BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
TEAMSTERS LOCAL UNION NO.695	
and	Case 38 No. 43073 A-4543
GATEWAY FOOTS - LACROSSE, WISCONSIN	

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller and Brueggeman, S.C., Attorneys at Law, by Mr. Scott Soldon, appearing on behalf of the Union.

Rider, Bennett, Egan and Arundel, Attorneys at Law, by Mr. Mark Schneider and Mr. Thomas Rock, on the brief, appearing on behalf of the Company.

ARBITRATION AWARD

The above captioned parties, hereinafter the Union and Company respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was transcribed, was held on February 7, 1990, in LaCrosse, Wisconsin. The Company filed a brief in the matter on April 16, 1990 and the Union filed a waiver of brief on April 18, 1990, whereupon the record was closed. Based on the entire record, I issue the following award.

ISSUE

The parties were unable to agree on the issue and requested the arbitrator to frame it in his award. The arbitrator frames the issue as follows:

Did the grievant's discharge violate the parties' collective bargaining agreement? If so, what is the remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1989-92 collective bargaining agreement contains the following pertinent provisions:

. . .

ARTICLE 7 - SENIORITY

. . .

7.5 Termination of Seniority. An employee shall lose his or her seniority for the following reasons:

. . .

B.Discharge for just cause;

. . .

D.Absence from work for three (3) days without reasonable cause and without prior notification unless the employee has a satisfactory explanation for failure to give such notice;

. . .

If the conduct of an employee falls within the conduct prohibited by 7.5B, D, or E, it shall be considered just cause for the purposes of this Agreement.

. . .

ARTICLE 8 - DISCIPLINE AND DISCHARGE

8.1 Progressive Discipline. The Company shall not discharge or suspend employees without just cause and shall warn an employee in writing at least once of any offense or series of offenses which, if continued or repeated, shall be considered cause for discharge. Such written warnings shall be considered to have full

force and effect for a period of time not to exceed nine (9) calendar months from the date of warning. Copies of all written warnings, notices of suspension and notices of discharge will be promptly provided by the Company to the Union.

8.2 Grounds for Immediate Discharge. If the conduct of an employee falls within the conduct prohibited by 8.2A through J, it shall be considered just cause for purposes of this Agreement.

. . .

I.Misconduct calling for immediate discharge under the Company's Operating Rules and Absenteeism Policy.

. . .

ABSENTEEISM POLICY

. . .

3. Unexcused Absences. An unexcused absence is any scheduled work day which an employee fails to come to work and is not excused. An unexcused absence shall also include an employee coming to work tardy or leaving work before his/her scheduled work day is completed.

4. Points by Occurrence. The discipline and discharge of an employee for absenteeism shall be based upon a point system. Any employee who accumulates twelve (12) points in any nine (9) month period shall be subject to discharge. . . .

5. Points. Points shall accumulate on the following basis:

1.Unexcused absence - no notice
(also see number 9 below) 4 points

. . .

6. Discipline. The following shall be recognized as the disciplinary procedure for excessive absences and tardiness:

. . .

4.After an employee accumulates twelve (12) points within any nine (9) month period, the employee shall be terminated on the grounds that he is

either unable or unwilling to work the regularly scheduled hours of employment.

FACTS

The Company is a wholesale grocery distributor. The grievant, Brett Meier, was employed by the Company for about three years before he was terminated on October 11, 1989. 1/ At the time of his discharge, Meier was classified as warehouseman and worked the third shift, Sunday night through Thursday night. He was discharged for failure to report to work without calling for three consecutive days.

Meier's last day of work was October 3. That night (the evening of October 3 and the morning of October 4) he was injured at work. He was sent to a clinic for examination/treatment and was released to return to work during that same shift with a medical slip from his doctor restricting him to light duty work (rather than his regular work). After he reported back to work about 4:00 a.m., foreman Kevin Kuester informed him there was no light duty work available at that time and sent him home. Meier testified that upon leaving work that morning, Kuester told him that someone from the Company would be contacting him (about returning to work). Kuester denies making such a statement.

Later that morning Meier contacted Roger Lundsten, a fellow Gateway bargaining unit employe, and told him of his injury. Meier and Lundsten had been roommates until the previous weekend when Meier had moved out. Meier asked Lundsten to take any phone messages that came for him because he did not have a phone installed yet in his new apartment.

Meier did not report to work that night (Wednesday, October 4) or the next night (Thursday, October 5) as scheduled or call the Company to report his absence. Meier testified the reason he did not contact the Company on those days was because he thought someone from the Company would be contacting/ calling him (at his old address) and should that happen, Lundsten would be around to take a message for him. Meier testified he also thought it would take a couple of days for the Company to get him on light duty.

Meier attempted to call Lundsten on those dates and also drove to his (Lundsten's) apartment several times (which is four miles from Gateway), but Lundsten was not home. Meier finally made contact with Lundsten on Friday, October 6 at 6:00 p.m. Lundsten told Meier at that time that both the hospital and a Mrs. Cunningham from the Company were attempting to contact him.

Over the weekend (October 7 and 8), Meier did not attempt to contact anyone from the Company, including Cunningham, nor did he go to the Gateway warehouse which is located three blocks from his new apartment. Meier did not report to work Sunday night (October 8) as scheduled or call the Company to report his absence.

Diane Cunningham, the Company's light duty administrator, attempted to contact Meier several times without success between October 4 through 9. In doing so, she learned that Meier had moved. She called his former residence on October 4, 5, 6 and 9 leaving several phone messages for him to call back and also called directory assistance looking for his new phone number. In the course of trying to contact him, Cunningham learned that Meier's medical clinic had also tried unsuccessfully to reach him. Cunningham testified that light duty work was available on the days Meier failed to show for work and that since he was immediately available for light duty work, he would have been put to work immediately upon reporting to work.

Meier called the Company on Monday, October 9 after a phone was installed in his apartment. Company representative Bob Zeeb took the call and arranged a meeting for the next day (October 10) between Meier and Company officials.

At that meeting, Meier told Company officials he never thought about contacting the Company from October 4 through 8, but that he had made numerous attempts to contact Lundsten during that period. Meier testified he told Company representatives during that meeting that Kuester told him on October 4 when he left work that someone from the Company would be contacting him. Warren Nedegaard, one of the Company representatives present, denied Meier made this statement at this meeting. Meier was suspended at the conclusion of the meeting.

Warehouse director Nedegaard made the decision to discharge Meier. In reaching this decision, Nedegaard testified he reviewed Meier's personnel file which showed three verbal warnings and one written warning for absenteeism in 1989. Meier's discharge letter reads as follows:

> This letter is to serve as notice of your termination with Gateway Foods. You were absent from work Wednesday

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1/ All dates hereinafter refer to 1989.

night, October 4; Thursday night, October 5; and Sunday night, October 8, 1989. These were unexcused absences. This is in violation of article 7.5D and also the Absenteeism Policy in the Warehouse Operating Rules.

Nedegaard testified that employes who violated the Company's three day no-call, no-show rule have been fired.

POSITIONS OF THE PARTIES

It is the Union's position that the Company did not have a proper contractual reason for discharging the grievant so his discharge violated the parties' collective bargaining agreement. According to the Union, the facts in this case do not constitute a three day no-call, no-show under Article 7.5D. In addition, it is the Union's view that the disciplinary procedures spelled out in the Absenteeism Policy would not require a discharge under the instant circumstances. The Union therefore requests that the grievant be reinstated with a traditional make-whole remedy.

It is the position of the Company that it did not violate the parties' collective bargaining agreement by discharging the grievant. According to the Company, the grievant was properly discharged for violating the three day no-call, no-show provision (Article 7.5D) because he avoided working for three days and failed to call the Company to inform them he would not be reporting. In the Company's opinion, the grievant's explanation for this simply is not believable. The Company further asserts that even if there was any confusion about who was to call whom (which it believes was doubtful), it made good faith attempts to reach the grievant during his absence and had light duty work available for him. In the Company's view, there are no mitigating circumstances for modifying the Company's action (i.e. discharge). In this regard the Company notes that the grievant had what it characterized as a chronic absenteeism problem which exacerbated the events that lead to the grievant's discharge. The Company therefore contends that the grievance should be denied and the discharge upheld.

DISCUSSION

The parties' labor agreement contains a modified three day no-call, no-show rule that provides that an employe's failure to report to work for three days without notifying the Employer or having a satisfactory explanation for their failure to do so will result in their discharge. This provision is found in Article 7.5D, wherein it provides "an employee shall lose his or her seniority for . . . absence from work for three (3) days without reasonable cause and without prior notification unless the employee has a satisfactory explanation for failure to give such notice". The Article goes on to provide that such conduct "shall be considered just cause" for discharge. This same conduct is also addressed in the contractual Absenteeism Policy wherein it provides that an employe who accumulates 12 points (three unexcused absences without notice to the Company) within any nine month period shall be subject to discharge. Lest there be any question about the penalty, Article 8.2, I specifies that this misconduct constitutes grounds for immediate discharge. This means that the normal progressive disciplinary sequence identified in Article 8.1 is inapplicable to such a situation.

Here, the grievant was absent from work on three consecutive scheduled work days (namely October 4, 5 and 8) and did not call the Company to report these absences. That being so, there is no question the grievant violated the three day no-call, no-show portion of Article 7.5D. However, as noted above, that provision further provides that an employe will nevertheless be excused from its coverage if he offers a "satisfactory explanation for failure to give such notice." Thus, the issue here is whether the grievant has offered a "satisfactory explanation" for his failure to notify the Company of his absences.

The grievant's primary explanation for not reporting to work or calling in on the days in question is that he thought someone from the Company would be contacting him so he did not have to return to work till that happened. In this regard he testified that upon leaving work the morning of October 4, foreman Kuester told him that someone from the Company would be contacting him (about returning to work). This alleged statement, which Kuester expressly denies, was not corroborated by anyone else. Meier further contends, and Nedegaard denies, that he (Meier) raised this point to management officials at the October 10 investigatory meeting. After weighing this conflicting testimony, the undersigned credits the testimony of Kuester and Nedegaard on this point since their self interest in this matter is not as great as the grievant's. Given the foregoing then, the undersigned is simply not persuaded by the record evidence that Kuester in fact told Meier on October 4 that someone from the Company would be contacting him.

However, even if Kuester did make such a statement to Meier or if Meier was confused about who was to call whom, it is clear that the Company tried, albeit unsuccessfully, to contact Meier during his absences. Specifically, light duty administrator Cunningham called Meier's phone number and, in doing so, learned that he had moved. She nevertheless made repeated phone calls to his former residence from October 4 through 9, left several messages for him to

call back and also tried to track him down through directory assistance. These actions satisfy the undersigned that although Cunninghman never made contact with Meier, it certainly was not for lack of trying.

That cannot be said of the grievant's efforts however. Meier knew from previous absences that it was his responsibility to report absences to the Company, specifically that he was to notify the Company if he was not going to report to work. Here, though, Meier made no effort to contact the Company from October 4 through 8 even though he had reason to believe the Company would be looking for him. The grievant knew he did not have a phone installed yet in his new apartment so there was no way the Company was going to reach him there. Instead, Meier anticipated that the Company would call his old phone number and that his former roommate (Lundsten) would be there, take a message for him and ensure that he got it. While this scenario certainly left a great deal to chance, it turned out that this in fact happened. The problem though was that Meier did not get Lundsten's message until October 6, by which time he had already missed two days of work. Upon receiving the message from Lundsten on October 6 that Cunningham had called, it was incumbent upon him to contact the Company and see what was up. Had he done so either by calling or personally visiting the Company warehouse located three blocks from his apartment, the undersigned surmises that Company officials would have advised him to report for work Sunday night (October 8). Instead, Meier let the entire weekend go by, and mostly importantly the third consecutive unexcused absence, before he finally called the Company on Monday, October 9. In the opinion of the undersigned, this call to the Company on October 9 was simply too little too late.

Another explanation offered by the grievant for not reporting to work or calling in was that he felt it would take a couple of days for the Company to get him on light duty. The record indicates the grievant's assumption in this regard was just plain wrong. Cunningham testified without contradiction that light duty work was available for Meier on the day he failed to report to work and that he would have been put to work immediately (doing same) had he shown up. Thus, contrary to Meier's assumption, there was no start up time for light duty work. However, even if there was, nothing in the record indicates that being placed on light duty relieves an employe of their obligation to report absences during such a start up period.

In light of the above, it is concluded that the grievant did not offer a satisfactory explanation for his failure to report to work without calling on three consecutive days (October 4, 5 and 8). As previously noted, both Article 7.5D and the Absenteeism Policy provide that the penalty for this misconduct is discharge. In accordance therewith, it is held that the grievant's discharge did not violate the parties' collective bargaining agreement.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the grievant's discharge did not violate the parties' collective bargaining agreement. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 1st day of June, 1990.

By _____
Raleigh Jones, Arbitrator