BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS "GENERAL" LOCAL UNION NO. 200

and

THE TEWS COMPANY

Case 25
No. 55399
A-5599

(Robert DeGroot Discharge Grievance)

Appearances:

Ms. Andrea F. Hoeschen, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Mr. Ron Loesch, Director of Human Resources, Tews Company-LaFarge Corporation, 6715 Tippecanoe Road, Building C, Canfield, Ohio 44406, appearing on behalf of the Company.

ARBITRATION AWARD

The Union and the Company are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was transcribed, was held on December 5, 1997 and January 12, 1998 in Milwaukee, Wisconsin. At the hearing, the parties waived the contract provision which provides that a decision will be rendered by a three-member arbitration board (Article 31.2). The parties also waived the contract provision which provides that the arbitrator's decision will be rendered within 30 days (Article 31.3). Afterwards, the parties filed briefs, whereupon the record was closed on March 25, 1998. Based on the entire record, the undersigned issues the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties stipulated to the following issue:

Was Bob DeGroot terminated for just cause? If not, what is the proper remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1996-1999 collective bargaining agreement contains the following pertinent provisions 1/:

1/ It is noted that the "Discharge or Suspension" language which follows differs from the "Discharge and Suspension" language included in the Union's brief on pages 1 and 2. The language which follows is from pages 10 and 11 of Joint Exhibit 1. The arbitrator surmises that the discipline language which the Union included in their brief (i.e. that denominated Article II, Section 3, Discharge and Suspension) is from the labor agreement covering the mechanics' bargaining unit. That agreement was not offered into evidence.

ARTICLE 13

DISCHARGE OR SUSPENSION

13.1 a. The Employer shall not discharge or suspend any employee without just cause, but in respect to discharge or suspension shall give at least two (2) warning notices of the complaint against such employee to the employee, in writing, and a copy of the same to the Union and job steward affected, provided however, that if the Employer considers the conduct of the employee to be so serious that repetition of it should lead to discharge, the Employer may state on the warning notice that it constitutes a first final notice, subjecting the employee to discharge or suspension upon its repetition, provided further, however, that if the Union disagrees that such misconduct warrants a first final notice, it may take the matter up under the grievance procedures.

b. The Employer shall notify the authorized representative of the Union of his intention to issue a first final notice, prior to issuing the same. The disposition of each first final

warning notice, whether it results from the failure of the Union to grieve, agreement of the parties, decision of the Joint Grievance Committee, or an award of the impartial

arbitrator, shall constitute neither a precedent nor evidence in any other dispute relating to the issuance of the first final notice. Neither party shall submit such disposition of such a dispute to, nor testify concerning it, before the impartial arbitrator in an arbitration involving the issuance of another first final notice. The Union shall also have the right to take up the issuance of any written notice under the grievance procedure.

13.2 Notwithstanding any other provision of this ARTICLE to the contrary, no warning notice need be given to an employee before he is discharged, if the cause of such discharge is theft, willful falsification of work records, use of alcohol or illicit drugs while working, recklessness resulting in a serious accident while on duty, or the carrying of unauthorized passengers while on the job. The first warning notice in the case of tardiness shall be issued only after the affected employee and the Employer have met to review the need for the warning notice. The steward shall be notified of any action at such meeting.

13.3 If the Employer and the Union do not agree, the warning notice or first final notice may be issued by the Employer, subject to the provisions of this ARTICLE and ARTICLE 31, GRIEVANCE PROCEDURE. In the event the Union does not meet with the Employer within the first workday following the date of notification to the Union, by the Employer for such meeting, the Employer may issue such warning notice or first final notice. The Union and Employer agree that any grievances filed by bargaining unit employes which are protesting the issuance of a warning letter shall be held in abeyance for nine (9) months, from the date of the warning letter. However, if further disciplinary action is taken, due to the protested warning letters, the grievances pertaining to warning letters will then be heard by the Joint Grievance Committee, prior to the grievances filed protesting the further disciplinary action.

13.4 A warning notice or a first final notice, as herein provided, shall not remain in effect for a period of more than nine (9) months from the date of such notice. Discharge must be by proper-written notice to the employee, steward and the Union. The employee may request an investigation as to the discharge or suspension. Should such investigation prove that an injustice has been done to an employee, the employee shall be reinstated. The Joint Grievance Committee and the arbitrator shall have the power to reinstate the employee with or without partial or full back pay. Appeal from discharge or suspension must be taken within seven (7) workdays from the date of discharge or suspension. If no decision has been rendered within seven (7) workdays, the case shall be taken up under the grievance procedures.

13.5 If it is determined that during the working day, including any lunch period, an employee has consumed intoxicating liquor, regardless of alcoholic content, or is under the influence of a narcotic drug, or any other substance, then that employee shall be

discharged. In any case where the Employer suspects but cannot prove by means other than physical examination of the employee that such employee has consumed an intoxicating liquor, narcotic drug or other substance in violation of this Section, the Employer may require such employee to submit a blood or urine sample (obtained as directed by the Employer and at the Employer's expense) for chemical analysis. Refusal to submit a blood or urine sample on such occasion shall also be cause for discharge.

FACTS

The Tews Company is a wholly-owned subsidiary of the LaFarge Corporation. Tews is a major producer and supplier of ready mixed concrete, aggregates, and stone and gravel construction building materials for the greater Milwaukee and southeastern Wisconsin area. It operates a number of ready mixed concrete plants. The Union is the exclusive bargaining representative for certain Tews employes in two bargaining units: one unit is known as the ready mix/building material unit and the other is known as the mechanics' unit. Grievant Bob DeGroot was hired in 1987 as a truck driver. He worked at the Company's Oak Creek facility and was in the ready mix/building material bargaining unit. He was discharged for going to four follow-up doctor appointments and staying "on the clock" (i.e. not punching out and going on his own time). His discharge is the subject of the instant grievance.

In April, 1995, DeGroot injured his shoulder at work while loading a truck. He was treated that day at the Medical Surgical Clinic. After examination and treatment at the clinic, DeGroot was released for work with certain restrictions, specifically no truck driving and a ten-pound lifting restriction. No work was available which met these restrictions, so DeGroot was placed on a medical leave of absence until he could return to his regular work duties. This occurred three weeks later when the clinic released him to return to his regular work duties.

After DeGroot returned to work, he still needed significant follow-up treatment for his shoulder. Between May, 1995 and November, 1996, he had 15 such follow-up appointments at the clinic. Most of these appointments were scheduled in mid to late afternoon and DeGroot attended them after his workday ended. DeGroot's regular routine for these doctor appointments was as follows: he would clock out, go to his doctor appointment, and then go home. He did not return to work after the appointment because it was inconvenient to do so. He attended these doctor appointments on his own time; not company time. On the days when he had an

appointment, he would tell his supervisor where he was going before he left work. The next day he would turn in a medical status report to the supervisor.

In November, 1996, DeGroot deviated from the routine just noted for his doctor appointments in the following respect. On four occasions that month, namely November 5, 12, 19 and 22, he went to his doctor appointments during his workday, not afterwards as he had previously done. On those four occasions he did not clock out when he left work; instead, he

stayed on the clock. Thus, he went to these four doctor appointments on company time, not on his own time. DeGroot admitted at the hearing that he did not clock out for these four doctor appointments. He testified that the reason he did not clock out for these appointments was because he started going to a different clinic which was closer to where he worked than the other clinic was.

On November 25, 1996, Company supervisor John Fahser questioned DeGroot about whether he had stayed on the clock for his doctor appointments on November 5, 12, 19 and 22. DeGroot readily admitted that he had indeed stayed on the clock for those doctor appointments. Fahser responded by telling DeGroot he would talk to Company Vice-President David Ferron about it.

The next day, November 26, 1996, Fahser told DeGroot he was to clock out for future doctor appointments. Later that day, DeGroot went to another doctor appointment. This time he clocked out for the appointment.

On November 27, 1996 at the end of the work day, Fahser handed DeGroot an envelope which contained the following letter signed by Company Vice-President David Ferron:

> On November 5, 12, 19 and 22, 1996 you left Tews premises to go to doctor visits and did not punch out until you returned. You did not have authorization to remain on the clock. As you are fully aware, this is against Tews Company policy. . . 2/

2/ The sentence which followed has been deleted because the charge made in the sentence was not corroborated by the testimony of any witnesses.

According to the current labor Agreement, Article 13.2, such action is cause for discharge.

> This letter will hereby serve as official notice of your discharge from our employment effective immediately.

Neither Fahser nor any other management official elaborated to DeGroot on the letter's contents, or personally told DeGroot why he was fired.

Three management officials (Laurie Brown, Dennis Heitman and Robert Trester) testified they personally told DeGroot he was to clock out when he went to his follow-up doctor appointments. Brown testified she told this to DeGroot and co-worker Joe Kattner in 1995. Both DeGroot and Kattner denied Brown ever told them this. Heitman testified he told this to DeGroot when he took DeGroot to the doctor in April, 1995 when DeGroot injured his shoulder at work. Trester testified he told this to DeGroot in October, 1995 when he (Trester) was investigating a wrist injury DeGroot had suffered at work. DeGroot denied that either man told him he was to clock out for his follow-up doctor appointments.

In November, 1995, the Company adopted the following policy:

> Re: Doctor appointments
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> All doctor and/or clinic appointments are to be scheduled only for late in the day whenever possible. Personnel must punch out before leaving work to go to an appointment for illness or injury. The use of company owned vehicles is prohibited for doctor, clinic, or hospital visits unless the situation is considered an emergency by management.
>
> Robert G. Tews

The record indicates this written policy was not widely disseminated and posted because numerous employes testified without contradiction they had never seen it prior to DeGroot's discharge. Additionally, the Union did not receive a copy of same until after DeGroot's discharge. The record further indicates that some company supervisors were unaware of the policy and its contents until after DeGroot's discharge.

The record also indicates that prior to DeGroot's discharge, numerous other employes had gone to doctor appointments during work hours without clocking out. When they did, they were not warned, disciplined or discharged for doing so. Thus, prior to DeGroot's discharge, no other employe had been disciplined or discharged for not clocking out to go to a doctor appointment. The record further indicates that while other employes had been discharged before for various acts of misconduct, DeGroot is the first employe to be discharged for "theft" and "willful falsification of work records."

When he was fired, DeGroot had no warning notices in effect because they had been issued more than nine months prior to November, 1996.

POSITIONS OF THE PARTIES

The Union's position is that the Company did not have just cause to discipline the grievant, much less terminate him. It makes the following arguments to support this contention. First, with regard to the basis for his discharge, the Union notes that the grievant's discharge letter (which was the only notice he received explaining why he was discharged) indicates on its face that he was fired for "theft and willful falsification of work records." The Union avers that at the hearing, the Company attempted to expand the reason for his discharge to include something else, namely his overall work performance. The Union asks the arbitrator to not consider that reason when reviewing the grievant's discharge. Second, the Union contends that since the Company chose to fire the grievant for theft, the standard of proof which the arbitrator should apply here is the stringent standard applicable to criminal cases, namely the beyond-a-reasonable-doubt standard. Next, regardless of the standard applied by the arbitrator, the Union argues that the Company cannot prove theft because there is no evidence in the record showing that the grievant intended to commit fraud by staying on the clock for the four doctor appointments in question. The Union notes in this regard that the grievant had told his supervisors where he was going before he left work for his appointments and then he gave them a medical status report when he returned. The Union submits that the foregoing establishes that the grievant thought he was entitled to remain on the clock for his doctor appointments. The Union also asserts that the Company cannot dodge their burden of proving theft by reasoning, as it does, that since the grievant clocked out for his previous doctor appointments, he must have been stealing from the Company when he failed to clock out for the four appointments in question. Next, aside from that, the Union avers that the Company had no policy against going to work-related doctor appointments on the clock. It notes in this regard that numerous other employes went to work-related doctor appointments on the clock during work hours. The Union calls particular attention to the fact that in every instance documented in the record (except, of course, for the grievant's) the employe was not disciplined for doing so. The Union argues in the alternative that even if the Company did have a policy prohibiting employes from going to follow up doctor appointments on the clock, it was unpublished, a secret, and not disseminated to the workforce. It cites the following to support this premise. First, it notes that numerous employes testified without contradiction they were unaware of such a policy and did not see a written copy of same until after the grievant was fired. Second, it notes that several supervisors were unaware of the policy and its contents. Third, it asserts that the Union did not formally receive a copy of the policy in question until after the grievant was fired. Fourth, building on the foregoing points, the Union contends the grievant had no more knowledge of the Company's policy than did the rest of the employes. The Union therefore submits that the Company cannot discipline DeGroot, much less fire him, for not complying with a policy when the Company never gave him notice of same. The Union's final argument is that in imposing discipline here, the Company did not follow progressive discipline as it should have. It notes in this regard that at the time of his discharge, the grievant did not have any valid warnings

in effect. Based on the foregoing, the Union believes there was no just cause to discharge the grievant. In order

to remedy this unjust discharge, the Union requests that the grievant be reinstated with a make-whole remedy. The Union further requests that the arbitrator retain jurisdiction to determine the amount of back pay and benefits in the event the parties cannot resolve that question.

The Company's position is that it had just cause to discharge the grievant. It makes the following arguments to support this contention. First, with regard to the basis for the grievant's discharge, the Company believes it was justified in considering the grievant's overall work performance when deciding what discipline to impose here. In its view, nothing in the labor agreement prevents it from doing so (i.e. considering the grievant's overall work performance when deciding on the appropriate level of discipline.) Second, with regard to the standard of proof which the arbitrator should apply, the Company believes that the applicable standard is the preponderance of the evidence standard. According to the Company, it has satisfied that standard. Next, the Company notes that the grievant admitted at the hearing that he did what he was charged with doing, namely not clocking out to go to four follow-up doctor appointments in November, 1996. The Company further notes that the grievant did not have management approval to stay on the clock for these appointments; rather, he should have clocked out. The Company avers that the grievant knew he was to clock out when he went to his follow-up doctor appointments. According to the Company, the grievant had this notice from two separate sources: 1) there was a Company policy to that effect; and 2) lest there be any question about it, the grievant was given personalized instructions by different management officials that he was to clock out when he went to his follow-up doctor appointments. With regard to the former (i.e. the policy), the Company avers that its policy directing employes to clock out for follow-up doctor appointments was widely distributed. In the Company's opinion, it made every effort to ensure the policy was universally understood by employes and consistently applied by management. Given the foregoing, the Company believes this policy can be used as a basis to ascribe notice to the grievant that he was to clock out for his follow-up doctor appointments. With regard to the latter (i.e the personalized instructions) the Company contends that three management officials (Trester, Heitman and Brown) told the grievant on three separate occasions in 1995 that he was to clock out when he went to his follow-up doctor appointments. The Company submits that the grievant understood the policy/directive because he clocked out when he went to his doctor appointments from May, 1995 to November, 1996. The Company argues that when the grievant failed to clock out for four follow-up doctor appointments in November, 1996, he willfully and deliberately violated both the Company policy and the personalized instruction he had been given. The Company believes the grievant's misconduct constitutes "theft" because he received wages for unapproved non-work hours and "willful falsification of Company records" because he falsified his time card on the four days in question. With regard to the level of discipline imposed,

the Company asserts that termination is warranted because the grievant's offenses (i.e. "theft" and "willful falsification of work records") are contractually- mandated cardinal offenses requiring immediate discharge. It argues that under these circumstances, progressive discipline is not applicable. The Company urges the arbitrator to

defer to the Company's judgment for the penalty for the grievant's misconduct. The Company therefore contends that the grievance should be denied and the discharge upheld.

DISCUSSION

Article 13.1(a) of the parties' labor agreement contains what is commonly known as a "just cause" provision. It provides that the Company will not suspend or discharge an employe without just cause. What happened here is that the grievant was fired by the Company. Given this disciplinary action, the obvious question to be answered here is whether the Company had just cause for doing so.

As is normally the case, the term "just cause" is not defined in the parties' labor agreement. While the term is undefined, a widely understood and applied analytical framework has been developed over the years through the so-called common law of labor arbitration. That analytical framework consists of two basic questions: the first is whether the Company demonstrated the misconduct of the employe, and the second, assuming this showing of wrongdoing is made, is whether the Company established that the discipline imposed was contractually appropriate.

Before addressing these questions though, it is necessary to address the threshold question of why the grievant was fired. It is necessary to do so because the parties dispute the exact reason for the grievant's discharge. The Union contends the stated reason for the grievant's discharge was "theft and willful falsification of work records", while the Company asserts he was discharged for that reason plus his overall work performance which it characterizes as "less than spotless". 3/ In the Union's view, this latter reason was not communicated to the grievant in his discharge letter, but instead was simply added at the arbitration hearing. I agree with the Union on this point. 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. 4/ In this case, the grievant was never personally told by anyone from management

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3/ Transcript, p. 120 and Company brief, page 11.

4/ Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 922.

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why he was fired; instead, he was simply handed a (discharge) letter. Under these circumstances, the letter obviously is the only source which indicates why the Company fired the grievant. On its face, that letter indicates that the Company considered his conduct on

November 5, 12, 19 and 22, 1996 (wherein he remained on the clock for four follow-up doctor appointments) to be "theft and willful falsification of work records". Nothing was said in this letter about his overall work performance. When the Company wrote the grievant's discharge letter, it could have cited his overall work performance as a reason if it wanted because it obviously was aware of same. However, it did not do so. Instead, the Company chose to discharge the grievant solely for "theft and willful falsification of work records". Such was its right. Having done so though, it cannot now expand the reason for the grievant's discharge to also include his overall work performance. Accordingly then, the grievant's overall work performance will not be used as a basis for reviewing the grievant's discharge.

Having so found, attention is now turned to the first part of the just cause analysis which, as previously noted, requires that the Company demonstrate the grievant's misconduct.

In their respective briefs, each side addressed what degree of proof is needed to make this call. The Union contends that the standard of proof in this case is guilt beyond a reasonable doubt because the grievant was discharged for theft. Not surprisingly, the Company takes the view that a less stringent standard of proof is needed. I agree with the Company on this point. Although the charge against the grievant can certainly be characterized as a crime, this is not a criminal case. The undersigned is not empowered to decide, and in point of fact will not decide, whether any crime was committed here. That being so, I believe that the standard of proof applied in criminal cases (i.e. beyond a reasonable doubt) is not necessary. Having said that, there is no question that the Company still has the burden of proof. The question here is what level or standard it has to meet. The undersigned believes that the degree of proof the Company has to meet is to persuade the arbitrator. Specifically, the Company has to convince me of the following: 1) that the grievant did what he is charged with doing (i.e. not clocking out to go to four follow-up doctor appointments); and 2) assuming he did, that he knew he was not to do so.

The first point is not in issue. The grievant admitted at the hearing that he did not clock out when he went to his follow-up doctor appointments on November 5, 12, 19 and 22, 1996. Given this admission, there is no question that the grievant did what he is charged with doing (i.e. not clocking out to go to four follow-up doctor appointments).

The focus now turns to the second point referenced above, namely whether the grievant knew he was to clock out when he went to his follow-up doctor appointments. The Company contends that he knew he was to clock out, while the Union disputes that assertion. The Company's premise that the grievant knew he was to clock out for follow-up doctor appointments is based on the following assertions: 1) that a written Company policy exists which mandates same; and 2) that several management officials personally told the grievant he was to clock out to go to his follow-up doctor appointments. These matters are addressed below in the order just listed.

Notwithstanding the Company's assertion to the contrary, there are several problems with using the Company's written policy as a basis to ascribe notice to the grievant that he was to clock out for follow-up doctor appointments. The following shows why. First, although the policy was adopted in 1995, it was not widely disseminated and posted or even given to the Union. Second, numerous bargaining unit employes testified without contradiction they had never seen the policy before DeGroot's discharge. Third, the record indicates that some Company supervisors were either unaware of the policy or did not understand it. Fourth, at the hearing, Company Vice-President Ferron conceded that the policy had "probably not" been universally applied by management. Given the foregoing, I am unwilling to use the Company's written policy as a basis to ascribe notice to the grievant that he was to clock out for follow-up doctor appointments.

Attention now turns to the Company's contention that several management officials personally told the grievant he was to clock out to go to his follow-up doctor appointments. Although the grievant expressly denied ever receiving this directive, I am not persuaded by his general denial. Instead, I find that at least two management officials did just that. Three management officials (i.e., Brown, Heitman and Trester) testified they personally told the grievant he was to clock out to go to his follow-up doctor appointments. I have decided to not rely on Brown's testimony because it was disputed by both of the employes who supposedly heard her say it, namely Kattner and the grievant. However, I expressly credit Heitman's and Trester's testimony that they told the grievant he was to clock out for his follow-up doctor appointments for the following reason. The record indicates that Heitman took the grievant to the doctor in April, 1995, when the grievant injured his shoulder at work. It strikes me as extremely plausible that the subject of follow-up doctor appointments would be raised and discussed at that time. The record also indicates that Trester talked to the grievant in October, 1995, when Trester was investigating the grievant's wrist injury. Again, it strikes me as being an extremely plausible time for the subject of follow-up doctor appointments to be raised and discussed. I therefore conclude that Heitman and Trester both told the grievant in 1995 that he was to clock out for his follow-up doctor appointments. I further find that this supervisory directive was a legitimate directive since there is nothing in the contract which precludes the Company from making this directive. The fact that this directive was given orally has no bearing on its significance. This is because oral

directives are commonplace, if not the norm, in the workplace.

Since two supervisors gave the grievant a legitimate directive that he was to clock out for his follow-up doctor appointments, that is what he was to do. It is a cardinal rule in the workplace that employes are to obey supervisory orders and do what they are told regardless of whether or not they agree with it. 5/ The reason for this is obvious; there can hardly be a more

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5/ There are certain exceptions to this rule but none are applicable here.

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serious challenge to supervisory authority, and hence the Employer's ability to direct the work force, than the refusal to obey a supervisory order. Thus, the proper course of action is for employes to obey orders they believe are improper and obtain redress through the grievance procedure. Employes can be disciplined or discharged if they fail to obey, even if they are ultimately found to be correct in their assessment of the propriety of the order.

I am further convinced the grievant understood this directive because he complied with it throughout 1995 and most of 1996. Specifically, he clocked out for his numerous follow-up doctor appointments. That changed though in November, 1996 when the grievant failed to clock out for four of his follow-up doctor appointments. On those four occasions, he went to his doctor on Company time, not his own time.

Given the management directive he had previously been given, the grievant was not entitled to remain on the clock for these four follow-up doctor appointments. He should have clocked out for them just as he had done numerous times before. If he thought he was entitled to remain on the clock, he was just plain wrong. In point of fact, he did not have permission from any supervisor to stay on the clock, so his doing so was unauthorized and in contravention of the directive he had been given. I therefore find that the grievant committed misconduct by not clocking out on four occasions in November, 1996, and that this misconduct warranted discipline.

The second part of a just cause analysis requires that the Company establish that the penalty imposed was contractually appropriate. In this case, the Company summarily discharged the grievant. In doing so, it chose to characterize what he did as "theft" and "willful falsification of work records." By using those magic words from Article 13.2 of the labor agreement, the Company believes this is a case for summary discharge where it need not follow the normal progressive disciplinary sequence which is contained in Article 13.1(a). I disagree. It is noted at the outset that some offenses are so serious that they are grounds for summary discharge even if the employe has not been previously disciplined. Here, the parties have contractually agreed in Article 13.2 that "theft" and "willful falsification of work records" constitute cardinal offenses that

are grounds for immediate discharge. However, just because those cardinal offenses exist does not mean they are applicable here. In my view, while the grievant's failure to clock out as directed can be characterized in a variety of ways, it is overreaching to characterize it as "theft" and "willful falsification of work records." The reason is this: one of the elements of both "theft" and "willful falsification of work records" is intentional deception, and evidence of same is lacking here. The following shows this. On the days in question, the grievant did not try to deceive his supervisors as to his whereabouts. For example, he did not sneak out and later sneak back in before his absence was detected. Instead, he told his supervisors where he was going before he left for his doctor appointment, and afterwards he turned in a medical status report. Also, when Fahser questioned the grievant on November 25 about whether he had or had not clocked out for the four appointments in

question, the grievant readily admitted he had not clocked out. The foregoing persuades me that the grievant did not try to intentionally deceive his supervisors about his whereabouts on the four days in question, so he did not commit either "theft" or "willful falsification of work records." It follows from this decision that while the grievant certainly committed misconduct when he failed to clock out for four doctor appointments, that misconduct was not a cardinal offense warranting summary discharge.

Next, just cause requires uniformity in the treatment of all employes. The record establishes that prior to the grievant's discharge, numerous employes had done exactly what the grievant did (namely go to doctor appointments on the clock) and none of them were warned or disciplined, much less discharged, for doing so. This hardly lays the foundation for a summary discharge. To the contrary, it establishes that what the grievant did in November, 1996 (i.e. not clock out for follow-up doctor appointments) was then considered by the grievant's co-workers to be acceptable conduct. While the grievant's co-workers were put on notice through this case that if they do not clock out for a doctor appointment the Company considers it to be a dischargeable offense, the grievant was never given such notice prior to his discharge. Since he was not, he was subjected to disparate treatment.

Finally, having previously found that the grievant's misconduct was not "theft" or "willful falsification of work records", and thus not a cardinal offense warranting summary discharge, it follows that the normal progressive disciplinary sequence contained in Article 13.1(a) should have been followed. It was not. Under that system, the Company is to give an employe at least two warning notices or a "first final notice" prior to discharge or suspension. While the grievant had received warning notices in the past, those warning notices were no longer in effect because they had evaporated pursuant to the time limitation contained in Article 13.4. Since the grievant had no warning notice in effect in November, 1996, the undersigned finds that a written warning notice was the appropriate level of discipline for the grievant's misconduct. Inasmuch as the Company

skipped this step and proceeded instead to discharge, it failed to comply with the disciplinary sequence it has contracted to abide by for non-cardinal offenses. Consequently, the grievant's discharge is overturned and is reduced to a written warning notice. Hence, the grievant is to be reinstated with no loss of seniority and with full back pay and benefits less any interim earnings.

Based on the foregoing and the record as a whole, the undersigned issues the following

AWARD

Grievant DeGroot was not terminated for just cause. For the reasons set forth above, his termination for failing to clock out for four follow-up doctor appointments is set aside and is reduced to a written warning. The Company is directed to reinstate DeGroot with no loss of

seniority and to make him whole for lost wages and benefits less any interim earnings. The undersigned will retain jurisdiction for at least sixty (60) days from the date of this Award solely for the purpose of resolving any dispute with respect to the remedy herein.

Dated at Madison, Wisconsin, this 8th day of May, 1998.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

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