BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GENERAL TEAMSTERS UNION, LOCAL 662	Case 13 No. 51036 A-5233
and	
GEORGIA PACIFIC CORPORATION	

Appearances:

Mr. Kenneth Loebel, Attorney at Law, appearing on the behalf of the Union.

Ms. Bonnie Doerr, Division Manager/Labor Relations, Georgia Pacific Corporation, appearing on the behalf of the Employer.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and Company or Employer, 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 was held on August 11, 1994, in Wausau, Wisconsin. The hearing was not transcribed. The parties filed briefs which were received by September 1, 1994. Based on the entire record, the undersigned issued the following award.

ISSUE

The parties stipulated to the following issue:

> Did the Company violate the labor agreement when it terminated John Wopp on April 21, 1994?
>
> If so, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

The parties' 1992-95 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 2-EQUAL OPPORTUNITY

> It is the policy and practice of both Georgia-Pacific and the Union to provide Equal Employment Opportunity to all persons without regard to race, color, disability, religion, sex, national origin, or age as defined in applicable Federal and State laws. This includes hiring, assigning, training, promoting, transferring, terminating, compensating, providing employee benefits and all other conditions of employment.

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ARTICLE 7 - SENIORITY

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SECTION 4

Seniority shall be terminated and the Employer-employee relationship shall be severed by any of the following:

(1) Discharge
(2) Voluntary quit
(3) One (1) year layoff without regaining full- time status
(4) Unauthorized absence for three (3) successive scheduled working days
(5) Failure to return to work within five (5) working days f

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ARTICLE 10 - LEAVE OF ABSENCE

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SECTION 2 - LEAVE OF ABSENCE

Employees desiring leave of absence from their employment shall secure written permission from both the Union and Employer. The maximum leave of absence shall be for thirty (30) days and may be extended for like periods. Permission for same must be secured from both the Union and Employer. During the period of absence the employee shall not engage in gainful employment except with the permission of the Employer and the Local Union. Failure to comply with this provision shall result in the complete loss of seniority rights and the termination of the Employer-employee relationship for the employees involved.

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ARTICLE 11 - DISCIPLINE AND DISCHARGE

SECTION 1

In instances requiring warning or discipline the Company shall issue a warning letter to the employee for the first offense.

In the event of a second offense within a nine (9) month period the Company shall issue a second warning letter and may invoke a disciplinary layoff not to exceed three (3) days.

In the event of a third offense within a nine (9) month period the Company shall issue a warning letter and may invoke a disciplinary layoff or discharge.

SECTION 2

The Local Union shall be provided with copies of all warning letters which shall contain a description of the offense and any disciplinary action that has been taken.

SECTION 3

Warning notices need not be issued for the following offenses:

Possession of, use of, or under the influence of alcoholic beverages or non-prescribed drugs while on Company property or time, unauthorized removal of Company property, sleeping while on duty, insubordination, dishonesty, carrying unauthorized passengers, recklessness, or smoking in restricted areas shall be considered cause for discharge and shall be grievable or arbitrable only to the end that the discharged employee was not guilty of the above offenses.

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RELEVANT WORK RULES

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Page 1, No. 12. If an employee is absent for three (3) consecutive days without notification, said absence will be considered a voluntary quit.

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> Page 2, No.10. Employees must notify their supervisor each day when they miss work and the absence is unscheduled.

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BACKGROUND

The Company operates a distribution center in Wausau, Wisconsin, where employes unload material off railroad cars and load it on trucks for distribution. The Union is the exclusive bargaining representative for the truck drivers and warehousemen who work there. Grievant John Wopp was hired as a truck driver/warehouseman in 1979. He worked Monday through Friday on the day shift; he was off work Saturday and Sunday. Prior to being discharged, Wopp had not been previously disciplined.

In 1987, Company officials placed Wopp on a medical leave after he tested positive for marijuana. He was on such leave for about two weeks.

By his own admission, Wopp is an alcoholic. Before being discharged, he had not been disciplined for misconduct related to his alcoholism such as drinking while at work, reporting to work intoxicated, excessive absenteeism, or poor work performance. His attendance record was average.

Wopp's driver's license has been suspended several times due to convictions for operating his vehicle while intoxicated (OWI). The Company was aware of these convictions. In 1990, Wopp's driver's license was suspended for seven months for OWI. Thereafter, Wopp was removed from his truck driving duties with the Company. As a result, he has worked exclusively as a warehouseman since then. In 1991, his driver's license was revoked for 18 months, and he went to jail. He was released for work while in jail under Wisconsin's "Huber Law." This law permitted him to work rather than spend time in jail. In October, 1993, Wopp was again convicted of OWI. None of these OWI convictions were connected with work-related driving; all were non-work related.

Wopp underwent inpatient treatment for alcoholism at the North Central Health Care Facility in Wausau from November, 1993, until December 7, 1993. Company officials placed Wopp on medical leave during this period of time. This inpatient treatment was covered under the Company's health insurance program. After Wopp returned to work, Warehouse Supervisor Gary Somers told him that the Company was not going to pay the cost for any additional inpatient treatment for alcoholism under its insurance program.

Beginning mid-March, 1994, 1/ Wopp was again afforded "Huber Law" privileges whereby he was permitted to work rather than spend time in jail. Additionally, he was also under a "monitorship" program which meant that when

1/ All dates hereinafter refer to 1994.

he was not working, he could remain at his home instead of being confined to the jail. He wore an ankle bracelet which let the County Sheriff's Department know where he was.

The record indicates that Lisa Wopp has called the Company on occasion to report that her husband would be absent from work. Other employes' wives have also reported their husband's absence from work. Insofar as the record shows, these absences were one-day in length. These one-day absences were considered by the Company to be "authorized" absences.

The record further indicates that there have been employes who were absent more than three days. Just one instance is documented in the record though. In that instance, an employe had a heart attack. The Employer considered his subsequent absences to be "authorized" and placed him on a medical leave of absence. Insofar as the record shows, the Company has never previously considered being in jail to be an "authorized" absence.

Prior to the discharge involved here, no one had ever been fired from the Company's Wausau branch. This was the first time the Company relied on Article 7, Section 4 as the basis for a discharge.

FACTS

On Saturday, April 16, 1994, Wopp went on a drinking binge at his home and became intoxicated. His wife Lisa had a confrontation with him about his drinking whereupon she left the house. When she returned to the house later that evening, she found her husband passed out in the basement with a loaded shotgun along side him. She removed the shotgun and called the rescue squad. Since a weapon was found at the scene, the rescue squad reported the matter to the police.

Wopp was first taken by the rescue squad to the hospital for treatment. From there, he was taken to the North Central Health Care Center where he remained until Monday afternoon, April 18. He was then taken to the county jail and placed in detention because his resumed drinking of alcohol on Saturday, April 16 violated the terms of his "Huber Law" privileges.

Wopp did not report for work on Monday, April 18, a scheduled work day, whereupon supervisor Gary Somers called his home. No one answered, so Somers left a message on a telephone answering machine seeking a call back. Lisa Wopp called Somers back sometime between 8:30 and 9:30 a.m. and told him that her husband (John Wopp) would not be coming into work and that he was at the North Central Health Care Center. Somers asked her if the Sheriff's Department knew where her husband was, to which she replied that they did. This ended the conversation.

After his conversation with Lisa Wopp, Somers called the Marathon County Sheriff's Department to report that John Wopp had not come to work (as required for "Huber Law" privileges). Wopp's probation officer told Somers that Wopp was currently at the North Central Health Care Center; that he would shortly be moved to the county jail for a parole violation; and that he would be detained in jail until he had his "Huber Law" privileges restored. Insofar as the record shows, the probation officer did not give Somers a specific date when Wopp could have his "Huber Law" privileges restored. Somers then reported all the foregoing information to Plant Manager Ron Guilloz.

Wopp did not report for work on scheduled work days Tuesday, April 19 and Wednesday, April 20. Somers reported Wopp's absence each day to Plant Manager Guilloz.

On Wednesday evening (April 20), Lisa Wopp called Somers at his home, but he was not there so she left a message for him to call back. Somers got the phone message but did not call her back. The reason she called Somers was to tell him that her husband had been released from the Health Care Center on Monday, April 18, and had then been transferred to the county jail.

Wopp did not report for work on Thursday, April 21, a scheduled work day. As he had done on Monday, Tuesday and Wednesday, Somers reported Wopp's absence to Guilloz.

That afternoon, Somers and Guilloz conferred with Company Labor Relations Representative Bonnie Doerr by phone concerning Wopp's absences that week. After discussing the matter, they decided that his absences that week were "unauthorized." They further decided to discharge Wopp pursuant to Article 7, Section 4 of the labor agreement. At the end of that day, Somers wrote, signed and mailed Wopp's discharge letter. That letter, in its entirety, was as follows:

> Pursuant to the labor agreement, Article 7, Section 4, your employment with Georgia Pacific Corporation has been terminated effective April 21, 1994.

That night, Lisa Wopp called Somers at his home. In this phone call she told him that her husband's court hearing was scheduled for May 2 and that he could return to work thereafter if his "Huber Law" privileges were restored. Somers did not tell her that her husband had already been fired.

Following Wopp's termination, a grievance was filed concerning same which was ultimately processed to arbitration.

The record indicates that Wopp remained detained in the county jail until May 25 when he was permitted to leave and move to the Oakside Rehabilitation Center located in Stevens Point, Wisconsin. Thereafter, he obtained employment in Stevens Point and was again given "Huber Law" privileges to work at that job.

POSITIONS OF THE PARTIES

The Union's position is that the Company violated the labor agreement when it terminated the grievant. The Union notes at the outset that the grievant's past positive drug test and past driver's license suspension record were not the stated reasons for his discharge. The Union views these matters as simply afterthoughts which the Company seized upon to add weight to the grievant's discharge. The Union cites the established arbitral principle that a discharge must stand or fall on the reason given at the time of discharge and urges its application here. The Union notes in this regard that the stated reason for the grievant's discharge was that he allegedly violated Article 7, Section 4. Next, it argues that the Company's invoking of that provision in this instance was unreasonable and arbitrary. To support this contention, it relies on the following. First, it submits that management officials knew where the grievant was when he was absent because Lisa Wopp called Somers on Monday, April 18 and told him. Second, it notes that the grievant had never been previously warned that absences due to his alcoholism would be deemed "unauthorized." Third, it notes that the grievant had no history of work-related misconduct related to his alcoholism such as drinking at work, reporting to work intoxicated or excessive absenteeism. The Union contends that under these circumstances, the Company should have treated the grievant's absences the week of April 18 as authorized. According to the Union, the Company simply used Article 7, Section 4 to get rid of the grievant. Next, the

Union argues that what the Company did (i.e. discharge the grievant) was at odds with its obligation under Article 2 to accommodate those with disabilities (in this case the grievant's disability of alcoholism). In the Union's view, the Company failed to make a reasonable accommodation to the grievant's disability. Next, the Union asserts that the Company did not show that it would have suffered a hardship by simply giving the grievant an unpaid leave of absence instead of terminating him. The Union submits that it would not have objected to such a leave of absence. Finally, the Union asserts that the Company's decision to terminate the grievant instead of simply putting him on a leave of absence was particularly egregious because by losing his job it resulted in his staying in jail beyond May 2 when he could have been released under the "Huber Law" to return to work at the Company. It notes that without a job, the grievant had to remain in jail until May 25 when an opening occurred at a treatment center in Stevens Point. Given the foregoing, the Union believes the grievant's discharge violated the labor agreement. As a remedy for this alleged contract violation, the Union asks that the grievant be reinstated to his former warehouse classification without loss of seniority and made whole for lost wages and benefits incurred since May 2, 1994, (when but for his being terminated, he could have been released from jail under the "Huber Law" and been able to return to work). The Union asks that the time between April 18 and May 2 be treated as an authorized leave period for the grievant. The Union further asks that as a condition of reinstatement, the grievant be required to agree to follow a medically prescribed regimen banning the drinking of any alcoholic beverages, and that his failure to follow that prescribed regimen will result in his discharge by the Company.

The Company's position is that it did not violate the labor agreement when it terminated the grievant. The Company notes at the outset that in its view, the issue herein is not 1) whether the Company was notified of the grievant's absence; or 2) whether the Company acted fairly in discharging the grievant; or 3) whether the equities of the situation warrant reversing the discharge. With regard to the first point, the Company asserts that notification, or lack of same, was not the basis for the grievant's discharge. It specifically notes in this regard that the grievant was not fired for violating work rules, namely No. 12 on page 1 or No. 10 on page 2. With regard to the second point, the Company argues that it does not have the burden of demonstrating just cause for the grievant's discharge. Finally, with regard to the third point, the Company argues that it is not the arbitrator's job to do equity here. It believes there are no mitigating circumstances for modifying the Company's action (i.e. discharge). According to the Company, the question to be decided here is whether the grievant's discharge conformed with Article 7, Section 4. The Company argues that it does. To support this premise, it notes that the grievant was absent from work on April 18, 19, 20 and 21 (Monday through Thursday). The Employer asserts that it did not authorize any of these absences. That being the case, it submits that all these absences were "unauthorized" within the meaning of Article 7, Section 4. It contends that this language is clear and unambiguous in authorizing the severance of the employer-employe relationship under these circumstances. It therefore asks the arbitrator to enforce Article 7, Section 4 exactly as written. In conclusion, the Company argues that it is not contractually obligated to treat the grievant any differently from other employes because of his long-term abuse of alcohol. The Company therefore contends the grievance should be denied and the discharge upheld.

DISCUSSION

The stipulated issue requires a determination whether the grievant's discharge violated the contract. Based on the rationale which follows, I find that the answer is "no."

It is noted at the outset that the grievant's discharge letter did not say what it was that he did or why he was fired. Instead, it simply cites a portion of the contract (namely Article 7, Section 4) and says that he was terminated pursuant to that provision. Article 7, Section 4, which will be addressed in detail below, deals with unauthorized absences for three successive scheduled work days. Since that provision deals with unauthorized absences for three successive scheduled work days, it can be inferred that the grievant was fired for his absences on April 18, 19, 20 and 21. Thus, even though the discharge letter does not specifically cite those absences, it is implicit that it referenced same.

That said, there is a question as to whether there were additional reasons (other than these absences) for the discharge. That being so, it follows that this, by necessity, is the threshold issue.

The Union notes that at the hearing, the Employer made reference to the grievant's past positive drug screen and his driver's license suspension record. In the Union's view, these were afterthoughts which the Company seized upon to also justify the grievant's discharge. It is a fundamental arbitral principle that a discharge must stand or fall upon the reason given at the time of the discharge--not the reason given at the arbitration hearing. The grievant's discharge letter did not say anything about either of the aforementioned matters. However, just because these matters were not mentioned in that letter does not mean that the Employer was precluded from raising them at the hearing. Certainly the grievant's past work record was fair game at the hearing. Not surprisingly, each side emphasized the part of the grievant's work record which supports their case. For example, the Union calls the arbitrator's attention to the fact that the grievant had never been disciplined prior to being discharged. On the other hand, the Employer calls attention to the grievant's past positive drug screen and his driver's license suspension record. All of the foregoing has been considered. The Union's point that the grievant had not received any progressive discipline under Article 11, Section 1 prior to being discharged is certainly well taken. The usual inference when an employe has not been previously disciplined is that their work record is acceptable to the Employer. By the same token though, the grievant's past positive drug screen and driver's license suspension record cannot simply be swept under the proverbial rug. The grievant's positive drug screen in 1987, though now dated, is nevertheless relevant here because the Company gave the grievant a leave of absence after that incident and the Union contends it should have done so here as well. Additionally, the grievant's driver's license suspension record is relevant here because the Company removed the grievant's truck driving duties because of his driver's license suspensions. Thus, the grievant's driver's license suspensions had an impact on the duties he could perform for the Company. Given the foregoing, it is held that the Company was not precluded from raising the foregoing matters at the hearing.

The question remains though whether the foregoing matters were additional reasons for the grievant's discharge. It is held they were not. In point of fact, the Company did not contend at the hearing that it fired the grievant for either of these reasons. That being the case, the Employer did not improperly expand the reasons for the grievant's discharge beyond what was referenced in the discharge letter.

Next, as noted above, the Union argues that the Company should have given the grievant a leave of absence instead of terminating him. The record indicates the Company has given the grievant leaves twice before to "clean up his act." The first time was in 1987 after the grievant tested positive for marijuana, and the second time was in November, 1993 when he was treated at a alcohol treatment center. Since the Company had given the grievant leaves on

two prior occasions, it obviously could have chosen to do so a third time. However, the question here is not what the Employer could have done. Rather, it is what is the Employer contractually obligated to do. A review of the leave of absence provision (Article 10, Section 2) indicates that the granting of leaves by the Employer is discretionary. Nothing in that provision mandates that the Company has to grant a leave. Here, the Company decided that it would not grant the grievant a third such leave. The contract gives the Employer the right to make that call. There is nothing in the record which indicates that the Employer treated the grievant differently from other employes when it made that call (to not grant such a leave). As a result, there is no evidence that the grievant was subjected to disparate treatment when the Company declined to grant him a third medical leave. It is therefore held that the Company's failure to grant the grievant a leave under the instance circumstances was not a contract violation.

Next, attention is turned to the Union's argument that what the Company did (i.e. discharge the grievant) was at odds with Article 2. That provision (the Equal Opportunity clause) provides in pertinent part that it is the Company's policy "to provide Equal Employment Opportunity to all persons without regard to ... disability ..." The Union contends that the grievant had a disability, namely alcoholism. Assuming for the sake of discussion that alcoholism is a "disability" within the meaning of Article 2, there is nothing in the record indicating that the Company failed to provide an "Equal Employment Opportunity" to the grievant because of that disability. Thus, it has not been established that the Company discriminated against the grievant for being an alcoholic. Likewise, there is nothing in the record indicating that the Company fired the grievant for that reason. In point of fact, it fired him for another reason (the legitimacy of which will be addressed below). Nothing in Article 2 precludes the Employer from terminating an employe who is an alcoholic for legitimate reasons.

Having so found, the focus turns to the contract provision which the Employer relies on, namely Article 7, Section 4. That section provides that "the employer-employe relationship shall be severed" if any of five specified events occur. Item No. 4 on that list references an "unauthorized absence for three (3) successive scheduled working days." Thus, employes can be penalized for being absent without authorization for three successive scheduled work days. The parties have contractually agreed that if this occurs, the penalty is "severance of the employer-employe relationship." This of course means discharge. Given this provision, the normal progressive disciplinary sequence identified in Article 11, Section 1 is inapplicable to such an infraction.

As previously noted, the grievant was absent from work on April 18, 19, 20 and 21. These were consecutive scheduled working days for the grievant, so there is no question that the grievant was absent for "three (3) successive scheduled working days." Management determined that these absences were all "unauthorized." The Union challenges this determination and contends that these absences should have instead been considered authorized.

Attention is therefore turned to the critical question of whether these absences were "unauthorized." The phrase "unauthorized" is not defined in Article 7, Section 4 or anywhere else in the contract. That being the case, there is nothing in the contract that indicates how such a decision is made or sets an objective standard to follow. In the absence then of any expressed definition or objective standard, the undersigned will apply a reasonableness standard in reviewing the Company's determination that the absences were "unauthorized." It is expressly noted that such a standard admittedly affords less protection to employes than other standards, such as a just cause standard, but a just cause standard is not contractually mandated herein.

The record indicates that the reason the grievant missed work on April 18 was because he was at an alcohol treatment center, and the reason he missed work on April 19, 20 and 21 was because he was in jail. There is no evidence in the record that other employes who missed work because they were in alcohol treatment centers or in jail were considered to have "authorized" or "excused" absences. Since no one else has been held to a different standard than the grievant, it follows that no disparate treatment is evident here. That being the case, there is no objective basis in the record for overturning the Company's conclusion that the grievant's absences due to being at an alcohol treatment center and being in jail were "unauthorized." While the Union notes that the grievant had never previously been warned that such absences would be considered "unauthorized," there is no contractual requirement that the Company was obligated to do so.

The undersigned surmises that the reason the Company decided to invoke Article 7, Section 4 here is that it considered, and rejected, using other grounds to justify the grievant's discharge. To begin with, the Company could have contended that the grievant's absences violated the Company's no-call, no-show work rules (namely No. 12 on page 1 and No. 10 on page 2). However, the Employer recognized that the problem with relying on these work rules to justify the grievant's discharge is that they are premised on notification not being given to the Company. What happened here though is that the grievant's wife called Somers on April 18 (the first day of his absence) and told him where her husband was that day (i.e. at the alcohol treatment center) and where he would be thereafter (i.e. jail). Thus, the Company received notification of the grievant's absence and where he was. Next, given the grievant's past abuse of alcohol, the Company could have chosen to rely on misconduct which is often times related to alcoholism such as drinking at work, reporting to work intoxicated, excessive absenteeism or poor work performance. However, the Employer also knew that the problem with using any of these traditional reasons is that the grievant had no history of any of these types of work misconduct. This of course means that none of these were viable options for the Employer either. Given the foregoing, it is not surprising to the undersigned that the Company chose to invoke Article 7, Section 4 here.

The Union views the Company's invoking of Article 7, Section 4 here as a harsh result. The undersigned does not disagree with this characterization. Be that as it may, the Company certainly had the right to invoke that provision, even though it never done so before. Just because the Employer has not utilized this contract provision prior to this instance does not mean it has somehow waived the right to utilize it. Were the undersigned to hold otherwise and find that the Company could not invoke Article 7, Section 4 in this instance, this would make this provision either meaningless or ineffective. It is an accepted rule of contract construction that interpretations which nullify a contract provision are to be avoided because the presumption is that the parties intended the provision to have some meaning. That being so, the undersigned believes he is constrained to enforce the provision as written and not disallow its application herein.

In conclusion, it is noted that an employe assumes one basic obligation in an employment relationship. That obligation is that the employe report for work. If an employe is unable to show up for work and is absent without authorization, the employer is justified in terminating that relationship because of the employe's inability to provide the contracted for services. This basic principle applies to all employes, alcoholics and non-alcoholics alike. Here, the grievant was absent on four successive days in a row. The Company decided that these absences were all "unauthorized," and this decision has not been overturned by the arbitrator. As previously noted, Article 7, Section 4 provides that the penalty for being absent without authorization for three successive scheduled work days is discharge. Since that is what happened here, the Company had a sound contractual basis for discharging the grievant.

The grievant's alcoholism does not change this. It is therefore concluded 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 issues the following

AWARD

That the Company did not violate the labor agreement when it terminated John Wopp on April 21, 1994. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 4th day of November, 1994.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator