BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL NO. 695

and

ASSOCIATED MILK PRODUCERS, INC.

Case 2
No. 56494
A-5685

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Andrea F. Hoeschen**, appearing on behalf of the Union.

Felhaber, Larson, Fenlon & Vogt, by **Attorney Edward J. Bohrer**, appearing on behalf of the Company.

ARBITRATION AWARD

Teamsters Union Local No. 695, herein the Union, and Associated Milk Producers, Inc., herein the Company, jointly requested the Wisconsin Employment Relations Commission to designate the undersigned as an arbitrator to hear and to decide a dispute between the parties. The undersigned was designated as the arbitrator. The parties waived the twenty-one day period in Article 3 for the issuance of an award. Hearing was held in Portage, Wisconsin, on July 16, 1998. A stenographic transcript of the hearing was not made. The parties completed the filing of post-hearing briefs on August 26, 1998.

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.

ISSUES

The parties stipulated to the following issues:

1. Was the grievant (ET) properly suspended or should he receive pay and benefits for any or all of the period between September 24 through November 7, 1997?

2. Was the grievant (ET) terminated on December 10, 1997, in accordance with the contract?

BACKGROUND

The grievant was hired by the Company as a temporary employe on May 27, 1997. 1/ On June 30 the grievant was hired by the Company as a full-time employe with a seniority date of June 30.

1/ All other dates herein refer to 1997, unless otherwise specified.

The grievant was absent on June 27, during which time he was still a temporary employe. After becoming a full-time employe, the grievant was absent on July 24 and August 13. On August 20, the grievant was given a verbal warning for the absence on August 13. On September 8, the grievant was given a written warning for being absent on August 19. The grievant was assessed a half point for being absent for part of his scheduled shift on September 16. On September 22, the grievant left work prior to the end of his shift because he was sick. The grievant worked for three hours on September 23, and then went home early again because he was still sick. On September 23, the Company instructed the grievant's supervisor to give the grievant a three-day suspension for leaving work early on the previous day. However, the grievant had already left work due to his illness before he could be informed of the suspension. On September 24, the Company discharged the grievant, in addition to issuing the written three-day suspension notice to him. The grievant filed a written grievance on July 29, alleging that the Company had not counted his absences correctly. The Company denied the grievance in writing on October 3. Said denial listed the absences for which the grievant had been assessed points under the attendance policy, as follows:

6-27	1 point
7-24	1 point
8-13/14	1 point
8-19	1 point
9-16	½ point
9-22	1 point
9-23	1 point

At the monthly Union/Management meeting on October 30, the Union raised the issue of the grievant's discharge and argued that the Company had incorrectly calculated the points for the grievant. The Company refused to discuss the grievance on the basis that it was not a proper topic for the meeting. On October 31, the Union sent a letter to the Company setting forth what it believed to be the errors in the Company's calculations of the grievant's attendance record. On November 3, the Company contacted the Union's business agent and requested a meeting to discuss the grievance. The Company and the Union met on November 6 to discuss the grievant's discharge. At that meeting the Company agreed to make the following changes in the grievant's attendance record: to not count June 27 as an absence under the attendance policy; to remove the ½ point assessed for September 16, because the grievant had worked his full shift on said date; and to count September 22 and 23 as one absence, rather than as separate absences. Those changes would mean the grievant would have only four absences on his record, which amount calls for a written warning. On that basis, the Company agreed to reinstate the grievant. However, the parties did not resolve the issue of whether the grievant should receive any back pay for the period of September 24 to November 7. The grievant returned to work on November 7.

The grievant was scheduled to work a four hour shift on Sunday, November 30, from 9:00 a.m. to 1:00 p.m. The grievant neither reported to work nor called in to report his absence by 1:00 p.m. when the plant closed for the day. The grievant testified that he did try to call the plant at about 1:30 p.m. when he returned to Portage, but there was no answer. On December 2, the Company informed the grievant that he would be suspended for three days, which suspension would occur on December 3, 4 and 5, because his absence on November 30 was his fifth absence in six months. The grievant argued that November 30 should be considered a half absence, rather than a full absence, since he had missed only four hours of work. The Company's Personnel Director, Tom Amend, testified that he called the grievant at about 10:00 a.m. on December 3, and informed him that the absence on November 30 would be counted as a half absence, that the suspension was being withdrawn and, therefore, that the grievant should report to work on the second shift on that day, i.e., December 3. The grievant testified that he did not receive any telephone call from the Company on December 3. The grievant did not report to work on December 3, 4 or 5, but he did work on Saturday, December 6, and Sunday, December 7. On Monday, December 8, Amend learned from the grievant's supervisor that the grievant had worked on December 6 and 7. When the grievant reported to work for the afternoon shift on December 8, Amend informed him that he was being discharged for being absent from work without notification on December 3, 4 and 5.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE I – RECOGNITION

> The Employer recognizes the Union as the sole and exclusive bargaining agent for all full-time and regular part-time production and maintenance employees of the Employer at its Portage, Wisconsin plant, including truck

drivers and laboratory technicians; excluding temporary employees, office clericals, management employees, professional employees, guards and supervisors as defined in the Act.

. . .

ARTICLE VI – SENIORITY

. . .

Section Five. Termination of Seniority. Seniority shall accrue from the date of last hiring by the Employer.

An employee's seniority will be terminated for any of the following reasons:

. . .

(d) If he is absent for a period of two (2) working days without notifying the Employer.

. . .

ARTICLE XVI – MANAGEMENT RIGHTS

Except as specifically limited by the express provisions of this Agreement, the management of the plant, including but not limited to, the right to hire, promote, demote, direct the working forces, schedule employees, discharge for cause, maintain discipline, require observances of reasonable plant rules and regulations, maintain efficiency of employees, and to determine the equipment utilized, days and hours of production and the exclusive functions of management.

. . .

ARTICLE XX – ATTENDANCE POLICY

. . .

II. Disciplinary Policy.

(a) There will be no discipline for the first two absences in any rolling six month period. Thereafter:

3rd Absence – Verbal Warning
4th Absence – Written Warning
5th Absence – Suspenison up to 3 days
6th Absence – Discipline (suspension) up to and including discharge

Termination can occur if any employee is suspended three (3) times in any rolling two (2) year period.

(b) An absence is defined as any one or more consecutive work days absent. An absence of 5 or more hours in a work day is considered an absence. Late or absence of 10 minutes to 5 hours is considered a one-half absence. Fully paid time off, i.e. vacation, holiday, funeral, jury is not an absence.

(c) Pre-scheduled short days or short weeks do not count as an absence. This includes pre-scheduled, pre-approved time off for doctor appointments or court appearances required by subpoena.

(d) Management (Personnel Department) may take mitigating circumstances into account.

. . .

POSITION OF THE UNION

When calculating the grievant's absences, the Company should not have counted June 27, since he was a temporary employe at that time and was not a member of the bargaining unit. The Company was in error in assessing the grievant a half point for September 16, since the grievant was at work for his entire shift on that date. The grievant should have been assessed only one point for his absences on September 22 and 23, since the contract clearly states that two consecutive absences will count as only one absence. Thus, the Company should have assessed only four absences to the grievant as of September 24. Because it took the Company seven weeks to correct its mistakes, the grievant's suspension should be reduced to a written warning and he should be made whole for lost wages during his suspension.

The Company did not have just cause to terminate the grievant on December 10. The grievant missed only four hours of work on November 30 and the contract is clear that an absence of less than five hours is assessed only a half point. The Company failed to show that it notified the grievant that his suspension had been rescinded. Amend did not document the revocation, even though he had documented all the prior disciplinary actions involving the grievant. Amend did not send a letter to confirm the phone call rescinding the suspension. Neither did Amend call the grievant on December 3 to find out where he was. Although Amend thought the grievant had quit, he did not either issue any paperwork to change the

grievant's status or pull his time card. The exhibits relating to the telephone records search submitted by the Company fail to show the results of the search. The grievant should be reinstated with full back pay.

POSITION OF THE COMPANY

The Company asserts that an absence during an employe's employment as a temporary employe can be counted because a temporary employe is covered by the contract and is represented by the Union. Nothing in the contract excludes temporary employes from the application of the attendance policy. The Company has always counted absences occurring during an employe's temporary and/or probationary status under the attendance policy without any prior grievances or objections. Advance notice of an absence does not excuse the absence. The Company is not required to consider mitigating circumstances.

The Company agreed to bring the grievant back to work without any admission of liability, but it did not agree to give him any back pay. The Union was responsible for the delay in bringing the matter to a conclusion. The Company's written response to the grievance was given to the Union steward on October 3. On October 13, Amend contacted the Union steward about the grievance. The steward told Amend that the Company's response to the grievance had been forwarded to the Union's Business Agent. The Business Agent, Wayne Schultz, did not contact the Company about the grievance until the regular Union/Management meeting on October 30.

On November 30, the grievant chose deer hunting over work and either failed to call in or called in after the end of his scheduled shift, even though he knew he was in a precarious position because of his attendance record. The shift on November 30 was one work day and, thus, arguably it was one "work day's absence," which would justify a suspension for the fifth absence. Since it could be argued that the absence on November 30 was less than five hours and should be a half point assessment, the Company agreed to give the grievant a break by reducing the full absence to a half absence and to rescind the suspension.

Amend, in the presence of Supervisor James Clemmons, telephoned the grievant at his home in the morning of December 3 and informed him that the suspension was canceled and that he should report for work that afternoon. The Company had no reason to fabricate a telephone call and attempted, without success, to obtain records from the telephone company to show that such a call was made. The grievant was a short term employe who continuously looked for loop holes in the Company's policies. The Company did have just cause to terminate the grievant.

DISCUSSION

It is clear from the evidence that the Company and the Union, at their meeting on November 6, reached an agreement to have the grievant return to work on the following day. However, there is no evidence to contradict Amend's testimony that the parties failed to reach agreement on whether or not the grievant would receive any back pay for the period of September 25 to November 7. Rather, the back pay issue was left unresolved.

The Union accurately asserts that temporary employes are specifically excluded from the bargaining unit by the language of the recognition clause. Conversely, the Company correctly asserts that the contractual attendance policy does not specifically exclude absences occurring while a permanent employe was in temporary status.

The Company submitted the disciplinary records of two employes who were disciplined after becoming full-time employes for absences including one absence during the time the employes were working as temporary employes. One of those employes, Leota Zabloudil, received a verbal warning for three absences, one of which occurred while Zabloudil was a temporary employe. Later, Zabloudil received a written warning for absences which also included the absence while she was a temporary employe. The other employe, Nicole Behnke, received a verbal warning for absences which included absences while she was a temporary employe. Thus, while it appears that the Company has a history of including absences incurred as a temporary employe when counting absences of a permanent employe for disciplinary actions, there is no evidence to show that the Union was aware either of those instances or of the Company's policy. Accordingly, it was reasonable for the parties at their meeting on November 7 to agree to exclude the absence of June 27 in order to allow the grievant to return to work, even if the parties were not in agreement on what the policy would be for future cases. The evidence does not establish that in so agreeing the Company accepted the Union's position that in the future absences incurred during employment as a temporary employe would not be counted under the attendance policy when that employe became a permanent employe. Instead, the Company agreed to not count the absence of June 27 in this particular situation, so that the grievant's attendance record would be reduced to the written warning step, which would allow the grievant to return to work.

September 16 initially was counted as an absence only because of an error in punching the timecard. In fact, the grievant had worked his full shift on said date. However, whether or not September 16 was counted would have failed to make any difference in the level of discipline given to the grievant, since the date was counted as a one-half absence.

There was a basis for assessing a total of only one point for the grievant's absence on September 22 and partial absence on September 23, rather than assessing a separate point for each of those dates, because both absences resulted from the same illness. Article XX specifies that an absence on consecutive work days is to be counted as one absence. Said provision also specifies that an absence of five or more hours is a full absence, while less than five hours is a one-half absence. That language is not clear on how to count those cases where an employe either missed

work because of illness or went home ill on one day and returned to work the next day, but then went home ill prior to the end of the employe's shift. Neither did the parties present any evidence of prior situations of such a nature. Since the language is ambiguous and could be given the interpretation of either party, the Company's agreement to count September 23 and 24 as one absence, rather than two absences, does seem to have been a concession to resolve a grievance.

The agreement of the Company to compromise its positions and to allow the grievant to return to work on November 7 did not render those positions to be without basis. As noted above, the language of Article XX is open to alternate interpretations. Therefore, the undersigned does not believe the Company should be required to give the grievant back pay and benefits for the period of September 24 through November 6.

The undersigned now turns to the issue of whether the grievant was terminated on December 10, in accordance with the contract. The determination of this issue turns on whether the grievant was notified by the Company that his suspension was revoked and that he should return to work on December 3 on his regular second shift, since the fact that the grievant did not report for work on December 3, 4 and 5 is undisputed.

Amend testified that he spoke to the grievant on the telephone in the morning of December 3. The grievant testified that, although he had been home during the morning of December 3, he did not receive a telephone call from either Amend or any other management employe of the Company on that date. Clemmons testified that he was with Amend when Amend telephoned the grievant on December 3 and that, although the conversation between the grievant and Amend was not on a speaker phone, he did hear Amend both use the grievant's first name in addressing the other party and twice say that the grievant should report for work that afternoon.

As of December 8, Amend had neither sent a letter to the grievant confirming the revocation of his suspension nor made any written record of the revocation and the alleged phone call. The Union believes such failure supports the grievant's testimony that he did not receive a phone call from Amend. If the record showed such a delay to be unusual, the Union's argument might have been more persuasive. However, the exhibits show that Amend often did not initiate disciplinary action or make a written record of such action for several days after the event occurred, even in prior instances involving the grievant. The verbal warning given to the grievant was dated a week after the violation occurred. The written warning given to the grievant was dated over two weeks after the violation occurred.

Further, the Union points to the fact that Clemmons allowed the grievant to work on December 6 and 7 to show that the Company had not terminated his employment. Clemmons had been a supervisor for about one month at that time. He testified that he was the only supervisor on the grievant's shift and that he did not know what to do when the grievant reported to work, so he decided to wait and talk to Amend on Monday, December 8. Such a reaction by Clemmons, who was a new and inexperienced supervisor, is not surprising and fails to establish that the grievant had not received a phone call from Amend.

The documents submitted by the Company, relative to a request of the telephone company for records of local phone calls made from the Company on December 3, do not contain any information to show whether Amend did or did not call the grievant.

The undersigned concludes that Amend did phone the grievant in the morning of December 3 and tell him the suspension was being rescinded and he should report to work that afternoon as scheduled. The grievant, by failing to report for work on December 3, 4 and 5 without notifying the Company of his absence, provided the Company with cause to terminate his employment. Such cause was not eliminated by the fact that the grievant worked on Saturday and Sunday, December 6 and 7.

The instant matter differs from the situation in the arbitration case cited by the Union, ANHEUSER-BUSCH, INC., 108 LA 813. In that case the grievant had not been told to report to work after being told he was suspended. In the instant matter it has been concluded that the grievant was told the suspension was being rescinded and that he should report to work.

Based on the foregoing, the undersigned enters the following

AWARD

That the grievant is not entitled to any pay or benefits for the period of September 24 through November 6, 1997; that the termination of the grievant on December 10, 1997, was in accordance with the contract; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 23rd day of October, 1998.

Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator

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