BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
WARVEL PRODUCTS, INC.	:	Case 10 No. 49833
and	:	A-5122
UNITED FURNITURE WORKERS OF AMERICA LOCAL 800, FWD-IUE, AFL-CIO	:	

Appearances:

Mr. Jerome Schur, Katz, Friedman, Schur & Eagle, Attorneys at Law, 777 West Washington Street, 30th Floor, Chicago, IL 60602-2801, on behalf of Local 800.

Mr. Dennis W. Rader, Godfrey & Kahn, S.C., Attorneys at Law, 333 Main Street, Suite 600, P.O. Box 13067, Green Bay, WI 54307-3067, on behalf of the Employer.

ARBITRATION AWARD

According to the terms of the 1993-96 collective bargaining agreement between Warvel Products, Inc. (hereafter Employer or Company) and United Furniture Workers of America Local 800, FWD-IUE (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as impartial arbitrator of a dispute between them involving the discharge of Marcus Schwabe. The undersigned was designated arbitrator. Hearing was held on November 30, 1993 at Gillett, Wisconsin. A stenographic transcript of the proceedings was made and received by December 7, 1993. The parties submitted their initial briefs by January 24, 1994 and their post-hearing reply briefs by February 14, 1994, all of which were exchanged by the undersigned at the parties' request.

Issues:

The parties stipulated that the following issues should be determined in this case:

> Was the termination of Marcus Schwabe for proper cause?
>
> If not, what is the appropriate remedy?

Relevant Contract Language:

ARTICLE IV

MANAGEMENT CLAUSE

A. Except to the extent expressly abridged by a specific provision of this agreement, the Company reserves and retains, solely and exclusively, all of its common law rights and statutory rights to manage the business as such rights existed prior to the execution of this agreement with the Union.

. . .

B. The management of the Company and the direction of the working forces, including the right to plan, direct and control Company operations; to determine the products to be manufactured; to hire, promote, suspend or discharge for proper cause or failure to maintain reasonable production standards and quality; to transfer or relieve employees from duty because of lack of work or for other legitimate reasons; and the right to introduce new or improved methods or facilities, it is agreed, is vested solely in the Company, provided this will not be used for the purposes of discriminating against any member of the Union and provided the exercise of the above rights will not conflict with the other terms of this agreement.

. . .

ARTICLE V

SENIORITY

. . .

D. Seniority and the employment relationship shall be automatically terminated when an employee:

1. Voluntarily quits;
2. Is discharged for proper cause;
3. Is terminated upon permanent shutdown of the Company's facilities;
4. Overstays a leave of absence or a vacation without justified cause and without notifying the Company;

. . .

9. It (sic) is justifiably absent but fails to notify the Company within two (2) days following the absence unless physically impossible;
10. Unjustifiable absence in excess of one (1) day; . . . .

Relevant Work Rules:

. . .

ABSENCES: Absences without good reason may result in a warning.

TARDINESS: An employee should report to work on time. If it is impossible to do so, call and inform the Company. Tardiness may result in a warning.

LONG ABSENCES: An employee who knows that he will be absent for several consecutive days must call to notify the Company only once, before the first day of absence.

SERIOUS ILLNESS OR INJURY: In case of a serious illness or injury, the employee will notify the Company within five (5) days of probable duration of the illness/injury so that a sick leave may be arranged.

FAILURE TO NOTIFY THE COMPANY: As stated in the Contract in the Seniority section, an employee who is absent for three (3) consecutive days without notifying the Company, unless physically impossible to do so, will be considered as having been terminated.

. . .

EXCESSIVE ABSENTEEISM: Excessive Absenteeism is more than two (2) unexcused absences in any 60 day period and may result in disciplinary action. An unexcused absence is defined as: reporting to work late, leaving early, not working due to sickness, personal, or detention or absent due to criminal offense or unknown reasons. The preceding could be

excused if you arranged with your supervisor or plant manager one day in advance for the absence.

EXCUSED ABSENCE IS DEFINED AS: An excused absence is something that must be pre-scheduled by the employee in advance, which would include such things as vacations, funerals (those covered in contract), approved military leave, jury duty, workmen comp. injuries etc. Other reasonable reasons will be considered with advance notice and approval.

ABSENTEEISM WILL BE ASSESSED AS FOLLOWS:
Tardy or leaving early--counts as one.
Absent--counts as one.
Ill--one day or several days consecutively without an approved doctors report--counts as one.
Absent--due to weather will count as one unless a larger percentage is absent and has been approved by a designated person.

. . .

DISCIPLINE

Penalties for most violations of the Shop Rules will be assessed by the foreman. Usually, the first violation, if minor will result in only a verbal warning. A more serious violation, or a second or subsequent related violation, will result in a written warning. All written warnings will become a part of the employee's permanent file. The time limit for issuing written warnings for absenteeism is 10 working days, the warning issuance time limit for all other offenses is 5 working days.

PENALTY FOR OFFENSE: The following penalties may be made at the discretion of the Company.

1st Offense--Written Warning.

2nd Offense--Written warning and up to and including a five (5) day layoff.

3rd Offense--Written warning and five (5) day lay-off or more, up to and

including discharge.

After an employee has worked for 12 (twelve) months with no violations, his or her record shall be cleared. Also, after 12 (twelve) months from each violation, that violation will be cleared from the employee's record.

A foreman, at his discretion, may, when issuing warnings, limit the time the warning remains on the record, capable to being renewed, to six months.

Background:

The Company manufactures wood veneer products at its facility in Gillett, Wisconsin. The Company has had a collective bargaining relationship with Local 800 for an unknown number of years.

The Company has a Disciplinary Review Committee (DRC) made up of five management representatives including Mike Gloede, General Foreman of the Press Department. 1/ This Committee meets regularly to decide the appropriate level of discipline to be meted out for all employe misconduct. In anticipation of these meetings, each morning, Gloede and Personnel Director Knoll and her assistant, review absentee slips which are made out by the employe's supervisor or the office whenever an employe calls in to request an unpaid day or otherwise requests or uses an unpaid personal day pursuant to the above=quoted work rules. Gloede, Knoll and her assistant check the employes' absenteeism records against each absences slip to see whether the employe should be disciplined, and Gloede then makes a recommendation to the DRC at its next meeting regarding discipline on these items.

It is undisputed that employes of the Company may take up to two unpaid personal days in a 60-day period pursuant to the Work rules, (amended by agreement on September 1, 1990), if they call the Company in advance. However, if personal days equal or exceed two days in a 60-day period, those days will be counted as unexcused absences on the employe's absenteeism record.

The Company submitted testimony and documentation to show that it currently administers its disciplinary system as follows. The Work Rules indicate that discipline is automatically down-graded on an employe's record after twelve months from the date of

1/ Foreman Blohowiak, Brown, Reinhold and Smaney report to Gloede.

the discipline. For example, as a general rule unless an infraction calls for severe discipline, if an employe receives a written warning, that warning will be removed from the employe's record after twelve months. Thereafter if the employe commits another infraction, the Company will generally give the employe a written warning. If an employe has a written warning on his record, he will receive a five-day layoff for another infraction committed before twelve months from the first warning. However, thereafter, the original warning will be removed twelve months after its issuance and at that time the five-day layoff will be down-graded to a written warning, which will be removed twelve months after the issuance of the original five-day layoff. The Company's witnesses stated, and it offered documents which the Company contends generally showed, that the Company has followed progressive discipline (written warning, five-day layoff and termination) for each absenteeism infraction by an employe.

Prior to September 1, 1990, the Company's Work Rules provided a four step process as follows: a written warning, a written warning with a 3-day layoff, a written warning with a 5-day lay off, followed by termination. Under this procedure, the Company automatically down-graded written warnings and lay offs (as it does under the current procedure described above except that the down-grading then took 9 months rather that the 12 months provided for under the current rules.

Many examples of prior disciplinary cases were raised by the parties covering the years before and after the September 1, 1990 change in the Work Rules (to a 3 step/12 month system). However, the Union raised three specific cases from among all those discussed at the hearing which it argued demonstrated that the Company had treated Schwabe arbitrarily. These cases related to the following listed employes and the discipline they received as follows:

1) Chad Markiwicz --

5-15-89	Written Warning Absenteeism
5-22-89	" " "
6-12-89	5 Day Lay-off Absenteeism
9-19-89	Written Warning Safety Violation
10-03-89	Written Warning No Call
10-23-89	Written Warning Not Filling out Ticket
11-27-89	5 Day Lay-off Absenteeism and Falsifying Labor Ticket (reduced to WW as of 8/27/90)
8-31-90	Written WArning Argument and Swearing

2) Charles Prock --

Absenteeism - 6/4/90 - Written Warning
(only 1 min. late)
Horseplay -- 7/9/90 - Written Warning
(Not severe enough for 5 day)
Exc. Absenteeism -- 3/13/91 (5 day LO
Reduced to a W.W. on 3/13/92)
Horseplay -- 9/12/91 (5 day LO Reduced
to a W.W. on 3/13/92)
Exc. Absenteeism - 6/4/92 - (5 day LO
Reduced to a W.W. 6/4/93)

3) Brenda Danielson received one written warning for
the following absences --

1-18-91	Personal day
2-27-91	" "
2-28-91	" "
3- 1-91	" "
3- 4-91	" "
3- 5-91	" "
3- 6-91	" "

The many other prior disciplinary cases submitted by the parties were administered in accord with the Company's practices as their witnesses described them (including down-grading discipline and counting each occurrence as one incident no matter what type of activity it involved).

Facts:

The events leading to the filing of the grievance herein are not in dispute. Marcus Schwabe was hired by the Company in August, 1989. By May, 1993, his job title was scarfer operator.

On August 6, 1993, Schwabe came to work on the second shift (3:00 p.m. -11:00 p.m.) feeling ill, although he did not tell his foreman this. Schwabe worked at his regular job under foreman Jeff Simpson until Simpson's normal quitting time at 3:30 p.m. Thereafter, Schwabe's foreman was George Blohowiak. At approximately 7:40 p.m., Blohowiak came to Schwabe at his work station in the veneer prep area and asked Schwabe to perform a form change. 2/ Schwabe told Blohowiak he did not feel

2/ To perform a form change, an employe must remove a form from a press machine, using a forklift, drive through the plant with the form carried high on the lift to avoid hitting machines and people, put the unneeded form away, get the

comfortable performing form changes because he had only done so on one or two of the smaller forms. Schwabe said he was not comfortable driving the larger forms through the plant raised up high on the lift because he did not have enough experience. Schwabe asked Blohowiak to have the leadman do the form change. 3/

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needed mold or form from storage using the forklift, and drive it safely through the plant and put it in the machine.

3/ Although Schwabe was classified as a scarfer operator on August 6, 1993, he then had a valid forklift operator's license. The Company has a separate classification of forklift operator but there were no forklift operators employed on the second shift on August 6, 1993. Schwabe's leadman, Dave Martin, was at work on August 6th and he too possessed a valid forklift operator's license but Martin was working on a continuous operation machine that night, known as the finger jointer, which once started cannot be stopped or left unattended until the job is completed.

Blohowiak responded that he wanted Schwabe to do the form change. Schwabe said that he did not feel well and was thinking about going home. 4/ Blohowiak said that Schwabe could not go home then because Blohowiak had already given him a direct order to perform the change and if Schwabe went home it would constitute insubordination and Schwabe would be fired.

Schwabe performed the form change. He then told Blohowiak he was not feeling well and was going home. Blohowiak said, "Okay. Go ahead." Schwabe left work at about 8:00 p.m.

Schwabe reported to work as scheduled on August 9th. On August 10th, he was terminated. In reaching the conclusion to discharge Schwabe, the Company, by its Disciplinary Review Committee, took into consideration Schwabe's record which showed the following:

May 11 - 17, 1993, (five-day layoff) 5/
June 8, 1993, one unpaid personal day taken (no discipline)

July 15, 1993, one unpaid personal day taken (no discipline)

4/ This was the first time Schwabe had told supervision he did not feel well on August 6th.

5/ The Union offered evidence regarding the reason for Schwabe's five-day layoff in May, 1993, which Schwabe did not grieve. Schwabe offered, by way of explanation, that he had received permission to remove scrap wood from the plant but that instead of using his permission ticket to do so right away, Schwabe had given the wood he had saved to another employe who stated he had a ticket also. A couple of weeks later, Schwabe removed other scrap wood from the plant, believing he could use the old ticket granting him permission to remove scrap. This violated the Company's rules/policies and Schwabe received a five-day layoff therefor.

August 6, 1993, one sick day taken (discharge)

Based upon the Company's interpretation of its shop rules, Schwabe had an active five-day layoff on his record at the point in time when he had taken more than two unpaid days off in a sixty-day period. This amounted to excessive absenteeism, in the Company's view. The Company therefore (assertedly) applied progressive discipline and terminated Schwabe, the next level of discipline after a five-day layoff.

Positions of the Parties:

Employer:

The Employer urged that as a general matter, arbitrators should leave the level of discipline (if within a reasonable range) to the Employer, absent a proven abuse of discretion on the Employer's part. In this case, the Employer urged, it had proper cause to discharge Marcus Schwabe. On this point, the Employer observed that Schwabe had violated the Employer's rules regarding absenteeism because Schwabe had three "unexcused absences" as defined in the rules in a 60-day period.

The Employer noted that during his employment, Schwabe had demonstrated that he knew how the Employer's no-fault absenteeism rule operated because he had been disciplined thereunder repeatedly. The Employer urged that even if it could be assumed that Schwabe had been ill on August 6, 1993, this did not excuse Schwabe's acts or diminish the Employer's (and other employes') legitimate need to have Schwabe regularly and dependably employed in his position.

The Employer contended that its enforcement of its work rules in this case was done in accord with the rules and the past practice regarding them. In this regard, the Employer noted that the evidence showed that under its practice, each infraction has lead to progressively greater discipline culminating in discharge, no matter what type of offense was committed. The Employer argued that Schwabe knew and "played the system" from the beginning of his employment, as shown by his record of discipline: 6/

6/ The Work Rules (Discipline) specifically state that written warnings "become a part of the employee's permanent file." Layoffs are issued with a written warning under the Rules.

10/11/89	Warning
8/28/90	5-day layoff (ex. absenteeism)
12/91	5-day layoff (ex. absenteeism)
12/92	5-day layoff (ex. absenteeism)
5/93	5-day layoff (stealing)
8/93	terminated (ex. absenteeism)

The Employer urged that the Union's argument that because other employes had two active layoffs in a 12-month period and were not discharged that Schwabe should therefore be reinstated, was not supported by the facts. In any event, there was no valid reason to allow Schwabe to avoid the consequences of his own choices and actions, in the Employer's view.

The Employer contended that the examples of inconsistencies in rule enforcement offered by the Union were not inconsistent according to the Employer's records and testimony. The only exception was the Employer's treatment of Brenda Danielson who received only a written warning for a series of absences which were consecutive. The Employer urged that one isolated inconsistency prompted by unusual and distinguishing circumstances, should not require a conclusion that the grievance must be sustained.

The Employer argued that the Union had failed to prove any circumstances in Schwabe's favor which would call for mitigation of the discharge penalty. The Employer noted that Schwabe began having absenteeism problems just two months after his hire and that those problems continued unabated thereafter. The Employer also observed that it could have terminated Schwabe with impunity in May, 1993, for stealing. In the circumstances, therefore, the Employer sought denial and dismissal of the grievance in its entirety.

Union:

The Union observed that the Company bears the burden of proving that it had "proper cause" to discharge Schwabe and that the severity of the penalty given Schwabe -- "economic capital punishment" -- should have been in keeping with the seriousness of the offense. The Union urged that Schwabe's minor infraction of August 6th was not a serious offense, in light of Schwabe's honest attempts to comply with Company policies.

The Union argued that on June 8th and July 15th, Schwabe had shown consideration for the Company's needs by calling the Company and requesting and receiving permission to take unpaid personal days for those days. Yet under the Employer's "no fault" attendance rule, Schwabe received the same penalty for his honesty

as he would have received had he simply not shown up for work or lied to the Company. The Union also contended that Schwabe tried to do the right thing when he reported to work on August 6, despite feeling ill, and when he performed the form change which Blohowiak ordered him to perform. When Schwabe received Blohowiak's "O.K." to go home ill after completing the form change on August 6th, the Union asserted, he should have been able to reasonably conclude that he would not be punished for leaving his shift three hours early.

Indeed, the Union observed, August 6, 1993 was the last day of the 60-day absence period for Schwabe, so that if Schwabe had been able to complete his shift on August 6th and even if he had failed to come to work on his next scheduled work day, he would not have been disciplined at all. The Union contended that Blohowiak had no right to deny Schwabe, a sick employe, the right to go home without being disciplined therefor. To discharge Schwabe on these facts, was neither just nor did it amount to just cause, in the Union's view.

The Union further argued that Schwabe's violation of Company policy in May, 1993 was a merely technical one and that the Company acknowledged this until the instant hearing when the Company styled Schwabe's actions as "stealing." Furthermore, the Company's disparate treatment of Schwabe demonstrated the unfair manner in which the Company has enforced its allegedly automatic "no-fault" absenteeism policy. In this regard, the Union pointed out that although General Foreman Gloede claimed the absenteeism penalties were automatic, he also admitted that the Company could impose less than a five-day suspension for a second absenteeism offense and less than termination for a third offense, through its review committee's discretionary actions.

Thus, the Union asserted, the Company applied its absenteeism policy arbitrarily in Schwabe's case and that therefore, Schwabe should be reinstated with backpay and benefits. The Union pointed to the cases of Charles Prock, Chad Markiwicz and Brenda Danielson to demonstrate that Schwabe was treated arbitrarily. These three employes had been given the benefit of the doubt and had been favored by the Company, despite their serious misconduct, while Schwabe was not given such favorable, lenient treatment. In the case of Danielson, the Union noted that the Company counted her "six-day self-elected holiday" the same as Schwabe's three hour absence for illness. This, the Union contended, showed that the Company's absenteeism policy was fatally flawed and indefensible. Finally, the Union argued that the Company's standardized warning notices failed to properly notify employes of possible discharge and failed to impress upon them the consequences of future misconduct so that they could modify their behavior.

Reply Briefs

Employer

The Company strongly resisted the Union's assertions that Schwabe was a loyal, honest and conscientious employe, noting that Schwabe's character is not an issue to be determined herein. The Company also disputed the Union's contentions Schwabe acted appropriately when he left work early on August 6th and that Foreman Blohowiak's comments constituted permission to leave work with impunity on August 6th. In this regard, the Company noted that under its no-fault absenteeism policy a foreman's approval on the day of absence does not and cannot change such an unexcused absence into an excused absence. The Company also observed that the Union failed to prove that Schwabe was actually ill on August 6th. In addition, the Company argued that because there was no proof offered by the Union that Blohowiak actually knew the current status of Schwabe's absenteeism record, Blohowiak lacked both the knowledge and the authority to "approve" of Schwabe's absence.

The Company argued that the Union's assertions that the Company had been dishonest in describing its no-fault absenteeism policy as automatic were incorrect. The Company urged that its policy was to allow two unexcused absences in a 60-day period but that beyond this, the Company has consistently and automatically disciplined employes. The Company observed that the manner and consistency of an employe's progression through the Company's progressive disciplinary program for misconduct other than absenteeism is not in issue here.

The Company also contended that its no-fault absenteeism policy is clear and does not result in disparate treatment of employes. In this regard, the Company noted that the specific provisions of the policy were followed in both the Schwabe and Danielson cases. The Company observed that no absenteeism policy can treat every case in the same fashion, but that the Company's policy is extremely fair, allowing at least 12 unexcused as well as excused absences in each year. Finally, the Company argued that the cases of mixed discipline cited by the Union as evidence of disparate treatment, are distinguishable and irrelevant to Schwabe's case.

Union

The Union asserted that the Company made arguments in bad faith regarding Schwabe's prior disciplinary record. The Union noted that the Shop Rules state that an employe's record "shall be cleared" after 12 months. The Union further contended that the Company had failed to prove that Schwabe's conduct warranted discharge. In this regard, the Union noted that Schwabe's excessive absenteeism consisted of "two personal days expressly approved by Schwabe's foreman and a three-hour absence due to

illness in 60 days," also OK'd by Blohowiak. The Union argued that Schwabe's absenteeism was therefore, not "inherently destructive of the employment relationship." The Union also resisted the Company's characterization of Schwabe as being dishonest and unrehabilitated.

The Union urged that the discipline of Markiwicz, Prock and Danielson cannot be explained away and that these cases show that the Company's action in firing Schwabe was unfair, unjust and unreasonable. The Union therefore sought Schwabe's reinstatement with full backpay.

Discussion:

There is no dispute that the Grievant, Marcus Schwabe, received a five-day lay off in May, 1993; that Schwabe never grieved the receipt of this lay off; and that this lay off was active and on his record at the time he went home approximately three hours early on August 6, 1993. It is also undisputed that on June 8 and July 15, 1993, Schwabe had taken two unpaid personal days off, known as unexcused absences, and that his leaving work early on August 6th due to illness amounted to a third such unexcused absence in a 60-day period. 7/

7/ There is no evidence to show that Schwabe attempted to arrange in advance for "excused absences" on June 8 and July 15th pursuant to the Work Rules. His calling the Company to inform them of these absences on the dates of the absences did not convert them to excused absences under the Rules. Nor did Blohowiack's "OK" comment to Schwabe's August 6th statement that he (Schwabe) was about to leave work early due to illness, meet the Rules' definition of an "excused absence" because Schwabe had not given the Company the advance notice and received prior approval for his August 6th absence. Therefore, Schwabe's absence on August 6th was also an unexcused absence.

The disputes in this case essentially revolve around whether the Employer has a consistent, clear progressive disciplinary program, whether the Employer properly applied this program to Schwabe's situation or whether it arbitrarily treated him differently from other employes similarly situated, and in addition, whether the penalty of discharge is too harsh for the "crime" Schwabe committed on August 6th.

In regard to the first question, the evidence showed that the Company has a no-fault absenteeism program contained in its Work Rules; that it has generally administered this program by its past practice, to keep track of but allow employes to take two unexcused absences in each 60-day period. It is only when the employe exceeds two such absences in a 60-day period that he/she "may" become subject to discipline therefor under the Work Rules. 8/ The Work Rules clearly do not distinguish between absences for good reasons and absences for "bad" reasons -- having been arrested or simply not showing up. Nor do the Rules distinguish between absences for a short time, "reporting to work late" and absences of a longer length, so long as the employe notifies the Company of an absence that is longer than two days. However, the Rules specifically state that disciplinary "penalties may be made at the discretion of the Company."

The Union argues that Schwabe's absences in June, July and August had been excused and should not be counted against him. I disagree. The overwhelming evidence showed that although Schwabe called in his absences in June and July he did not arrange in advance for them to be "excused" under the Rules. Therefore, Schwabe's absences in June and July were considered unpaid days which were then counted by the Company as unexcused absences under the Rules. In addition, the fact that Foreman Blohowiak told Schwabe it was "OK" for him to leave the plant early on August 6th, does not mean that Schwabe's absence was thereby excused. As aptly pointed out by the Company, under the Work Rules, Blohowiak lacked the power to grant Schwabe an excuse to leave early on August 6th. In this regard, I note that the Rules require specifically employes to pre-schedule excused absences "in advance" and "with advance notice and approval." Thus, all three of Schwabe's absences were unexcused and could then be counted as such under the Company's absenteeism rules/policy.

The parties submitted many prior disciplinary cases which the Company asserted showed its consistent administration of its rules and policies while the Union contended the opposite conclusion must be reached based on this evidence. As noted above, only three of these prior cases appeared to be inconsistent with the

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8/ The Work Rules do not specifically state that discipline for excessive absenteeism will be automatic, as Gloede claimed.

Company's rules/policies/practices. The first of these cases involved Chad Markiwicz. It should be noted that all discipline of Markiwicz was done in 1989-90 prior to the September 1, 1990 change in the Work Rules. Markiwicz's first two written warnings were received in May, 1989 for absenteeism. On June 12, 1989 he received a 5-day lay off for absenteeism. All three of these disciplinary actions would have been down-graded by March 12, 1990. However, Markiwicz received two written warnings and a verbal warning for infractions not related to attendance in September and October, 1989. On November 27, 1989 Markiwicz received a 5-day lay off for absenteeism and falsifying a labor ticket. This 5-day lay off was reduced to a written warning as of August 27, 1990. On August 31, 1990 Markiwicz received a written warning for arguing and swearing. It is clear from this case that in 1989 and early 1990 the Company did not count every infraction as a part of its progressive disciplinary program or Markiwicz would have been terminated on or before August 31, 1990. The Markiwicz case supports the Union's arguments here although the weight thereof must be diminished by the fact that all discipline given to Markiwicz was received prior to the Work Rule changes.

The second case, involving Charles Prock also showed that Prock received two written warnings (in June and July, 1990) prior to the September 1, 1990 Work Rule changes. Prock's case shows that the Company had tightened its application of discipline, applied its down-grading procedure and had begun to apply progressive discipline to all offenses with one exception: The Company failed to issue Prock a lay off for the horseplay he engaged in on July 9, 1990 because, it stated, that incident was not serious. However, with each discipline Prock received in 1991 and 1992 the Company followed its procedure of issuing a 5-day lay off when a written warning was active, no matter what type of offense Prock committed. I note that the Work Rules provide that the Company may exercise discretion in setting penalties (such as for the July 1990 horseplay incident) and that in every other respect, the Prock case tends to support the Company's arguments rather than the Union's.

Regarding the case of Brenda Danielson, Danielson missed six work days between February 27, 1991 and March 6, 1991, yet this was counted as one absence by the Company because of a loophole. The Company explained that it has generally counted a series of absences as one absence and that issued discipline to Danielson (and others similarly situated) upon her return to work after her consecutive-days absence. The Company explained that this loophole existed because it has been the Company's practice to deliver discipline slips to employes personally, not to mail them.

Although the Union made several valid points regarding the consistency, clearness and fairness of the Company's disciplinary scheme, in the majority of cases submitted covering discipline

issued after September 1, 1990, the Company followed a consistent and clear policy which policy it applied to Schwabe's case. The Danielson exception, 9/ noted above appeared to be a rare instance not applicable to Schwabe, which fails to diminish the fact that Schwabe clearly violated the rule against having more than two unexcused absences in 60 days. Furthermore, the record evidence demonstrated that the Company counted Schwabe's unexcused absences as it had done in the past when the absences were not consecutive, and that the Company applied its progressive disciplinary scheme, noting that Schwabe had one active written warning and 5-day lay off on his record at the time he exceeded two unexcused absences, to discharge Schwabe.

It is significant that the Company could have given Schwabe a penalty less than discharge under the language of the Work Rules, but that it chose not to do so. As the parties are fully aware, arbitrators are loathe to disturb or amend disciplinary penalties meted out by employers in cases where an abuse of discretion in setting the penalty has not been proven. In the instant case, I

9/ As I indicated above, the strength of the Markiwicz case is lessened somewhat by the fact that all discipline was given to him before the September 1, 1990 Work Rule changes. In addition, as also stated above, I believe the Prock case weighs more on the side of the Company than on the side of the Union. This leaves the Danielson case as a clear exception to the "general rule."

believe that the Union failed to prove that the Company abused its discretion in setting the discharge penalty and although the Company could have set a lesser penalty here, in these circumstances, I shall not disturb the Company's decision.

Based upon the relevant evidence and argument herein I issue the following

AWARD

Marcus Schwabe was discharged for proper cause.

The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 29th day of March, 1994.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator