

was given a verbal warning about absenteeism. On May 19, 1992, 1/ he was given a Constructive Advice Record for unauthorized absence. On September 18, the Grievant filled out an Absence Report and talked to his foreman about getting permission to leave work early that day. His request was granted. He punched out on the time clock, checked out on the computer and left the premises. Other than discipline related to absenteeism, the Grievant has not been disciplined by the Company.

On October 8, the Grievant was working on the 2:45 to 10:45 p.m. shift. That day he was assigned to work as an order selector on the mini-mech in close proximity to his foreman. Early in the shift, the Grievant told another employe that he was thinking about going home sick. At 3:30 p.m., the Grievant telephoned his former girlfriend to discuss their relationship. A little before 4:45 p.m., he went to the bathroom. When he left the bathroom, the Grievant did not return to the mini-mech; instead, he went into the shipping office. The Grievant went to the counter, picked up a Warehouse Request Form and asked the clerk for a pen. She gave him a pen. The Grievant went to a desk and filled out the form. He returned to the counter where the clerk was working, placed the pen and form on the counter, and left the shipping office. He did not say anything to the clerk. On the form, the Grievant checked the space requesting to leave early. His stated reason was "Personal". He punched out on the time clock, but did not check out on the computer. A computer terminal was located outside the shipping office. He left the premises and went home where he attempted to call his former girlfriend. He was unsuccessful in reaching her. After awhile, he went to Oktoberfest and had a few beers.

Approximately 20 minutes after the Grievant left, an employe went to the foreman and asked if the foreman was going to replace the Grievant. The foreman, unaware that the Grievant had left, went to the shipping office. He asked the clerk if she had given the Grievant permission to leave. She said she had not. The Grievant was replaced on the mini-mech.

The Grievant returned to work on October 9 and was told to report to management. At that time the Director of Distribution conducted an investigatory interview, after which he suspended the Grievant. The Grievant filed a grievance which stated in part as follows:

On Oct. 8, 1992 I filled out a slip that I wished to leave work for personal reasons. I

1/ All dates are 1992 unless indicated differently.

handed the slip to (the clerk) and told her that I was leaving. The personal problem I went to take care of was a recent breakup of my relationship with a girlfriend. Things didn't work out so I went to have a few beers and then returned to work on Oct. 9, 1992. I feel I was unjustly suspended as I did everything the same as I have done in the past when leaving work. I feel I have 8 hrs. pay coming to me as I have done nothing wrong.

In a certified letter dated October 13, the Director of Distribution wrote to the Grievant in part as follows:

This letter will confirm your termination with Gateway Food, Inc. effect (sic) October 13, 1992, for leaving the company premises while on duty without obtaining a supervisor's permission.

The grievance, modified to include the discharge, was processed through the parties' procedure without resolution and is properly before this Arbitrator for decision.

PERTINENT CONTRACT LANGUAGE

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) working months from the date of warning. .

. .

. . .

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 the purposes of this Agreement.

. . .

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

. . .

ARTICLE 18 - MISCELLANEOUS

- 18.1 Warehouse clerks have the same power and authority as supervisors but will not perform bargaining unit work.

PERTINENT WORK RULES

WORK RULES AND ABSENTEEISM POLICY

On the pages which follow, 2/ the Company's Work Rules and Absenteeism Policy are contained. These policies have been implemented pursuant to the Company's management right to unilaterally implement Work Rules and Absenteeism Policies. They are printed in the contract booklet for convenience only, and in no way indicates any obligation on the part of the Company to negotiate Work Rules, Absenteeism Policies, Productivity Standards, or any other Operating Rules with the Union.

Warehouse Operating Rules

. . . The Company has the right to adopt reasonable work rules and to change them from time to time as Company operations require.

. . . Any employees failing to comply with these work rules is subject to disciplinary action. Please review these rules continually and retain this copy as your permanent record until these rules are

2/ The Work Rules and Absenteeism Policy appear in the booklet containing the labor agreement immediately following said agreement.

changed.

A. Major Violations

It shall be a major offense to engage in any of the following actions:

. . .

2. Leaving the Company premises while on duty without obtaining a supervisor's permission.

. . .

The penalty for a major offense shall be suspension or immediate discharge depending on the severity of the event and the employee's past record.

. . .

ABSENTEEISM POLICY

1. Policy Statement. Excessive absenteeism and absences without prior notification will not be permitted.

. . .

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 any 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. . . .

ISSUE

The parties stipulated at hearing that the Arbitrator would frame the issue in the Award.

The Union would frame the issue as follows:

1. Was the Grievant terminated for just cause under the terms of the collective bargaining agreement?
2. If not, what is the proper remedy?

The Company would frame the issue as follows:

Whether Gateway Foods had just cause to discharge Malay.

The Arbitrator frames the issue as follows:

Did the Company violate the collective bargaining agreement when it discharged the Grievant on October 13, 1992?

If so, what is the appropriate remedy?

POSITION OF THE PARTIES

Union

The Union argues that the Grievant's discharge was not for just cause as he did not violate the Company rule prohibiting leaving the company premises without permission; that the facts do not support the Company's assertion that the Grievant left work without permission; that the facts do not support the Company's assertion that the Grievant was terminated with just cause; that the facts clearly establish that the Grievant followed the procedure for leaving work early on October 8 in that he filled out a slip and he sought permission to leave from the Clerk who has authority to excuse employees from work; that the Company did not present evidence that the Clerk denied the Grievant permission to leave early; rather, the Company bases its entire case on the fact that the Clerk made no response to the Grievant's request; that this is a weak argument in that the Clerk is usually so busy that she does not verbally respond to people but gets them what they need; that, therefore, it is more than reasonable that the Grievant would interpret her taking his slip as an indication that

he was free to leave; that the Company has not proven that the Grievant did not sufficiently follow the required procedure for leaving work early, nor that he did not make an honest, good faith effort to do so; and that, in light of these facts, the Grievant's termination was not for just cause.

The Union also argues that, if the Grievant is guilty of any offense, it is more properly characterized as an unexcused absence under the Absenteeism Policy; that, therefore, any discipline imposed upon him by the Company should have been in accordance with the progressive discipline system provided for in the Policy; that, furthermore, the Company's discharge of the Grievant for his actions on October 8 is inequitable treatment; that arbitrators consistently refuse to sustain discipline imposed by the Company where it is found that the variation in punishment between employes engaging in the same or similar conduct is not supported by a reasonable basis; that two employes testified that they had both left work early and it was questionable whether they had received permission from their supervisors; that one employe received no discipline, although his supervisor denied giving him permission to leave; that the other employe received a written warning pursuant to the point system of the Absenteeism Policy; that the Grievant's actions were clearly of the same type as those of his fellow employes; that the Company has not demonstrated that there were aggravating facts in this case that warranted deviation from the progressive discipline system; that it is apparent that no reasonable basis existed for terminating the Grievant; and that he was not discharged for just cause under the collective bargaining agreement and, therefore, is entitled to reinstatement with full back-pay.

Finally, the Union argues that if the Grievant's offense is leaving the premises while on duty without permission, discharge remains unwarranted because the offense is not of such a serious nature as to warrant discharge; that it is well established among arbitrators that the degree of the penalty should be in keeping with the seriousness of the offense; that the Grievant's early departure from work on October 8 is a classic example of the kind of "lessor offense" that does not warrant discharge on the first offense, especially given that the Grievant honestly believed that his submitting a written slip to the Clerk notified her that he was leaving early for personal reasons and that this was sufficient for the purposes of obtaining permission to leave the premises; that, therefore, even if the arbitrator finds that the Grievant left work without properly obtaining supervisory permission, the Grievant should be reinstated in light of the mitigating facts in his case.

Therefore, the Unions request that the Grievant be reinstated with full back-pay and no loss of seniority or other benefits

provided to him pursuant to the collective bargaining agreement.

Company

The Company argues that the Grievant did not receive approval to leave early; that the testimony of the director, clerk and foreman must be credited over the Grievant's testimony; that, first, the Grievant had properly followed the procedure for leaving early before and, thus, cannot claim that he was unaware of this policy; that, second, the testimony of the clerk that the Grievant did not request approval to leave early must be believed; that, third, other aspects of the Grievant's story do not add up in that he told a fellow employe earlier that he was going home sick, that he ended up going home for personal reasons and that he subsequently had a couple of beers at Oktoberfest; that the Grievant's departure from work was premeditated, not spur of the moment, and as such he had ample opportunity to ask the foreman for permission to leave, having worked in close proximity to the foreman and walked past the foreman before he left; and that the Company's version of the incident is simply more credible than the Grievant's account of the incident.

The Company also argues that the Grievant's absenteeism provides just cause for his discharge; that there is no question that the Grievant left work early without receiving permission; that under the collective bargaining agreement, the Company is not required to follow a progressive discipline procedure, as the Union will argue, but may immediately discharge an employe who is engaged in misconduct under the Company's operating rules and absenteeism policy; that under said rules and policy, it is a major offense to leave the Company premises while on duty without obtaining a supervisor's permission; that these rules state that the penalty for a major offense such as this is suspension or immediate discharge, depending on the severity of the event and the employe's past record; that it is clear that the Grievant's actions constitute a major violation of this policy; that this misconduct was serious in that it could have resulted in a shut down of the mini-mech system; that the Grievant had received a verbal warning and a written warning for unauthorized absences previously; and that, under the contract, this lends more support that discharge is the appropriate discipline and such a negotiated penalty should not be reversed or altered by this Arbitrator.

Finally, the Company argues that even if the Arbitrator does not agree that the discipline used by the Company was proportionate to the Grievant's actions, the Arbitrator should not alter the Company's chosen form of discipline; that arbitrators agree that it is primarily the function of management to decide on a penalty; that arbitrators should hesitate to substitute their

own judgment; that even if the Arbitrator would have imposed a lesser penalty, the Arbitrator should not disturb the Company's chosen discipline since reasonable minds may differ; that this is particularly true where the Union agreed to negotiated language concerning the Company's right to discharge for major work rule violations; that the Company's determination of discipline should not be set aside unless discrimination, unfairness, capriciousness or arbitrary actions are involved; that none of these factors were involved in this case; and that, accordingly, the Company's discharge of the Grievant must be upheld and the grievance should be denied.

DISCUSSION

The question before this Arbitrator is whether the Company violated the collective bargaining agreement when it discharged the Grievant on October 13, 1992, and, if so, what is the appropriate remedy. This was not an easy case to decide in two ways.

First, the Company argues that the Grievant committed an offense under the major violations section of the Warehouse Operating Rules (hereinafter Rules). Indeed, the Company terminated the Grievant for said violation; specifically, Major Violation 2: "Leaving the Company premises while on duty without obtaining a supervisor's permission." Thus, the termination will be sustained or overturned based upon a determination of whether the Company proved that it had just cause to terminate the Grievant for said violation.

The Union argues that, if the Grievant committed any offense, which it vigorously denies, the Grievant had an unexcused absence under the Absenteeism Policy (hereinafter Policy). An unexcused absence is defined in part as including "an employee coming to work tardy or leaving work before his/her scheduled work day is completed" (emphasis added). The first difficulty, therefore, lies in the similarity of these two offenses and the differences contained therein.

Several employes testified that they had left work early in the past and that they had received only points under the Policy (or discipline if their point total reached a certain level). So why would the Company discipline the Grievant under the Rules? In each of these cases, the employe advised the foreman that he was leaving before he left. Although not specifically stated by the parties, that seems to be a key element in receiving points under the Policy as opposed to a major violation under the Rules. 3/

3/ The Union points to one instance in which a supervisor denied

This distinction makes policy sense. If the employe leaves work early after advising the foreman and getting permission, that is nothing more than an absenteeism concern. The foreman can make the necessary adjustments to compensate for the employe's absence.

But when an employe leaves work without informing the foreman, this is a major concern as the foreman will operate the shift as if the employe is present and, if the employe is not, many problems can occur.

The Union argues that the Grievant had received permission from the clerk to leave. As the Statement of the Facts indicates, I do not find that the clerk gave the Grievant permission to leave or did anything to give the Grievant the impression that she had given him such permission. And contrary to the Union's assertion that the Grievant did not do anything different than in the past, I find that he did in that, in the past, when he wanted to leave early, he told his foreman. The Grievant did not tell the foreman this time, even though the Grievant was working in close proximity to the foreman and, indeed, had to pass him on the way to the bathroom.

I therefore find that the Grievant left the Company premises while on duty without obtaining a supervisor's permission and, indeed, without even advising the foreman at the time. As such, I find that he committed a violation within the scope of Major Violation 2. I also find that the Company, based upon its investigation, had just cause to discipline the Grievant for this violation of the Rules.

The second reason this case was not easy to decide is the severity of the punishment. While the Grievant has had absenteeism problems in the past, he apparently has never walked off the job before without telling his foreman. Absent language to the contrary, I might agree with the Union that this offense does not warrant discharge on the first offense.

But this contract has very strong language in terms of discipline. In Article 8.2, the parties agreed there are grounds for immediate discharge, and that, if an employe's conduct falls

giving an employe permission to leave and the employe did not receive any discipline even though he left. However, during the investigatory interview, the employe told the Company of the circumstances under which he believed he had been given permission and identified two witnesses. The Company credited his statement and did not discipline him. I do not believe this in any way supports the Union's argument as the Company determined that the employe reasonably believed he had received permission.

within the prohibited conduct, it shall be considered just cause. Included in the grounds for immediate discharge is "(m)isconduct calling for immediate discharge under the . . . Rules." Said Rules, included in the agreement although not negotiated with the Union, include Major Violation 2: "Leaving the Company premises while on duty without obtaining a supervisor's permission."

I have found that the Grievant's actions come within Major Violation 2. Under Article 8.2, the Company had just cause to discharge the Grievant. While it may not be a decision I would have made, it is not a decision I will overturn, based on the language of Article 8.2 of the agreement.

Therefore, for the reasons stated above, the Arbitrator issues the following

AWARD

1. That the Company did not violate the collective bargaining agreement when it discharged the Grievant on October 13, 1992?
2. That the Grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 13th day of August, 1993.

By James W. Engmann /s/
James W. Engmann, Arbitrator