

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration	:	
of a Dispute Between	:	
TEAMSTERS LOCAL UNION NO. 695	:	Case 43
	:	No. 51084
and	:	A-5236
	:	
GATEWAY FOODS	:	
	:	

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Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller, Brueggeman, S.C.,  
Attorneys at Law, by Mr. John J. Brennan, on behalf of  
Teamsters Local Union No. 695.

Rider, Bennett, Egan & Arundel, Attorneys at Law, by Ms.  
Patricia A. Burke, and Ms. Amy K. Adams, on behalf of  
Gateway Foods.

ARBITRATION AWARD

Teamsters Local Union No. 695, hereinafter the Union,  
requested that the Wisconsin Employment Relations Commission  
appoint a staff arbitrator to hear and decide the instant dispute  
between the Union and Gateway Foods of LaCrosse, Wisconsin,  
hereinafter the Company, in accordance with the grievance and  
arbitration procedures contained in the parties' labor agreement.  
The Company subsequently concurred in the request and the  
undersigned, William K. Strycker, Commissioner, was designated to  
arbitrate the dispute. The hearing was held before the  
undersigned on August 9, 1994 in LaCrosse, Wisconsin. A  
stenographic transcript was made of the hearing and the parties  
submitted post-hearing briefs in the matter by September 22, 1994.  
Based upon the evidence and the arguments of the parties the  
undersigned makes and issues the following award.

Issue

The parties stipulated to the following issue:

Was the grievant discharged for just cause?  
If not, what is the appropriate remedy?

Relevant Contract Provisions:

The following provisions of the parties' 1992-1995 agreement  
are cited:

ARTICLE 7 - SENIORITY

. . .

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

- A. Voluntary termination;
- B. Discharge for just cause;
- C. Retirement;
- 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 7.5 B, 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) working 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. Any month in which an employee works shall be counted as a work month for purposes of this section.

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

- A. Dishonesty.

. . .

#### WAREHOUSE OPERATING RULES

A. MAJOR VIOLATIONS

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

. . .

7. Any form of dishonesty, including but not limited to, falsifying Company records, punching another's time card, taking Company equipment or products, pilfering, or fraudulent statements on an employment application.

. . .

ABSENTEEISM POLICY

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

2. Excused Absence. Excused absences for purposes of this policy shall include approved vacations, scheduled holidays, approved time off for official union business, time off as the result of compensable injuries, other leaves as provided for in the Collective Bargaining Agreement, layoffs, or other excused absences. The Company may at the Company's own discretion excuse an employee from an absence if, in the Company's sole judgment, the employee has good cause for the absence, provided the employee has given notice as far in advance as possible (and not less than one-half hour before his/her scheduled starting time) to his/her foreman or other person designated by the Company to receive such notice, and further provided that such notice had indicated the reason for the absence.

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. Points are accumulated under this program on a daily basis, except for 5.2 below which shall be on an "occurrence" basis, i.e., an occurrence means one work day or such consecutive work days of absence as a result from one incident, provided that the absent employee has reported his status to the Company on a daily basis not less than one-half hour before shift starting time. An occurrence shall be broken by the employee's weekend.

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

1. Unexcused absence - no notice (also see number 9 below) 4 points
2. Unexcused absence with proper advance notice to the Company (not less than one-half hour before shift starting time for each occurrence) 2 points
3. Unexcused absence - improper notice (notice given any time after one-half hour prior to shift starting time and before end of shift) 3 points
4. Tardiness (for each day) less than two hours 1 point
5. Tardiness (for each day) more than two hours 2 points
6. Leave early (for each day) less than two hours 1 point
7. Leave early (for each day) more than two hours 2 points
8. Leave early followed by unexcused absence with proper advance notice for any reason whatsoever on the next scheduled work day for the employee's shift 3 points
9. Leave early followed by unexcused absence (no notice) 5 points

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

1. After an employee accumulates four (4) points within any nine (9) month period, the employee shall be verbally warned by his supervisor.
2. After an employee receives six (6) points within any nine (9) month period, the employee shall receive a written warning and counseling by his supervisor.
3. After an employee accumulates eight (8) points within any nine (9) month period, the employee shall be called in to meet with the supervisor and perhaps other managerial representatives. At this meeting, the employee shall be orally warned of the seriousness of the situation. He shall also receive a five (5) day suspension and be advised that if his conduct persists, he will be discharged.
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.

7. Other Work. No employee shall work at another job while absent from work at Gateway Foods, and in such event, each day of absence shall be deemed a separate unexcused absence (two (2) points for each day) despite 5.2 above.

8. Seniority. The company shall literally enforce Article 7.5D of the Collective Bargaining Agreement between the

parties which states:

7. "An employee shall lose his or her seniority for the following reasons:

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."

9. Bonus Days. Employees will receive two (2) bonus points for every thirty (30) paid calendar work days of perfect attendance. Employees qualify for one (1) bonus day off for each six (6) bonus points they accumulate, to a maximum of four (4) paid bonus days per year. Bonus points will be retained for up to a maximum of twelve (12) rolling months.

Bonus days may be used as excused absence days (unchargeable under the disciplinary system) for personal illness, if the employee calls in not less than one-half (1/2) hour before shift starting time.

There will be a limit of two (2) employees per shift who can use these bonus days on each shift. Seniority shall prevail if more than two (2) employees per shift request a bonus day for illness or personal reasons. First shift shall have a limit of two employees eligible for bonus days. Bonus days will not be granted more than 30 days in advance of the requested bonus day period.

Example: Employee A has perfect attendance for January and February. He earns two (2) bonus points for each month. On March 1, he has an unexcused absence with a proper call in. He has two (2) disciplinary points against him, but retains his four (4) bonus points previously earned. Effective September

1, 1989, this policy will go into effect. All employees shall start with a clean record.

10. Earn-Back Provision. Employees who work thirty (30) working days from their last chargeable absence under the system shall earn back one (1) point for each thirty (30) working day period of perfect attendance.

### Background

The Company is a wholesale grocery distributor located in LaCrosse, Wisconsin. The Company distributes groceries to over four hundred (400) retail establishments. The Company and the Union have a longstanding collective bargaining relationship. The Company has a specific Absenteeism Policy which is attached to the contract. The policy identifies types of absences, and creates a point system by which discipline and discharge may occur if an employe is absent or tardy. The policy relies on progressive discipline principles, identifying levels of discipline based on points accumulated and carried during a rolling nine month basis.

Employes can "earn back" points for perfect attendance over thirty (30) days. The policy provides that employes who accumulate four points receive a verbal warning. Employes who receive six points within any nine month period receive a written warning and counseling from the supervisor. If an employe accumulates eight points within any nine month period, the employe is suspended for five days, (40 hours) and warned that discharge will occur if his/her conduct continues. After an employe accumulates twelve points within any nine month period, the employe shall be terminated. When absences occur over the weekend, a notation is made and submitted to the office on Monday morning. The absence notices are then forwarded to Mr. Bob Zeeb, Warehouse Superintendent, who reviews the individual's record, assigns points and returns it to a clerical employe for entry into the system. Discipline, resulting from violations of the Absenteeism Policy normally occurs within five (5) days of the event, after processing and discussion with the employe. Employes receive updated absence reports from the Company every other month.

The grievant Tom Miles has been employed by the Company for approximately fourteen years as a warehouseman. The grievant worked a "fourth shift" from 6:45 a.m. to 4:45 p.m., Friday through Monday. During his tenure with the Company Mr. Miles was disciplined under the terms of the Absenteeism Policy approximately thirty five (35) times. During the nine month period immediately preceding the grievant's discharge, he received the following discipline in accordance with the Absenteeism Policy:

10/29/93	Verbal warning
11/26/93	Written warning
12/ 6/93	40-hour suspension

Mr. Miles did not grieve the above discipline. As of April 29, 1994, Mr. Miles had a balance of six (6) points for prior violations.

On April 29, 1994 the grievant was involved in a domestic dispute with his girlfriend, Katherine Sarazin. In response to a 911 telephone call placed by Ms. Sarazin, police arrived at the premises and arrested the grievant. As the grievant was leaving he asked Ms. Sarazin to notify the Company the next morning that he would not be in because he was "sick or something."

On Saturday, April 30, 1994, at approximately 7:49 a.m. Ms. Sarazin called the Company and reported that the grievant would not be in because he was sick. This was an untimely call as defined by the Absenteeism Policy. On April 30, 1994, Mr. Miles contacted his probation officer in an attempt to expedite his release from jail. The probation officer indicated that she would not authorize his release before his court appearance which was scheduled for Monday, May 2, 1994. On Saturday Mr. Miles made several telephone calls to his girlfriend, probation officer, and father. Mr. Miles did not call the Company. Prisoners have limited opportunities to use telephones between 9:00 a.m. and 9:00 p.m.

On Sunday, May 1, 1994, Ms. Sarazin contacted the Company at approximately 6:45 a.m. to report the grievant's absence. She explained to foreman Bob Turk that the grievant was in jail and not sick. Ms. Sarazin identified that Mr. Miles had a court date on Monday, May 2, 1993. This call was also untimely as defined by the Absenteeism Policy.

On May 2, 1994 Ms. Sarazin made another untimely call at approximately 7:10 a.m. to report the grievant's absence for that day. Bob Zeeb received the grievant's weekend absence reports for April 30th and May 1st on Monday, May 2nd. He assessed three (3) points for each absence which took Mr. Miles to twelve (12) points. Mr. Zeeb discussed the matter with the grievant's probation officer.

Effective Monday, May 2, 1994, Mr. Miles was suspended pending an investigation. On Tuesday, May 3, 1994, the Company had a meeting with the grievant and his Union representative. The grievant explained the reasons behind his absence, his efforts to return to work and the measures he took to insure the Company was notified about his absences. On May 5, 1994 the grievant was terminated by the Company because of his unacceptable attendance record. Mr. Miles filed a grievance on May 9, 1994, which was subsequently denied by the Company resulting in this arbitration proceeding.

#### Positions of the Parties



## Union

The Union argues that the policy requires a five (5) day suspension prior to termination. When the grievant moved from six (6) points to nine (9) points a forty (40)-hour suspension should have occurred. The fact that the points were not processed until Monday does not eliminate the requirement to impose the suspension prior to discharge. Failing to suspend the employe violates the progressive discipline concept provided for in the policy which was expected by the grievant and the Union. Arbitrators have overturned discipline when progressive discipline programs are not followed.

The grievant is a victim of unfortunate circumstances, as he should not have been in jail. After he was arrested, the grievant had two primary concerns. His first concern was to be able to leave jail as soon as possible so that he could return to work. The second concern was to notify the Company of his absence. He began working on his first concern through conversations with his probation officer. He addressed the second concern, Company notification, by asking his girlfriend to contact the Company. He expected to be out of jail on Saturday, and did not wish to inform the Company of his arrest. As a result he asked his girlfriend to report that he was sick on Saturday. When it became apparent that he would not be out, he asked his girlfriend to speak to foreman Turk and inform him about the details of his absence.

The Union also argues that the grievant was not handled fairly as evidenced by the treatment of Ken Brophy. Brophy's absence, which was reported more than six hours after his starting time, was excused.

The Union asserts that the Company's dishonesty argument should be dismissed. This argument was first advanced at the hearing, thereby violating principles of due process. Further, the Company knew that the grievant was not sick at the time of his discharge. His discharge notice clearly states that the reason was absenteeism.

## Company's Position

The Company argues that the grievant was terminated for just cause under the Absenteeism Policy. The Absenteeism Policy allows the Company to terminate employes who accumulate twelve (12) points during a rolling nine month period. The grievant knew of his obligation to notify the Company of absences at least 30 minutes prior to the beginning of the shift, but failed to do so. The grievant could have explained this to his girlfriend. Had the calls been timely, the grievant would not have accumulated twelve (12) points. Furthermore, the grievant, also, had the

opportunity to contact the Company on Saturday, April 30th and avoid accumulating the number of points necessary for discharge.

The Company contends that the Union argument that the grievant should have been suspended as of April 30, 1994 his first day of absence and should not have been assessed points and discharged for his absence on May 1, 1994, should be rejected. Progressive discipline is to allow an employe the opportunity to improve conduct and performance. In this instance the grievant had been warned and disciplined previously in accordance with the policy.

Further the grievant was not treated differently than Ken Brophy as the Union argues. Brophy's absence was excused based upon the explanation he provided the Company.

Additionally, the Grievant's discharge is warranted under the Immediate Discharge provisions of the contract. Clearly, the report that his absence on April 30 was due to sickness was dishonest. The contract provides that dishonesty is grounds for immediate discharge.

#### Discussion:

The basic facts in this matter are not in dispute. The Union is challenging the Company's application of the Absenteeism Policy. The Union argues that the policy was violated because the grievant should have received a forty (40) hour suspension when he attained eight (8) points as a result of his first day of absence on April 30, 1994. It is important to recognize that the six (6) points earned by the grievant were the result of "back-to-back" unexcused absences that occurred over a weekend. The assessment of points for consecutive absences such as this is common. Even if the violations had occurred during the week, it is unlikely that a suspension would have been administered the day following the first absence as the Union suggests. The record supports that discipline for absenteeism generally occurs within five (5) days of the violation but only after processing, point assessment and discussion with the employe. In this case the grievant would not have been available to attend a meeting as required at the suspension step of the disciplinary process, on Sunday, May 1, 1994.

It is also instructive to review the Absenteeism Policy. The policy identifies a system of progressive discipline that warns employes about problematic performance and provides the opportunity for improvement. In order to terminate an employe under this policy several specific actions need to occur. First an employe must receive twelve (12) points during a rolling nine (9) month period. The policy provides that an oral warning

is issued when an employe accumulates four (4) points in any nine (9) month period. A written warning is provided when an employe receives six (6) points in any nine (9) month period. When an employe receives eight (8) points in any nine month period, the employe receives a forty (40) hour suspension and a "final" warning that discharge will occur if the conduct persists. While it may occur, the policy does not require that multiple warnings or suspensions be issued during the nine (9) month period. The Absenteeism Policy is consistent with Section 8.1 of the contract which addresses progressive discipline.

In reviewing the record it is clear that the conditions for discharge were met. The grievant had accumulated twelve (12) points over a nine (9) month period. Also, the grievant had received a forty (40) hour suspension (December 6, 1993) during the nine (9) month period prior to discharge. A verbal warning (October 29, 1993) and a written warning (November 26, 1993) were also issued. The warnings and suspension were not grieved by Mr. Miles or the Union. The fact that the grievant was able to reduce his total below eight (8) points, does not create a new requirement for management to issue an additional five (5) day suspension prior to discharge in light of his "back-to-back" absences, as he had already received the benefit of the suspension and "final" warning step. If only the April 30, 1994 absence had occurred, which raised the grievant to nine (9) points, a forty (40) hour suspension and warning would have been appropriate. However, in this instance because twelve (12) points were reached and the other requirements for discharge had been satisfied, an additional suspension was not necessary.

The Union argues that the Company's action denied Mr. Miles a reasonable expectation that progressive discipline would be applied consistently and uniformly. The record supports that the grievant was well aware of the policy as he had been disciplined for absenteeism/tardiness violations approximately thirty five (35) times during his employment with the company. In keeping with the progressive disciplinary nature of the Absenteeism Policy, skipping steps entirely because of consecutive violations would not be permissible. To conclude otherwise would deny an employe the benefit of the opportunity to rectify performance at a reduced level of discipline. The Union's argument would have been persuasive if the grievant had moved from six (6) points to twelve (12) points without receiving a suspension and the accompanying "final" warning. Given the grievant's extensive experience with discipline under the Absenteeism Policy, there should have been no doubt in his mind about the consequences of continued unexcused absences and tardiness. In fact the grievant testified that he knew that his job was in jeopardy and communicated this to his probation officer.

The Union also argues that Mr. Miles did everything he could to get out of jail and notify the Company that he was unable to report to work. While Mr. Miles attempted to gain release from jail on Saturday, April 30, 1994, by contacting his probation officer, the record substantiates that he was told on Saturday morning that he would not be released prior to his court appearance on Monday, May 2, 1994. He had ample opportunity, as evidenced by his other telephone calls and the availability of Company telephone numbers, to report his situation to the Company on Saturday, April 30, 1994. Had he made this contact, he would not have received twelve (12) points. The record supports that he asked his girlfriend, Katherine Sarazin, to inform the Company of his absences. The record is not clear that he told Ms. Sarazin about the requirement to notify the Company one-half (1/2) hour before the start of the shift. It is undisputed that each absence report provided by Ms. Sarazin was untimely as defined by the policy. Given that Ms. Sarazin judiciously contacted the Company each day as requested, it seems unlikely that she knew about the timing requirement. Regardless, the notification responsibility resides with the grievant. Had he fulfilled his notification responsibility on Saturday after he knew he would not be released, Mr. Miles would not have received the twelve (12) points which subjected him to discharge.

The Union, also, argues that the Absenteeism Policy was applied arbitrarily to Mr. Miles. As support the Union points to an instance when another employe, Ken Brophy, was not disciplined when he reported an absence after the start of his shift. The Company treated this event as an excused absence as provided under the policy. No evidence was submitted identifying Mr. Brophy's prior experience under the Absenteeism Policy or proving any similarity between the grievant and Mr. Brophy. The record does not demonstrate any discriminatory or arbitrary application of the policy in regards to Mr. Miles.

#### AWARD

For the foregoing reasons and based upon the record as a whole, it is the decision of the undersigned Arbitrator that:

1. The Company had just cause to discharge the Grievant, Thomas Miles.
2. The grievance is, therefore, denied.

Dated at Madison, Wisconsin this 13th day of December, 1994.

By William K. Strycker /s/

William K. Strycker, Arbitrator