BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

GEORGIA PACIFIC CORPORATION

and

GENERAL TEAMSTERS UNION, LOCAL 662

Case 15
No. 54620
A-5538

Appearances:

Ms. Leeann G. Anderson, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Milwaukee, Wisconsin 53212, on behalf of the Union and the Grievant.

Mr. Robert E. Shumaker, DeWitt, Ross & Stevens, S.C., 2 East Mifflin Street, Madison, Wisconsin 53703, on behalf of the Company.

ARBITRATION AWARD

According to the terms of the 1995-99 collective bargaining agreement between Georgia-Pacific Corporation Building Materials Distribution Center (hereafter Company) and General Teamsters Union, Local No. 662, affiliated with the International Brotherhood of Teamsters (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving the discharge of Stuart Hansen. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. Hearing was scheduled and held at Wausau, Wisconsin on January 15, 1997. A stenographic transcript of the proceedings was made and received by January 24, 1997. The parties filed their initial and reply briefs by April 7, 1997, whereupon the record was closed.

Issue:

The parties were unable to stipulate to an issue to be decided in this case. However, the parties agreed that the undersigned could frame the issue based upon the relevant evidence and argument in this case. The Company suggested the following issue:

> Did the Company violate the labor agreement when it terminated Stuart Hansen? If not, what is the appropriate remedy?

The Union suggested the following issue for determination:

> Did the Company have just cause to discharge Stuart Hansen? If not, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case, the Union's issue shall be determined herein.

Relevant Contract Provisions:

Article 7 - SENIORITY

. . .

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 following receipt of Notice of Recall. A copy of the Notice of Recall shall be sent to the Union.

. . .

Article 10 - LEAVE OF ABSENCE

. . .

SECTION 2 - LEAVE OF ABSENCE

Employees desiring a leave of absence for reasons other than those covered by the FMLA 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.

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.

No employee will be discharged or disciplined without just cause.

SECTION 2

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

Relevant Work Rules:

. . .

The Company reserves the right to make and publish reasonable rules not inconsistent with the terms of the labor agreement.

The following rules are designed to fairly and impartially regulate the actions of employees in order to assure safe, orderly and efficient operation of the branch. Employees are expected to comply with these rules at all times and violation will not be excused because an employee is unfamiliar with any particular rule. Violation(s) of these Work Rules is/are cause(s) for discipline and/or discharge.

VIOLATION OF THE FOLLOWING RULES MAY BE CAUSE FOR IMMEDIATE DISCHARGE.

. . .

12. If an employee is absent for three (3) consecutive days

without notification said absence will be considered a voluntary quit.

. . .

VIOLATION OF THE FOLLOWING RULES CONSTITUTES REASON FOR DISCIPLINE AND/OR SUSPENSION OR DISMISSAL AS THE COMPANY MAY DETERMINE:

. . .

10. Employees must notify their supervisor each day when they miss work and the absence is unscheduled.

Background:

The Company's Wausau Distribution Center distributes wholesale building materials to independent lumber yards, cabinet makers, and manufactured housing accounts in the Wisconsin and upper peninsula areas. At Wausau, the Company has seven trucks and employs thirty-one employes, seventeen of which are employed in the warehouse while the rest of the employes are employed in the sales department at the Wausau facility. Beginning sometime in April, 1995, Stuart Hansen began employment with the Company as a Utility Warehouse Worker. Hansen regularly worked in the Beam Yard working with forklifts, chainsaws, picking orders, assisting on saw work and also working in the warehouse. During all times relevant hereto, the Company employed just enough workers to perform all of the necessary tasks during each work day, assuming no employes were absent for any reason. Therefore, if employes call in sick or take vacation, employes who are working have to take up the slack and complete the work that the absent employes did not complete. As a result of this, the Company has to assign employes overtime to cover absences and it sometimes has difficulty scheduling the work that needs to be completed each day.

The 1992-95 collective bargaining agreement between the parties contained language identical to that of the 1995-98 agreement (quoted above) in Article 7 - Seniority, Section 4. The language currently appearing in Article 10 - Leave of Absence, Section 2 was changed by the parties in the 1995-99 contract. The language of the 1992-95 agreement at Article 10 read in relevant part as follows:

ARTICLE 10 - LEAVE OF ABSENCE

. . .

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.

In the 1995-99 contract, the parties also changed the language of Article 11 to add the requirement that discipline and discharge must be based upon just cause.

In early November, 1994, WERC Arbitrator Jones issued a decision in the John Wopp grievance. That grievance involved John Wopp's having missed four scheduled work days without ever attempting to call the Company. In that case, the Company determined that Wopp's absences were unauthorized and the Company terminated Wopp pursuant to Article 7, Section 4(4) at the end of the fourth workday during which he had been absent. The Company mailed a copy of the termination notice to Wopp at that time. The facts of that case also showed that Wopp's wife had called a Company supervisor on the evening of the third work day her husband had been absent from work to explain that Wopp had been taken to a treatment center and then to jail for violating his parole. Wopp's wife also called the employer's supervisor on the evening of the fourth workday Wopp had missed to give her husband's supervisor a status report. The Jones Award was issued during the effective period of the 1992-95 contract.

The parties reached agreement on the 1995-99 collective bargaining agreement (the agreement which is applicable to this case) after the Jones Award was rendered. The 1995-99 contract was ratified by the Union on or about May 2, 1995. Union Representative Reardon and Union Steward Buchler were present at the ratification meeting on May 2, 1995 and talked to the employes present regarding the requirement of calling the Company regarding all absences under Article 7, Section 4 of the contract. It should be noted that Stuart Hansen was present at this ratification meeting. Buchler and Reardon told employes to talk to their supervisors and not to a salesman in order to receive an authorized absence. Reardon stated herein that he told employes at this ratification meeting that they must notify the Company that they are going to be absent. Both Buchler and Reardon agreed that the language of Article 7, Section 4 was not changed by the parties during their negotiations over the 1995-99 agreement.

During the week of September 13, 1996 Hansen had three absences for which he was neither warned nor disciplined. On September 16 and September 18, Hansen had two dental appointments. Hansen's supervisor Ed Grosskopf 1/ stated that on September 16, 1996, Hansen

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1/ Grosskopf is a member of the collective bargaining unit at the Company. At the time of the instant hearing he had been with the Company eight and one-half years. On January 1, 1996, Grosskopf was made "supervisor" over warehouse employes including Hansen. As "supervisor", Grosskopf had been delegated the duty of taking calls regarding employe absences. Grosskopf does not have the authority to warn or discipline employes on his own. Only Rick Bates, Wausau Facility Manager, has the authority to decide and issue

called him in the middle of a dental appointment to state that he would be absent that day. Hansen was not disciplined on September 16th, despite his failure to call in prior to the start of his shift that day. On September 18, 1986, Hansen returned to the dentist to complete the dental work needed. On that day, he took vacation and no discipline was issued to him for his absence. On September 19, 1996, Hansen called in and indicated that he was having car trouble. At this time, the Company was very short-handed. Manager Bates decided to drive to the site where Hansen had indicated his car was broken down in order to attempt to pick him up and bring him to work. Bates was unable to find Hansen at the site he had expected to find him. Again, the Company did not discipline Hansen or counsel him in any way regarding these absences.

Facts:

It should be noted that the accounts given by Ed Grosskopf and Rick Bates regarding what occurred on September 24 through 27, 1996, vary from the account of the same events given under oath by the Grievant. The Company presented a good deal of evidence to show that Stuart Hansen was not a credible witness. Where Hansen's account varies from that of Grosskopf, I have credited Grosskopf over Hansen. I view Bate's testimony as corroborative of Grosskopf's.

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discipline to employes.

On Saturday, September 21, 1996 Stuart Hansen went to a walk-in emergency clinic and saw Dr. Nisswandt. Dr. Nisswandt diagnosed Hansen with an ear infection, bronchial pneumonia in the left lung, a sinus infection, and sinusitis. Dr. Nisswandt gave Hansen two medications (which he advised Hansen to take until they ran out). Dr. Nisswandt also advised Hansen to rest as much as he could. Hansen stated that Dr. Nisswandt told him that he should take off time from work if necessary, but Hansen stated that he told the doctor that he wanted to work through his illness. 2/ Hansen stated that he did not ask for an off-work slip for submission to the Company.

On Sunday, September 22, 1996 Hansen rested in bed and took his medications. On Monday, September 23rd, Hansen was scheduled to work and although he was dizzy, weak, nauseated and unsteady, Hansen went to work. Hansen stated that sometime during the day, he spoke to Grosskopf about his illness and his symptoms and stated that he (Hansen) did not know if he would be able to work the rest of the week. Hansen stated that Grosskopf did not respond to his comments. 3/ At this time, Hansen reminded Grosskopf about his divorce hearing which had been scheduled for September 25th and Hansen stated that Grosskopf told him that he would be willing to work with Hansen so that Hansen could attend this hearing by giving Hansen time off without pay or vacation time off. 4/ Hansen worked the entire day on September 23rd.

On the morning of September 24th, Hansen called the Company and spoke to Grosskopf.

2/ Dr. Nisswandt (who also testified herein) did not recall nor did his notes reflect that he told Hansen that he should take time off work.

3/ Grosskopf denies ever having such a conversation with Hansen and specifically denied that Hansen ever told him anything about his health on September 23, 1996.

4/ Grosskopf indicated that he had spoken to Hansen several times about Hansen's up-coming divorce hearing. Grosskopf stated that Hansen had told him that that hearing was supposed to be on September 25th but that this was "a target date to be firmed up" later. Grosskopf was not specifically asked whether he had a conversation with Hansen on September 23rd about Hansen's divorce hearing. Grosskopf stated that Hansen never firmed up the fact that his divorce hearing was scheduled and would occur on September 25th.

Hansen stated that he told Grosskopf that he would not be coming to work that day; that Grosskopf responded, "Oh shit, you've got to be kidding me," and that Hansen then told Grosskopf that he was too sick to work that day. Grosskopf stated that when Hansen called him on the morning of September 24th, Hansen stated "This is Stu. I'm not coming in today." Grosskopf stated that he responded, "You've got to be shitting me," and that Hansen then simply said "No, I'm not coming in." Grosskopf stated that he responded to Hansen's statements by telling Hansen that he had a day of vacation left and asking Hansen what he wanted Grosskopf to do with it. Grosskopf stated that Hansen responded that the two of them should talk about it later and this ended the conversation. Hansen stated and Grosskopf confirmed that Grosskopf did not tell Hansen he would be disciplined for not coming in to work on September 24th.

On September 25th, Hansen called the Company facility and spoke to salesman Steve Schloesser. Hansen stated that he asked to speak to Ed Grosskopf and that Schloesser responded that Grosskopf was out in the warehouse. Hansen stated that he then asked Schloesser to relay a message to Grosskopf that he (Hansen) was sick and would not be in that day. Hansen stated that Schloesser assured him that he would relay the message. According to Schloesser, Hansen called in at approximately 7:25 a.m. on September 25th and stated that he was not going to be in to work that day. Schloesser responded "Oh?" Schloesser stated that that was the end of his conversation with Hansen. Schloesser stated that Hansen did not ask to speak to anyone else at the Company. Schloesser stated that after he spoke to Hansen on September 25th, he relayed Hansen's message to Ed Grosskopf. 5/

On September 24th, Grosskopf reported to Bates that Hansen had called him to say that he (Hansen) was not coming to work that day. Grosskopf also reported his response to Hansen's statement. On September 25th, after Grosskopf received the message from Schloesser, he spoke to manager Rick Bates. Grosskopf told Bates that Hansen had called to say he would not be in that day. Bates asked Grosskopf why Hansen would not be in and Grosskopf responded that he did not know because Hansen had left a message with salesman Schloesser regarding his absence. Grosskopf stated that on September 25th he attempted to call Stuart Hansen at various numbers but could not find him at any of them. Bates stated and Grosskopf confirmed that Grosskopf told him that Hansen had not said he was sick on either September 24th or 25th.

On September 24, 1996 Bates wrote a disciplinary action, a verbal warning, in which Bates stated "Employee was absent from work on September 24, 1996. This was an unauthorized absence." Both Grosskopf and Bates signed this disciplinary notice on September 24. Bates stated that he placed a copy of this notice in the mail to the Union, that another copy was put in an envelope and left on Bate's desk for delivery to Hansen and that a third copy of this notice was placed in Hansen's personnel file. After his conversation with Grosskopf on September 25th,

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5/ As Schloesser had nothing to gain in this proceeding, I credit his testimony over Hansen's regarding this conversation.

Bates wrote up a second disciplinary notice, a written warning, which stated the following:

> Employee continues to be absent from work. Absent on September 24 and 25, 1996. Both are unauthorized absences.

This form was again signed by Bates and Grosskopf and the same distribution procedure was used. Hansen stated that on September 25th he attended his divorce hearing which he contended had been pre-scheduled with his employer as an absence.

On September 26th, Hansen stated that he called the Company at approximately 7:20 a.m. but no one answered. Hansen admitted that he never called the Company back on September 26th. Hansen also stated that around lunch time on September 26th, he went to his daughter's school to talk to her and that that evening, he was arrested and put in jail. Hansen stated that from September 24th through September 27th he was not at his normal residence, but that he had stayed in several different motels during this period because he had separated from his wife due to marital problems.

Bates stated that he had a conversation with Ed Grosskopf on September 26th after Hansen failed call or come in for work. Bates stated that because Hansen had failed to call in or come to work, he decided that Hansen should receive another disciplinary notice, a discharge, which read in relevant part as follows:

> Discharge effective as of 9/26/96 as per current contract May 1st, 1995 - April 30, 1999 General Teamsters Union Local No. 662 Article 7, Section 4, Subsection 4 (unauthorized absence for (3) successive scheduled work days).

Both Bates and Grosskopf signed the above-quoted form. Bates stated that he did not try to send any forms to Hansen because he did not know where Hansen was living at that time. Bates stated that at least by the week of September 13, 1996, he was aware that Hansen had been having marital problems and that between September 13th and September 26th no one told him that Hansen's issues had been resolved. Also, Bates stated that on September 26th, he did not attempt to call Hansen. Rather, Bates stated he just wrote the termination notice.

Bates stated that the reason that he did not discipline Hansen for his absences during the week of September 13th was because he was aware that Hansen was having marital problems and he wanted to try to be understanding. However, Bates was suspicious regarding Hansen's two dental appointments and his car trouble during that week of September 13th, and when Hansen called in his absence of September 24th, Bates decided that he had to address Hansen's attendance problems. Bates also stated that he wrote the oral warning on September 24th because Hansen could not be found by telephone and because he had not said he was sick in order to get authorization from Grosskopf to be absent from work that day. Bates stated that he issued the written warning to Hansen on September 25th because Hansen had not talked to his supervisor,

Grosskopf, about his absence and had not given any reason to Schloesser for not coming in to work that day so that Bates considered Hansen's absence unauthorized.

On September 27th, without knowing that he had already been terminated, Hansen called Grosskopf from the jail and stated that he had pneumonia and was sick and that he would not be in to work that day. Hansen stated that because Grosskopf did not ask him if there were any other reasons why he could not come in to work, Hansen did not tell Grosskopf that he was actually in jail at that time. Grosskopf testified that on the morning of September 27th a woman called him at his home and asked for Ed Grosskopf. When he responded that that was his name, the woman apparently handed the telephone to Hansen who then told Grosskopf that he would not be in to work that day because he had pneumonia and that he would try to make it to work later. Grosskopf stated that he reported this conversation to Bates and Bates stated that he then called the County jail and was informed that Hansen had been incarcerated on September 26th.

In early October, Union Representative Reardon, Grosskopf, Hansen and Bates met in regard to the grievance which Hansen had filed over his discharge. At this meeting, Bates asked if on September 25th Hansen had been in bed sick and Hansen responded that he had been. In addition, Hansen told Bates that he had been home in bed on September 26th but he admitted that on September 27th he had been in jail. Also at this meeting, the Union gave Bates a medical excuse for Hansen, signed by Dr. Nisswandt, which read in relevant part as follows:

> Stuart has been ill over the last two weeks. He was seen today again (9/30) and back on (9/21). He was off last week 9/24 - 9/27 due to the illness. . . . He is still being treated.

Hansen stated that he was aware prior to September 24th that Grosskopf was his supervisor. He also stated that he had received a copy of the Employer's Work Rules prior to September 24, 1996 and that he had signed a copy of the Rules. Hansen stated that he believed that the proper policy/procedure for calling in an absence was to "call in and verify" absenteeism by talking to a supervisor about it.

Manager Bates stated that the Company's policy/procedure regarding absences is that employes must call their supervisor (not a salesman) and explain what their problem is in order to get an authorized absence; that it is not acceptable for the employe to simply state that they will not be in or that they will be absent. Bates also stated that if an employe expects to be out sick, he or she must talk to their supervisor and say they are sick in order to get an authorized absence. Bates, however, stated that if an employe is simply going to be late or has car problems he can call a salesman and leave a message without being in fear of running afoul of the Employer's authorized absence policy. Union Representative Reardon stated that it was his belief that if an employe called in to notify the Employer that they were going to be absent, that this would automatically excuse the employe unless the Employer could show (after the fact) that the employe was not actually sick on the day in question.

Positions of the Parties:

Company:

The Company argued that this case should be controlled by the arbitration award issued by WERC Arbitrator Jones in November, 1994. The Company urged that as Arbitrator Jones found in the Wopp case, just cause and progressive discipline do not apply to situations governed by Article 7, Subsection 4 (where an employe has three consecutive unauthorized absences); that the Company's determination of what constitutes an unauthorized absence should not be judged on a just cause standard but a reasonableness standard; that the mere notification of a supervisor that an employe will be absent is insufficient to meet the requirements of Article 7.

The Company emphasized that the parties failed to change the language of the contract which Arbitrator Jones had construed in the Wopp Award, and that both the local union representatives had specifically explained Article 7, Section 4 at the contract ratification meeting which occurred after the issuance of the Wopp Award. On this basis, the Employer contended that the Union's argument that simple notification to the Employer would constitute an authorized absence was wholly unsupported by the evidence.

In the circumstances of this case, the Company argued that it had not violated the collective bargaining agreement when it terminated Hansen's employment. The Company noted that Hansen's poor attendance during the week of September 16, 1994 alerted his supervisor, Ed Grosskopf, to Hansen's problems the following week of September 23rd and made Grosskopf's testimony generally more credible than Hansen's. Given the fact that the Company's determination whether Hansen's absences were authorized should be subject only to a reasonableness standard, the Company noted that unless the undersigned found its actions to be entirely arbitrary and capricious, the Company's judgements should remain undisturbed. Furthermore, the Company argued that it is not for the Arbitrator to substitute her judgment for that of the Company so long as there is some rational basis for the Employer's decisions in this case.

In the Company's view, were the Arbitrator to effectively read out the requirement that absences be "authorized", this would render Article 7, Section 4 meaningless. The Company noted that the testimony of Local Union Representative Buchler as well as Company Manager Bates' testimony affirmed the fact that employes not only have to call their supervisors regarding an absence but that they also have to receive their supervisor's authorization for the absence under both practice and the Company's policies and procedures. The Company further noted that Hansen knew that he could be discharged for unauthorized absences and that Hansen admitted herein that he understood that he had to comply with the contract as well as the Company's Work Rules. Finally, the Company urged that its Work Rules, policies and procedures regarding absences were reasonable and that it had shown a business necessity therefor.

The Company argued that during the week of September 23, 1996, Hansen failed to get authorization for any of his three absences. In regard to September 23, 1996 the Company noted that Hansen worked all day yet he did not tell Grosskopf that he was sick nor did he tell Grosskopf that he (Hansen) might not be able to work due to illness during the rest of the week. In this regard, the Company again urged that Grosskopf's testimony should be credited over Hansen's. On September 24th, the Company asserted that although Hansen called in and talked to Grosskopf he did not say that he was sick nor did he request or receive authorization for his absence. Therefore, the Company found it reasonable that Bates disciplined Hansen on September 24th.

Regarding Hansen's absence of September 25, 1996, the Company pointed out that Hansen failed to speak to his supervisor, Ed Grosskopf on that date Hansen having spoken only to salesman Schloesser. The Company found it significant that during his conversation with Schloesser, Hansen never stated that he was ill or sought authorization for an absence. Therefore, the Company found it reasonable that Bates issued Hansen a written warning on September 25, 1996. In addition, the Company urged that the fact that Hansen had previously spoken to Grosskopf about his divorce hearing occurring possibly on September 25th could not be found to constitute authorization, as Hansen and Grosskopf had never confirmed either the date of that hearing or an authorized absence for Hansen thereon.

Finally, regarding Hansen's absence of September 26, 1996 the Company pointed out that Hansen neither called in nor showed up for work that day. Therefore, Bates' issuance of a notice of termination to Hansen was reasonable in the Company's view. The evidence which the Company proffered regarding the events of September 27, 1996, the Company urged, further underscored the fact that Hansen's testimony was not credible in this case. In all of the circumstances of this case, the Company sought an award denying and dismissing the grievance in its entirety.

Union:

The Union argued that the Employer's rules and policies regarding absences have been applied inconsistently and on an ad hoc basis. The Union noted that Hansen was treated leniently during the week of September 16th when he was granted a half a day off on Monday, a full day on Tuesday and a full day on Thursday. In this regard, the Union observed that Hansen was granted time off from work on Tuesday, September 17, 1996 despite the fact that he had not called in properly in the morning and the Union noted that Grosskopf granted Hansen the day off after-the-fact. Indeed, the Union noted that both Grosskopf and Bates were fully aware that Hansen was having marital problems and that Hansen's divorce hearing was scheduled for September 25, 1995.

The Union noted that Manager Bates admitted that he inconsistently enforces the Company's rules and/or policies regarding absences. In this regard, Bates stated that although it is generally necessary for an employe who is going to be off sick to talk to either his supervisor or to

Bates, Bates has not required employes who have had car trouble or who may be ten minutes late to speak directly to him or to a supervisor. In addition, the Union noted that Supervisor Grosskopf admitted that he granted Hansen time off to take care of a dental appointment, despite the fact that Hansen had not previously called in and spoken to Grosskopf or otherwise previously arranged for time off.

The Union contended that the Employer did not have just cause to discharge Hansen and that Article 11, Section 1 should govern this case. The Union noted that the standard of just cause was placed in the 1995-99 collective bargaining agreement for the first time, observing that in the 1992-95 contract no such standard existed.

Thus, the Union argued the Wopp Award should not apply to this case, as the contract under consideration there contained no just cause standard. In addition, the Union urged that the Wopp case is not only distinguishable on its facts from the instant case but it also did not address the same provisions of the collective bargaining agreement and the Work Rules which are in issue here. In this regard, the Union noted that the Arbitrator in the Wopp case did not have before him (nor did he consider) the Company's Work Rules or Article 11, Section 1.

The Union argued that Hansen's discharge was unjust not only under Article 11, Section 1, but also under Article 7, Section 4 and the Employer's Work Rules. In this regard, the Union noted, the Company failed to use progressive discipline under Article 11; that the Company never gave Hansen any notice that his absence could result in his discharge; and that therefore, Hansen had no opportunity to change his behavior in order to comply with the Company's rules and policies.

Furthermore, the Union asserted that Hansen did not in fact incur three unauthorized absences, during the week of September 23, 1996. On this point, the Union noted that Work Rules 10 and 12 refer only to notification and not to authorization; that there is no definition of an "unauthorized absence" contained in the collective bargaining agreement; and that the conflict between Article 7, Section 4 and the Work Rules shows that the language used in this area is ambiguous and inconclusive. The Union contended that the Company's interpretation of the contract and the Work Rules would not only result in harsh consequences for employes but it would result in the Work Rules conflicting with the contract.

The Union also argued that because Grosskopf and Bates had notice of Hansen's absences on September 24th and September 25th, Hansen did not have three unauthorized absences during the week of September 23rd. Given the fact that the Employer admittedly inconsistently enforced its Work Rules and policies regarding absences, the Union urged that its reading and interpretation of Article 7 in light of the Work Rules was more reasonable than the Company's interpretation. Thus, the Union asserted that simple notice to the Company that an employe is going to be absent should be sufficient to meet both the Work Rule and contractual requirements regarding absences.

The Union argued that the Company's refusal to approve Hansen's absence for illness after he presented it with a legitimate doctor's excuse also violated both State and Federal laws relating to family medical leave (hereafter FMLA). The Union urged that Hansen's absences were protected by both the State and Federal laws relating to family and medical leave, and that the circumstances of Hansen's case met the statutory requirements for protection. Thus, the Union urged that the reference to the FMLA in the effective collective bargaining agreement should lead the undersigned to a conclusion that the Company violated not only Article 11, Section 1, Article 7, Section 4 and the Company's Work Rules by discharging Hansen but it also violated State and Federal law as incorporated into the labor agreement. In these circumstances, the Union urged that the grievance should be sustained in its entirety and that Hansen should be returned to work with full back pay and benefits.

Reply Briefs:

Company:

The Company urged that the Union's argument that the just cause standard in Article 11, Section 1 applies to this case is specious. The Company observed that the contract contains the unchanged language of Article 7, Section 4(4), and that the Union's argument would render Article 7, Section 4(4) meaningless. Furthermore, even if the Arbitrator found the relevant language of Article 7 to be ambiguous, the Company contended that evidence of bargaining history showed that Hansen was fully aware of the requirements of Article 7, Section 4(4) and that the Union and the Company intended the Wopp Award to be binding. The Company also noted that the Arbitrator lacks the power to alter or modify the contract terms (Article 12, Section 1). Finally, the Company asserted that the language of Article 7, Section 4(4) clearly demonstrates that the parties intended that the just cause standard of Article 11 should not apply to situations covered by Article 7.

The Company argued, contrary to the Union, that it based Hansen's discharge solely on Article 7, Section 4(4) and its apparent use of progressive discipline prior to Hansen's September 26th absence was logical and reasonable, as the Company could not have foreseen that Hansen would be absent on three consecutive workdays prior to September 26th. In the Company's view, the Union misconstrued Manager Bates' testimony when it concluded therefrom that Bates used both the Work Rules and Article 7 Section 4(4) as grounds for Hansen's discharge. The Company observed that Article 7 Section 4(4) was stated as the only basis for Hansen's discharge in his termination notice. Therefore, in the Company's opinion, the Union's argument that the Arbitrator should look to the Company Work Rules to determine the meaning of Article 7 Section 4(4) was without merit. The Company also urged that as a general matter, work rules are not binding where, as here, they were unilaterally imposed.

In regard to the proper interpretation of the Wopp Award and the language of Article 7 Section 4(4), the Company noted that the Wopp Award states that mere notice of an employe's absence is insufficient to achieve authorization therefor under Article 7; that "authorized" is an

unambiguous term which requires that permission be granted for an absence; and that Union Steward Buchler's testimony demonstrated that authorization is necessary for employe absences. Thus, the Company contended in these circumstances, it was not necessary for the Company to investigate the reasons for Hansen's absences. In addition, in the Company's view, the fact that Hansen was not disciplined for his absences during the week of September 16th did not require a conclusion that the Company's discharge of Hansen for his absences during the week of September 24th was inconsistent, arbitrary or capricious. In this regard, the Company pointed out that Hansen had received authorization for his absences during the week of September 16th, but did not do so for his absences during the week of September 24th.

Finally, the Company urged that the Family and Medical Leave Act claims of the Union herein are beyond the scope of this arbitration proceeding. This is true, according to the Company, because the parties did not specifically agree in their contract to arbitrate FMLA claims and because the FMLA was not specifically incorporated into the contract. However, the Company asserted, even if Hansen's FMLA claims are found subject to arbitration, the Union failed to prove Hansen's entitlement to such relief as the Union neither demonstrated that Hansen notified the Company of his request to use FMLA leave nor did it show that Hansen's leave was "medically necessary" under the Act. On the latter point, the Company noted that the record evidence was replete that Hansen used the time he was not at work during the week of September 24th to take care of personal business, not to care for his medical needs. In all the circumstances, the Company urged denial and dismissal of the grievance in its entirety.

Union:

The Union argued that the Company has failed to meet its burden in this case and that the record showed that the Company did not have just cause to discharge Hansen. The Union also contended that the Company's use of the Wopp Award was mistaken and misleading, as the 1992-95 labor agreement did not contain a just cause standard (as does the effective agreement).

In addition, the Union observed, Arbitrator Jones did not apply the Work Rules in the Wopp case because the Company did not cite the Rules as a reason to discharge Wopp as the Company did in the instant case. Therefore, the Union contended that both the issues and the contract provisions in question in Wopp were distinctly different from those in dispute herein.

In these circumstances, therefore, the Union argued that if a just cause standard is applied in this case and the Work Rules are fully considered as they should be, the undersigned will sustain the grievance and return Hansen to work with full back pay and benefits.

Discussion:

The Company argued that the Wopp Award controls this case. I disagree. That case is factually distinguishable from the instant case. There, the evidence showed that Wopp failed to call the Company on four successive scheduled work days to report his absence.

In the Wopp case, the labor agreement then in effect did not contain a just cause standard, as does the 1995-99 agreement applicable here. It is therefore understandable that the Arbitrator in the Wopp case found the Company's decision "reasonable" that Wopp's absences on more than ". . . three (3) successive scheduled work days" were "unauthorized" despite knowledge/notice the Company had from sources other than Wopp himself regarding the reasons for Wopp's absences. On this basis, it is clear that the Wopp case is not only factually distinguishable but also distinguishable on the issues from the instant case. 6/

The threshold issue in this case is whether Stuart Hansen had three unauthorized absences on three successive work days in violation of Article 7, Section 4. Based upon the record evidence, I believe the answer to this question must be no. It is undisputed that on September 24, 1996 Hansen called the Company in the early morning and spoke with his supervisor, Ed Grosskopf. Grosskopf (whose testimony I have credited in its entirety) admitted that Hansen told him that he (Hansen) would not be at work that day. It is significant that although Hansen did not tell Grosskopf he was sick, Grosskopf did not ask Hansen or insist that Hansen give a reason for his absence that day. Instead, Grosskopf responded to Hansen's statement that Hansen would not be at work that day by asking whether Hansen wished to use vacation time or unpaid leave for his absence. In my view, Grosskopf's question at this juncture would reasonably lead Hansen to believe that Grosskopf had excused his absence on September 24th. Therefore, in the circumstances, I find that Hansen could have reasonably believed that Grosskopf had authorized his absence on September 24th and therefore I find that Article 7, Section 4(4) is not applicable to this case.

In this regard, I note that no evidence was offered to show that an employe had ever been denied leave by a Company supervisor based upon the employe's failure to state a reason for the leave. Furthermore, although Manager Bates testified that he requires employes to call in and state that they are sick in order to get authorization for sick leave, Bates also stated that he has allowed employes to call in and talk to a salesman to get authorization to be late to work due to car trouble or other reasons. Furthermore, the facts in this case showed that Supervisor Grosskopf lead Hansen to reasonably believe his absence of September 24th had been excused. In addition, the fact that Work Rules 10 and 12 remained unchanged after ratification of the 1995-99 contract and appear to conflict with Article 7, Section 4(4) support a conclusion that the requirements for obtaining time off are unclear.

In regard to Hansen's absence of September 25th, it is undisputed that Hansen called in that day at the Company. However, Hansen failed to talk to Supervisor Grosskopf or to Bates

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6/ I disagree with the Union's argument that the Company relied upon the Work Rules in the instant case to discharge Hansen. The greater weight of the evidence in this case and the termination notice itself showed that the Company relied only upon Article 7, Section 4 in terminating Hansen. The fact that the Company applied what it perceived to be progressive discipline on September 24th and 25th is insufficient basis to find that the Company relied on the Work Rules to terminate Hansen.

about his intention to be absent that day. Hansen knew due to his attendance at the Union ratification meeting for the 1995-99 contract, that all employes were required to speak to their supervisors, not to salesmen, regarding being absent. Thus, Hansen's failure to speak with either Grosskopf or Bates requires a conclusion that Hansen failed to properly communicate his absence to supervision on September 25th. In these circumstances, Hansen's absence of September 25, 1996 must be considered unexcused. In regard to Hansen's absence of September 26th, there is no doubt that Hansen failed to call the Company and speak to either Grosskopf or Bates regarding this absence. Therefore, Hansen's September 26th absence was also unexcused. Thus, as of September 26, 1996 Hansen had two successive unauthorized absences at the Company.

In these circumstances, the Company could not discharge Hansen pursuant to Article 7, Section 4(4) as the Company failed to prove that Hansen had been absent without authorization on three successive scheduled work days as of September 26th. Whether the Company had just cause to discharge Hansen for reasons other than his unauthorized absences of September 25 and 26, 1996 and whether the Company followed the progressive disciplinary procedure as described in Article 11, Section 1 of the labor contract are questions that must be answered next. As noted above, the Company relied solely upon Hansen's absences during the week of September 24th to support its decision to discharge him on September 26th. Given the fact that the Company failed to warn or discipline Hansen for any absences he had prior to September 24th, and as the Company did not then possess knowledge of or rely upon any other misconduct Hansen may have engaged in before (or after) September 26th, the Company's decision to terminate Hansen for his violation of Article 7, Section 4(4) was without just cause.

As I have found that Hansen's absence of September 24th was an excused absence, it follows that the Company therefore failed to follow the progressive disciplinary scheme detailed in Article 11, Section 1 in Hansen's case. Article 11, Section 1 provides that for a first infraction which the Company decides requires warning or discipline, the Company "shall" issue a written warning and if a second infraction occurs within nine months of the first which also warrants a warning or discipline, the Company "shall" issue a written warning which "may" be accompanied by a disciplinary layoff of up to three days in length. It is clear that the Company, by issuing Hansen an "oral" warning on September 24th and a "written" warning on September 25th, did not comply with Article 11, Section 1. 7/

In these circumstances, some arbitrators would order the Company to reinstate Hansen following a three day unpaid suspension. However, in this case I believe it is fair to order Hansen reinstated without any backpay or benefits. 8/

7/ It is also clear on this record that Work Rule 12 does not apply to this case. That rule appears to cover the situation where an employe is absent on three consecutive work days and fails, on all of those days, to call in. Without interpreting this Rule visa vis the contract, I note that at the very least, Hansen properly called in on September 24th and therefore his conduct did not fall within Rule 12.

8/ The Company argued that it could not afford to pay backpay if ordered. I find these

In this regard, I note that Hansen admitted that he knew he was required to call in and speak to a supervisor regarding each absence. Hansen also admitted that he failed to do this on both September 25th and 26th. If Grosskopf had insisted on a reason for Hansen's absence and had Grosskopf not lead Hansen to reasonably believe that Grosskopf had excused Hansen's absence of September 24th, the Company could have terminated Hansen with impunity pursuant to Article 7, Section 4(4).

The parties argued extensively herein regarding the relevance of Hansen's testimony concerning his actions on September 27th. I find that this testimony is relevant to show Hansen's motivation as well as his lack of credibility. Hansen's lack of total candor with Grosskopf on September 27th (failing to state that he was in jail) bolsters my finding that Hansen was an incredible witness. In addition, the fact that Hansen called Grosskopf at home early in the morning on September 27th, that Hansen specifically stated that he was sick and would not be at work that day, shows that Hansen was well aware of his obligations regarding calling in absences. Hansen's call to Grosskopf on September 27th also tends to show that Hansen knew he might be discharged if he did not speak to Grosskopf that day 9/ and get Grosskopf's assurance (in some fashion) that his (Hansen's) absence on September 27th would be excused or authorized. Mr. Hansen has essentially escaped termination based upon a technicality.

In sum, as Article 7, Section 4(4) is not applicable to this case, the Company lacked just cause under Article 11 to terminate Hansen. Based upon the relevant evidence and argument in this case I issue the following

AWARD

The Company did not have just cause to discharge Stuart Hansen. The Company is therefore ordered to offer Hansen reinstatement to the same or a substantially similar job to the one that he held prior to his discharge, within ten calendar days of the issuance of this Award. If the Company properly offers Hansen reinstatement as described herein, the Company will have no obligation to pay Hansen any backpay or benefits for the period from his discharge to the date he is offered reinstatement pursuant to this Award.

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arguments unpersuasive and I have not relied upon them in reaching my decision regarding the proper remedy herein.

9/ Hansen could have reasonably concluded that this was his third day of unauthorized absence, based upon the facts herein.

Dated at Oshkosh, Wisconsin this 14th day of May, 1997.

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