tardies and absences as a confirmation for recording and to avoid a potential credibility problem where not recorded. The union argument that the item checked for the suspension and termination was attendance rather than tardies is inconsequential, with the parties fully understanding the infractions of the tardies. Again, many of the tardies were for a duration of several hours, and the company properly regarded the tardies as poor attendance on the job.

7. The grievant testimony that many of his absences and tardies were due to his migraines fail as proof that the discharge was not justified. The grievant admitted that in the time frame leading to the discharge penalty, not all of his

tardies were caused by the migraines, though several of them were. During that period he had other paid leave approved absences in which only one was listed for a migraine. The others being shown for other sickness. Related to this, his explanation of his not driving and dependent upon a cab living several miles distance from the plant is a matter of his own choice and risk responsibility, in no way attributable to the company.

8. Among other items, the union noted that his performance record as a very good employee should have been given more consideration by the company. The company response that attendance is a matter of the contract and noted to him at each performance evaluation along with the additional warnings. The company also noted that the 2002 last chance letter given him occurred when the seven point accrual itself was for failure to punch out.

9. The union failed in its claim that after the negotiations the company agreed to eliminate the first three infractions under the time period from the penalty system. This claim was denied by the company and noted that it was inconsistent with the company goal and proposal to reduce the absences and tardies excluded and the terms finally negotiated in the contract. Further, the union had no writing nor corroboration of this claim.

10. The union fails in its claim that the company violated its FMLA responsibilities to the grievant. The evidence establishes that the grievant made no claim application or question of the FMLA and that he was aware of the FMLA notice posted on the company premises. He produced no medical evidence applicable. His only and last visit to a doctor was back in 1982, he has sought no medical treatment since. He testified that the medicine prescribed at that time has since been withdrawn and has been replaced by far superior medications. He himself has simply used Ibuprofen or Advil when his migraines arise. He has learned to recognize their onslaught and recessions.

In summary I find and conclude that the evidence establishes that the company had a proper justification and just cause for its discharge of the grievant, and that the union has failed to prove otherwise.

**DECISION**

The company has proven that its discharge of the grievant was justified, and the union failed to prove otherwise. The union grievance is not sustained.

Dated: January 2, 2007

Submitted by:

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Daniel G. Jacobowski, Esq.  
Arbitrator