BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BIG BUCK BUILDING CENTERS, INCORPORATED

and

TEAMSTERS LOCAL UNION NO. 43

Case 2
No. 66401
A-6354

(Suspension Grievance)

Appearances:

James R. Korom, Attorney, von Briesen & Roper, S.C., 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin, 53201, on behalf of Big Buck Building Centers, Incorporated.

John J. Brennan, Attorney, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North RiverCenter Drive, Suite 202, Milwaukee, Wisconsin, 53212, on behalf of Teamsters Local Union No. 43.

ARBITRATION AWARD

Big Buck Building Centers, Incorporated, herein Big Buck or the Company, and Teamsters Local Union No. 43, herein the Teamsters or the Union, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. On October 23, 2006 the Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission on behalf of Dana Ishman, herein Ishman or Grievant, challenging a suspension of Grievant by the Company. From a panel the parties selected Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held on the matter on December 12, 2006 in Racine Wisconsin. No transcript was prepared. The parties filed written briefs and arguments and the record was closed on January 16, 2007.

ISSUES

The parties did not stipulate to a statement of the issues. The Union states the issues as:

Was the Company justified in issuing a one day suspension to the Grievant for leaving work after four hours on September 22, 2006?

If not, what is the appropriate remedy?

The Company states the issues as:

Is the grievance arbitrable?

If so, did the Company violate the specific items of the collective bargaining agreement when it issued Joint Exhibit 2?

If so, what is the remedy?

The undersigned believes the record best reflects a statement of the issues as:

Is the grievance arbitrable?

If so, did the Company violate the collective bargaining agreement in issuing a one day suspension to Grievant for having left work on September 22, 2006 and not immediately reporting to Concentra pursuant to Article 14?

If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3. PROBATIONARY PERIOD

New full-time employees shall be considered temporary employees for the first ninety (90) calendar days, during which time the Employer may terminate their employment without cause and shall advise the Union upon such termination of employment. This period may be extended by mutual agreement between the Employer and the Union. Union membership shall be mandatory after thirty (30) calendar days. Probationary employees shall be paid 20% less than the regular contract rate for the first month of employment, 10% less than the regular contract rate for eth second month of employment and shall commenced with the full scale rate on the third month of employment. At the employer's discretion, the percentage reduction for probationary employees may be waived.

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ARTICLE 7. STEWARDS

The Employer recognizes the right of the Union to designate a job steward and alternate from the Employer's seniority list.

The authority of job stewards and alternates so designated by the Union shall be limited to and shall not exceed the following duties and activities:

(1) The investigation and representation of grievances to his or her Employer or the designated Company Representative in accordance with the provisions of the collective bargaining Agreement;

(2) The collection of dues when authorized by appropriate Local Union action;

(3) The transmission of such messages and information which shall originate with, and are authorized by the Local Union or its officers, provided such messages and information;

A. have been reduced to writing; or
B. if not reduced to writing, are of a routine nature and do not involve work stoppages, slow downs, refusals to handle goods, or any other interference with the Employer's business.

Job stewards and alternates have no authority to take a strike action or any other action interrupting the Employer's business, except as authorized by official action of the Union.

The Employer recognizes these limitations upon the authority of a job steward and his or her alternate, and shall not hold the Union liable for any unauthorized acts, and has the authority to impose proper discipline, including discharge, in the event the shop steward has taken unauthorized strike action, slow down, or work stoppage in violation of this Agreement.

. . .

ARTICLE 14. SICK LEAVE

The Employer agrees to grant six (6) days sick leave per contract year and the unused days shall accumulate for a maximum of ninety (90) days. Employees who have been on the payroll for 90 days or more who are sick and unable to work, shall be compensated for each day lost because of illness at the prevailing hourly rate of wages for eight (8) hours per day, Monday through Friday.

In order to qualify for sick leave pay, the employee must notify his or her Employer as early as possible on the first day of sickness. Sick leave credits shall accumulate at the rate of ½ day for each month of employment. Employer shall be entitled to an independent medical examination of any employee absent from work, said examination to be at the Employer's expense. The employee to qualify for sick leave pay must upon his or her return to work file a written request for sick leave including a brief summary of the type of illness and the treatment given.

Should an employee become ill, he or she shall immediately and as soon as practicable notify the Employer thereof. The Employer shall have the right to immediately interview the employee and have an independent medical exam performed to determine the employee's ability to work.

. . .

ARTICLE 17. QUITS, DISMISSAL AND LAY-OFFS

It is hereby agreed between the parties that the last employee laid off by the Employer may be rehired on a part-time basis at full Union scale pay upon mutual consent of the Employer, employee and the Union. If a full-time employee is laid off and offered part-time employment under Article 22, he or she may choose to reject such part-time employment without loosing seniority rights. His or her status on the seniority list shall continue in effect for two (2) years from the lay-off date. It is agreed that the employer will notify the Union of all contemplated discharge of employees at least forty-eight (48) hours before the discharge occurs, provided, however, that discharge for proven dishonesty or intoxication by alcohol, drugs or other substances shall not require the forty-eight (48) hours' notice.

Employees under Article 22 are not subject to the provisions of this contract with respect to notice. A separate seniority list for part-time employees, however, shall be maintained. If an employee quits, he or she shall be immediately removed from the seniority list.

. . .

ARTICLE 28. ARBITRATION

Should any controversy arise between the parties hereto governing the interpretation of this Agreement, or any part thereof, which cannot be settled to the satisfaction of both parties, then such controversy shall be referred to a new Joint Union-Company grievance committee, two from the Union and two for the Company, with Union and Company as co-chairpersons. Majority decision to be final and binding. If no majority decision, then arbitration within ten days. When appealed to arbitration, the parties jointly notify the Wisconsin Employment Relations Commission.

During such time as the matter is pending, there shall be no strike or lockout. The decision of a majority of members of such arbitration committee shall be binding upon both parties to the dispute.

The Employer agrees that should the arbitration committee decide that a discharge or lay off is unjustifiable, the affected employee shall be reinstated with full back pay.

It is further agreed between the parties hereto that the matter of membership in the Union shall in no case be subject to arbitration.

The filing fee required by the Wisconsin Employment Relations Commission for arbitration shall be split equally between the Union and the Employer.

BACKGROUND AND FACTS

Grievant has been employed as a truck driver for the Company since 1998 and is a member of the bargaining unit. The Company has a lumber yard, a truss plant and a door and window plant. Grievant makes deliveries of Company building products.

On Friday, September 22, 2006 Grievant started his regular shift at 6:00 a.m. with some gurgling in his stomach. He did not tell anyone about his stomach. While at his first delivery for the day the customer was unhappy with the delivery. A normal load for that customer would have been three stacks of walls and at that time the delivery was a stack and a half. Customers rely on timely deliveries in view of having cranes, machinery and work crews available to keep their projects going and use the building products. That was why the customer was unhappy. The customer yelled at Grievant because of this. Grievant feels that as a driver he is a point person for the Company because he is the person the customer sees. He felt abused by the customer. It is his desire that customers do not yell, scream and swear at him. He would rather they say he did a good job. Grievant feels this is an ongoing problem with deliveries. It was not just on September 22nd that he had an irritated customer. Grievant feels it was continuous, and lately vicious. Grievant feels this is something the Company should do more to deal with than they were. This was something Grievant was upset about that day.

Grievant had also gotten wet that morning when rainwater had showered over him as he removed a tarp from the load on the truck at the delivery site.

He returned to the Company shortly after 8:30 that morning and waited for the next load which was not ready. He spoke with his supervisor, Steven Graf, who is the yard manager. Grievant told Graf that he was upset, that he'd gotten showered by the rainwater, and that the first thing the customer had said to him was where were the rest of his walls and had yelled at him. He also told Graf that the truck blinkers were broke and needed to be fixed before he could go anywhere. At that point Grievant told Graf he was going to go home at 10:00. He was wet. He did not say he was sick and did not mention his stomach. Graf did not think he looked ill, but did appear angry. Graf told him to fix the truck, as that needed to be done, and thought Grievant was just blowing off steam. Grievant went and fixed the truck and returned to where Graf was at about 9:40 a.m., and asked if there was anything to do for the next 20 minutes because he was going home. Graf asked him if he was really going home and Grievant said yes, he was. He did not say to Graf that he was sick or mention his stomach. Graf didn't ask him why he was going home. As usual, there had been more loads scheduled for Grievant to deliver that day. Grievant is aware that customers depend on him being there when a load is scheduled. One of the other drivers was off that day. Graf did not have anything to be done for only 20 minutes, became somewhat upset and told Grievant that if he was going home then to go now. Grievant left the yard. He had not said anything to Graf about illness that day and did not tell Graf he was going home sick, just that he was going home. He punched out with his time card and wrote on it 9-22 ½ sick day,[1] then went home. He had diarrhea at home, and laid down.

[1] Graf first saw the handwriting the next week.

Graf then got a call from Valerie Hanson, the President of the Company. At about the same time, Hanson was dealing with a phone call from an irate customer looking for a load of building materials, and Graf had just been called by another employee helping with that customer to try and make arrangements for the delivery. Graf had responded that one driver was on a delivery, one was gone that day, another was going home and, there was no capacity to make the delivery. Normally there are three drivers.

Hanson, having perceived or assuming that Grievant had gone home sick, told Graf to send Grievant to Concentra for a fitness for duty examination. Concentra is a medical center that provides work related medical services to the Company and its employees, including fitness for work examinations. At about 10:20 a.m. Graf called Grievant's home and got the answering machine. He left a message for Grievant to call him immediately when he gets this message. Graf reported this to Hanson, and called Grievant again about 11:30 a.m. Grievant answered the phone. He had heard the phone ring the first time but had not answered it, not wanting to move. Graf told Grievant that he needed to go to Concentra for a fitness for duty examination or a physical. Grievant understood this to be some type of physical examination. He did not tell him precisely when to go, and they did not discuss Article 14 of the labor agreement. When directed by Graf to go to Concentra, Grievant said okay, he would do that. Grievant did not tell Graf at that time that he was suffering from diarrhea. He had no idea why the Company would want him to go to Concentra. He then listened to the earlier phone message.

Grievant then called Teamsters Union business agent Tom Strickland to verify that it was a contract requirement that he go to Concentra for a physical, and told Strickland that he had diarrhea. Strickland told Grievant that the Company had a right to send him, and that Article 14 applied to an immediate interview. He told Grievant he was not reading the Article to mean an immediate examination at Concentra. Grievant said okay.

Strickland then had a phone conversation with Hanson about the request for the examination and the meaning of immediate in Article 14 of the labor agreement. Hanson expressed her expectation that Grievant go immediately to a readiness for work evaluation.

Strickland then had a second phone conversation with Grievant, and said that the examination was a requirement and that he should go. They discussed the Company also felt that the examination was immediate, too. They discussed the difference of opinion as to whether the examination was also immediate. This call was about a half hour after the first call to Strickland. Grievant then laid down, with trips to the bathroom.

About noon the Company called Concentra and made arrangements for Concentra to do a fitness for duty evaluation of Grievant that day. At about 4:00 p.m. the Company called Concentra again and learned that Grievant had not been there.

At about 3:45 p.m. Grievant went to Concentra, arriving there sometime between 4:00 and 4:30 p.m. He had not had any sense of immediacy that he go to Concentra, and did not want to soil his pants going there. When he got there he identified himself, said he was suppose to come there for a physical, and had gone home sick. He was told that the Company had already called. He explained he had diarrhea, and was told that Concentra did not treat that, only workmen's compensation. Concentra did not examine him, but referred him to his own doctor or urgent care. Grievant did not try to call the Company or seek further care.

Had Grievant gone to Concentra earlier and was told he was fine, he could have gone back to work and delivered a scheduled load. A customer's delivery could have been made by Grievant yet that day. If Grievant has been told he would be able to work the following day and reported that to the Company, then the Company would have known who would be available for work on Saturday.

Not having heard from either Concentra or Grievant after the 4:00 p.m. phone call, the Company, on Friday at about 6:00 p.m. began looking for a new driver and to consider bringing in contract drivers.

The rest of the load for the unhappy customer who had yelled at Grievant was delivered by the Company the next day, Saturday. Grievant returned to work on Monday and told the Company about his going to Concentra on Friday. In a follow up telephone call by the Company, Concentra confirmed that Grievant had been there between 4:00 and 4:30 p.m. on Friday, complained about his stomach, that his condition was not work related, that he'd slept most of the day, and that he was referred to his own doctor.

Grievant has been disciplined by the Company before. He had a one day suspension in June, 1999 for disobedience and insubordination when he refused to deliver a load as directed, punched out and went home. In January of 2002 he made an unauthorized stop to wash the truck and was given a written warning after having been warned previously. In October of 2002 he was given a one day suspension for an accumulation of four violations consisting of two incidents of substandard work (delay in loading and delivery) after having been previously warned, leaving work without permission while taking a Company truck, and stopping to wash the truck without permission after having been previously warned.

The Company issued its disciplinary letter to Grievant on September 26, 2006, giving him a one day suspension without pay. The Company had considered Grievant did not have a history of abusing sick leave and did consider his prior discipline, the seriousness of the offense which included disappointed customers whose crews and deadlines were inconvenienced. He was disciplined for leaving work that day without the Company's being able to verify by an immediate examination that it was for legitimate purposes. The letter of discipline stated in part:

> VIOLATION: Dana did not immediately report to Concentra as directed and per Article 14. He reported only after the end of the normal work day, after any useful outcome of readiness to work had expired – the work day was over.

On September 28, 2006 Grievant filed a grievance over the suspension, referencing Article 28. The grievance committee met and discussed the facts of the case and the labor agreement. There was no discussion about the Union's right to go to arbitration in this grievance, although there was discussion about going to arbitration. This arbitration followed.

Further facts appear as in the discussion.

POSITIONS OF THE PARTIES

Company

In summary, the Company argues that the grievance is not arbitrable and there is no clear contractual standard to apply to the Company's decision. Article 28 does not contain a just cause or similar provision for suspensions. It provides that if a discharge or layoff is unjustifiable the employee is reinstated with full pay. This matter is not a layoff as provided in Article 6. Under Article 17, layoffs are not intended as disciplinary actions. The contract does not give the arbitrator a contractual standard against which the Company's decision to issue a one day suspension might be measured or applied. If some standard, such as arbitrary or capricious, is unilaterally imposed by the arbitrator, such standard merely requires some reason. And the Union cannot argue the disciplinary decision is without reason. Article 3 cannot infer a cause standard here because the contract language does not create such a standard on its face, and any such inference could only apply to termination of employment, not to disciplinary suspensions short of termination. The arbitrator should not write new contract language.

The Company argues that even if the arbitrator should impose a standard in this case the Company's decision must be upheld. The Grievant, despite knowledge of his alleged medical condition, never informed the Company of that condition as required by Article 14, and his decision created significant operational problems for the Company. The Company also argues that Article 14 is not susceptible to the strained interpretation that immediately only modifies interview and has no impact on timing of the examination. A word takes coloration from its association with accompanying words, and the meaning of language must be consistent with the principle purpose intended to be served. To suggest the Grievant is free to go to an independent medical examination at his leisure, including a time that frustrates the purpose of seeking the exam, would be a strained interpretation of Article 14. Rather, immediate modifies both interview and independent medical exam.

The Company further argues that Hanson's and Grievant's testimony should be credited that Grievant was informed of the existence of this disputed interpretation on the Strickland telephone call. Grievant then intentionally decided to disregard the Company direction to go immediately to the exam. This has consequences in light of the obey now-grieve later concept. Business would grind to a halt. And, the record is not clear that Grievant chose to delay because of intestinal distress. If so, it was incumbent on Grievant to communicate this to the

Company to work out the problem. He did not provide any information to the Company when he left work without explaining why, when he failed to check his voicemail, ignored the Company's interpretation of Article 14, delayed going to Concentra until late in the afternoon, and took no steps to inform the Company of any miscommunication at Concentra. The Company could do nothing else to avoid the problem. Grievant could have communicated to avoid the problem.

The Company values the Grievant's work and denying the grievance will emphasize a more open attitude and approach, and a more cooperative effort to fulfill the Company's legitimate needs is the objective behind the suspension. That is changed behavior. Article 14 required Grievant to report immediately. His failure to do so requires consequences. His prior disciplinary history and conduct on September 22 warrants the one-day suspension.

Union

In summary, the Union argues that the Company's arbitrability argument is unprecedented and absurd. The parties discussed going to arbitration at the grievance committee meeting. The arbitration clause in the contract is virtually unlimited. It applies to any controversy between the parties except the matter of union membership. The arbitration clause refers to whether a discharge is unjustifiable. Article 3 contemplates just cause. Article 7 contemplates discipline short of discharge as it authorizes the Company to impose proper discipline, including discharge. The Union also argues that the word layoff in Article 28 refers to disciplinary layoff by virtue of the entire clause. There are no labor agreements known that have an unfettered right to suspend without recourse.

The Union argues that Article 14 entitles employees to sick leave, without regard to employer or customer needs or on what the employee's job is. The governing language requires only that the employee notify the employer as early as possible on the first day of sickness. The Company has a right to an immediate interview and to have an independent medical exam performed to determine ability to work. The Company did not exercise that right in this case. Graf did not question Grievant's illness or right to leave the premises. Graf directed him to leave without condition. Had Grievant continued bed rest and never answered the phone there would be no case for suspension. However, Concentra would not have seen, treated or rendered an opinion regardless if he appeared at 1:00 or as he did at 4:00. Concentra made it clear to both parties that it did not see employees for minor stomach ailments which prevent employees from completing their shift.

The Union argues that Grievant was not notified of any immediacy or time period within which he had to report to Concentra. And he was unable to report immediately. It was safe to assume he could not and would not have reported to Concentra any earlier than his illness allowed. Nothing supports a suspension for his inability to report to Concentra earlier.

The Union also argues that Grievant was not informed that to determine his ability to return to work was the reason he was being asked to report to Concentra. He had no reason to believe the Company was attempting to determine if he could return to work that day. The suspension is without cause. It should be rescinded and removed from Grievant's file and he should be awarded back pay for the day.

DISCUSSION

The Company contends that the grievance is not arbitrable and that there is no standard in the labor agreement for the arbitrator to apply. The Union points to the general arbitration provisions and several different discipline references in the labor agreement to refute this.

The issue of arbitrability usually requires a specific analysis of the language in the labor agreement. There is procedural arbitrability and substantive arbitrability. Procedural arbitrability concerns questions such as timeliness of seeking arbitration or whether conditions precedent to arbitration, such as the actual filing of a grievance, have been met. Those types of issues are not involved in this case. Substantive arbitrability concerns whether the arbitration clause in the collective bargaining agreement is susceptible to an interpretation that covers the asserted dispute. This case presents an issue of substantive arbitrability.

The initial issue for decision is whether the grievance can be considered substantively arbitrable. The standards governing the enforcement of an agreement to arbitrate date back to the STEELWORKERS TRILOGY. UNITED STEEL WORKERS V. AMERICAN MFG. CO., 363 US 564 (1960); UNITED STEELWORKERS V. WARRIOR & GULF NAVIGATION CO., 363 US 574 (1960); UNITED STEELWORKERS V. ENTERPRISE WHEEL 7 CAR CORP., 363 US 593 (1960). The Wisconsin Supreme Court incorporated, from the Trilogy, the teaching of the limited function served by the reviewing authority in addressing arbitrability issues. DENHART V. WAUKESHA BREWING CO., INC., 17 WIS.2D 11 (1962). The Court, in JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASSO., stated this "limited function" thus:

> The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. 78 WIS.2D 94, 111 (1977).

The Jefferson Court held that unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" the grievance must be considered arbitrable. 78 WIS.2D AT 113.

Applying these standards to this case, Jefferson requires that the arbitration clause in the contract be first considered. In Jefferson the court was considering an arbitration clause that required the party invoking arbitration to point to specific contract language that arguably

expressly covered the subject of the grievance. In this case, the labor agreement between Big Buck and the Teamsters Union does not require any specific clause in the agreement to be identified when filing a grievance. There is no provision in the agreement which specifically excludes the dispute contained in Grievant's grievance. The relevant portions of the arbitration clause state:

> ARTICLE 28. ARBITRATION
>
> Should any controversy arise between the parties hereto governing the interpretation of this Agreement, or any part thereof, which cannot be settled to the satisfaction of both parties, then such controversy shall be referred to a new Joint Union-Company grievance committee, two from the Union and two for the Company, with Union and Company as co-chairpersons. Majority decision to be final and binding. If no majority decision, then arbitration within ten days. When appealed to arbitration, the parties jointly notify the Wisconsin Employment Relations Commission.

This arbitration clause refers to "any controversy ...between the parties hereto governing the interpretation of the Agreement, or any part thereof . . ." The letter of discipline specifically states an Article 14 violation and makes several references to Article 14 in the rest of the letter. The written grievance was in response to that letter of discipline and also alleged a violation by the Company of Article 28. There is a controversy here and part of it is the interpretation of Article 14 specifically as the Company has invoked that as a reason for issuing the discipline of a one-day suspension. Article 28 is about any controversy governing the interpretation of the agreement. That is a broader statement than the following clause which refers to "any part thereof". Article 14 meets the "any part thereof" clause. More broadly, the Agreement as a whole is being pointed to by the Union in its several references to a standard for issuing discipline. The Union points to Article 28, Article 3, and Article 7 in its discipline argument. The grievance itself complains that the suspension is unjust. In that sense the case also fits within the clause requiring a controversy governing the interpretation of the agreement. Thus, there is a construction of the arbitration clause which covers the controversy. The grievance is arbitrable.

A related issue to arbitrability is the Company argument that there is no contractual language or standard to apply to the disciplinary action in this case, it not being a layoff, discharge, or termination of a probationary employee. The Company argues that the arbitrator cannot write such language into the agreement. The Company is correct that the arbitrator cannot add to, subtract from, or modify the language of the labor agreement. However, the arbitrator can interpret the agreement to determine what, if anything, its construction provides in the way of discipline short of discharge or layoff. As pointed out by the Union, the agreement makes several references to disciplinary matters in various contexts. Besides the application of Article 14 itself, there are disciplinary matters in the agreement which lend themselves to interpretation here.

Article 28 makes some reference to discipline when it states, in part:

> The Employer agrees that should the arbitration committee decide that a discharge or lay off is unjustifiable, the affected employee shall be reinstated with full back pay.

This puts within the contemplation of the parties the requirement that a disciplinary discharge must be justifiable. Unjustifiable or justifiable in a discharge situation invokes the principle of just cause for the discipline. This would be a just cause standard, at least in a disciplinary discharge case. This is not a discharge case, so the application of the above clause might be questioned, as the Company certainly does. But it is noted that the above provision also references reinstatement with full back pay if discharge or layoff is unjustifiable. In this sense the clause is setting out a specific remedy for two specific types of unjustifiable Company actions, including a disciplinary one. The clause, in the remedy sense, does not limit or prevent the application of unjustifiable to other disciplinary matters – matters which may result in other, non-negotiated remedies.

There is a reference in Article 3 that the Company may terminate probationary employees "without cause". The Union contends this infers that permanent employees, such as Grievant, must be governed by a cause standard. There is some credence to this because the Article 3 language would not be needed if there were no other concern about cause for permanent employees. Yet there is some ambiguity in the application of the Article here because it is in reference to discharge, a situation not present in Grievant's case. And Article 3 might also apply to a probationary employee for purposes other than discipline, such as a simple inability to perform the job. The clause can be read to apply to both a disciplinary and a non-disciplinary situation. A disciplinary setting is not excluded under Article 3. It could be invoked by the Company to discharge a probationary employee for disciplinary reasons without cause. The clause would not loose any meaning in such circumstances. It retains meaning if cause is inferred for permanent employees.

Article 7 also addresses limits on the Company's imposing discipline in some circumstances. The Article concerns the duties, rights and responsibilities of Union Job Stewards, and states in pertinent part:

> Job stewards and alternates have no authority to take a strike action or any other action interrupting the Employer's business, except as authorized by official action of the Union.
>
> The Employer recognizes these limitations upon the authority of a job steward and his or her alternate, and shall not hold the Union liable for any unauthorized acts, and has the authority to impose proper discipline, including discharge, in the event the shop steward has taken unauthorized strike action, slow down, or work stoppage in violation of this Agreement.

In these Article 7 circumstances the parties have contemplated, as argued by the Union, that use of language including "proper discipline", and "including discharge" implies a standard for discipline and that such standard be applied for discipline less than discharge. Again, similar to the question discussed as to the Article 28 discharge language, the Article 7 language goes on to specify certain circumstances where proper discipline, including discharge, is to apply, such as strike, slow down or work stoppage. A question could arise if the limits on Company standard for discipline and related scope of discipline ("including" discharge implying lesser discipline) were only intended by the parties to apply in the strike, slow down, work stoppage, circumstances or apply generally.

In interpreting the agreement as a whole and construing the agreement so as to retain meaning in all its provisions, it is clear that the parties contemplated a cause, proper or justifiable limit on certain instances of discipline, and that instances of discipline were not necessarily limited to discharge. This strongly implies that there be a just cause type of standard for issuing discipline such as that given to Grievant. It does not seem reasonable that the parties would understand their agreement to allow for unfettered Company discretion in the area of discipline on any matter short of discharge, especially where they have recognized limits on that discretion in several places and the language implies a broader application of a cause type standard for all non-probationary employee disciplines. Even the Company recognized that arbitrators often apply a cause or just cause type standard in disciplinary matters where no such provision is included in a labor agreement.

Given the above references in the labor agreement, the undersigned is persuaded that the parties contemplated a just cause standard be used in issuing discipline such as that issued to Grievant in this case. The application of that standard to this case must now be examined.

The agreement does not define just cause and the parties obviously did not stipulate to a definition of just cause. Generally, just cause involves proof of wrongdoing and, assuming guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, whether the punishment assessed by management should be upheld or modified. See, *Elkouri & Elkouri,* Sixth Edition, p. 948. In essence, two elements define just cause. The first is that the employer must establish conduct by the Grievant in which it had a disciplinary interest. The second is that the employer must establish that the discipline imposed reasonably reflects its disciplinary interest. See also, AMERIGAS PROPANE, A-6129 (Gordon, April, 2006). Although the agreement here does not specifically provide for modification of penalties, the finding of a just cause standard subsumes the ability to consider the level of discipline, if any, for which there is just cause to impose.

Before addressing the just cause issue there are two fact matters to consider. The Union argues in its brief that Grievant indicated to Graf that he was sick and going home for the day. However, in cross examination at the hearing Grievant admitted that he did not tell Graf he was sick before leaving for the day. The undersigned is persuaded that Grievant's testimony during that cross examination is factual. The other factual concern is whether

Strickland discussed with Grievant on the telephone the Company's interpretation of Article 14 as requiring an immediate medical examination. Both Hanson and Grievant testified they spoke with Strickland about that. There is no question that Article 14 was being discussed in the several phone calls that morning. It is most likely that the Company's position on an immediate medical examination was discussed in the second conversation Grievant had with Strickland. And it is Grievant's understanding of what the Company position was which goes to the merits of the grievance. As noted, Grievant's testimony confirms that he understood what the Company's position was on the immediacy of the medical exam. The undersigned is persuaded that his testimony on this point is accurate and factual.

The merits of the case require deciding if the Company had just cause to issue the one-day suspension for Grievant's alleged failure to report to Concentra pursuant to Article 14 of the labor agreement. If the Company did not have just cause then it violated the agreement. The first matter in reviewing just cause is to determine if the Company established conduct in which it had a disciplinary interest.

The Company has established certain conduct of Grievant. Grievant left work about half way through the normal work day. He did not tell the Company he was ill, sick, had a gurgle in his stomach or that he was even taking sick leave. He wrote ½ day sick leave on his time card as he punched out, but there is no evidence that the Company knew this until the following week. The fact that Graf told him to leave because there was not 20 minutes of work to do before 10:00 a.m. is simply a matter of exactly when he left. Grievant did not ask permission to leave, he said he was leaving. Grievant also knew at that time that there were more deliveries for him to make that day. He had been waiting for the truck to be reloaded while he fixed the blinker and there usually are deliveries to make. He knew that customers needed and expected deliveries, and that customers become upset when deliveries are not made in full or not made in a timely manner. These are circumstances that existed when Grievant left work. He did not take any steps to notify the Company that he was ill, other than the written note on his time card. That note was ineffectual. The record also established that when Grievant and Graf spoke on the telephone later that morning Grievant again did not tell Graf he was sick, ill or mention anything about his stomach. Graf did tell him he needed to go to Concentra for an examination. Grievant did not tell Graf at that time or the Company at any time that he was concerned about having diarrhea or felt unable to go to Concentra either immediately or at any time. A bit later that morning Grievant had two telephone conversations with his Union business agent concerning Article 14 and Grievant then understood that the Company's position was that the examination was to be immediate. Grievant did not go to Concentra immediately. He did not call the Company to say he was unable to go immediately or to question the nature of the examination. He arrived at Concentra sometime after 4:00 p.m. and did not contact the Company then when a question arose over what was expected of Concentra or what his physical condition was at that time. The Company has a disciplinary interest in this conduct. Grievant does have a right to sick

leave under Article 14. But both parties have rights and responsibilities under Article 14. Article 14 establishes the disciplinary interest of the Company in this conduct. Article 14 states:

> ARTICLE 14. SICK LEAVE
>
> The Employer agrees to grant six (6) days sick leave per contract year and the unused days shall accumulate for a maximum of ninety (90) days. Employees who have been on the payroll for 90 Days or more who are sick and unable to work, shall be compensated for each day lost because of illness at the prevailing hourly rate of wages for eight (8) hours per day, Monday through Friday.
>
> In order to qualify for sick leave pay, the employee must notify his or her Employer as early as possible on the first day of sickness. Sick leave credits shall accumulate at the rate of ½ day for each month of employment. Employer shall be entitled to an independent medical examination of any employee absent from work, said examination to be at the Employer's expense. The employee to qualify for sick leave pay must upon his or her return to work file a written request for sick leave including a brief summary of the type of illness and the treatment given.
>
> Should an employee become ill, he or she shall immediately and as soon as practicable notify the Employer thereof. The Employer shall have the right to immediately interview the employee and have an independent medical exam performed to determine the employee's ability to work.

The Article requires an employee to notify the employer as early as possible on the first day of illness. The employer is entitled to an independent medical examination of any employee absent from work. If an employee becomes ill they shall immediately and as soon as practicable notify the employer thereof. The employer has a right to an immediate interview and have an independent medical exam performed to determine the employee's ability to work. The parties disagree whether immediate applies to only the interview or to the interview and the examination. The sentence uses the word "and" between the interview and the examination. Immediacy is a timing qualification. There is nothing in the sentence which indicates that qualification applies only to the interview and not to the examination. On the contrary, the sentence also contains the clause "to determine the employee's ability to work". The ability to work most reasonably would include the ability to work at that time as well as in the future. There would be no need for the word immediately in the sentence if the ability to work then, as determined by an examination then, were not to be immediate. Grievant was absent from work. Article 14 gives the Company the right to an examination and that it be done immediately.

The disciplinary interests in Article 14 are also set in the larger context of the Company having work duties that need to be performed. The Company is there to provide building materials to customers, who need, and demand, timely service. Both Grievant and the Company are aware of the various ramifications to both a delivery employee and the Company itself if deliveries are not made. When Grievant left work the Company had one less driver to make deliveries scheduled for that day and to meet the needs of other demanding customers. The Company's ability to meet those needs is compromised when a delivery driver leaves work. Grievant has a right under Article 14 to sick leave and to leave work if sick. But he also has a responsibility to follow the provisions of Article 14 to invoke that right. This is so the Company can determine what workforce it has available to meet its needs The Company has an interest in scheduling drivers and must know who is or is not available. Article 14, when followed by both parties, meets that need. Set in the context of being able to supply customers, the condition of "immediately" as applied to both the interview and examination is the most reasonable interpretation of what Article 14 requires. It is an additional disciplinary interest that the Company has in the conduct of Grievant on September 22nd.

Here it is clear that Grievant did not notify the Company as early as possible on the first day of sickness as Article 14 requires. Upon becoming ill he did not immediately and as soon as practicable notify the Company. He later knew the Company wanted him to go immediately to a medical exam and he waited over four hours, until after 4:00 p.m., to go to Concentra rather than go immediately. Grievant failed to comply with Article 14 in at least these three respects. Had he mentioned to the Company at any time that there was something preventing him from either notifying the Company of his illness or preventing him from going to Concentra right away there might be some mitigating circumstances here that made compliance with Article 14 impossible. Grievant did not do that. Even during his telephone conversation with Graf when he was directed to go to Concentra he did not do that. Had he done so then the Company would have at least had that information and knowledge in determining how it would schedule and meet the immediately pressing needs of customers demanding deliveries that day. Grievant points out that Concentra did not examine him but instead referred him to his own doctor. This does not mitigate his conduct. Grievant did not call the Company when Concentra said it was not going to examine him. Had he done so the Company would have at least been able to access the situation in view of its scheduling needs. It also prevented the Company from making alternate arrangements for a timely examination.

Considering the disciplinary interest of the Company and the nature of Grievant's conduct, the Company has persuasively shown that it had just cause to impose discipline when Grievant left work on September 22, 2006 and not immediately report to Concentra pursuant to Article 14 of the labor agreement.

Just cause for discipline having been established, the just cause analysis requires a determination if the discipline imposed reasonably reflects the employer's disciplinary interest. This analysis takes into account the nature of the offense and the employment history of the

Grievant. The nature of the conduct and its impact on the Company's interests has been set out immediately above. When the Company cannot make deliveries it is the customer, the customer's work crews, equipment and schedules that are impacted along with the Company's interests. As a driver who is a point person for the Company, Grievant's testimony explained very well the impact on Company employees such as himself when customers do not get timely and complete deliveries. Grievant's conduct actually exacerbated this situation because he left the Company short handed on a very busy day. The Company had to consider hiring other drivers because it couldn't rely on Grievant being at work.

Grievant's discipline record is relevant. The labor agreement does not set out a progressive discipline system nor contain any time limits on consideration of past disciplines. The Company values Grievant's work. The Company considered Grievant not having abused sick leave in the past. Grievant has had several disciplines in his approximately nine years with the Company. They have been for a similar type conduct, at its root, not being available to make timely deliveries. He has been warned before having some of those prior disciplines imposed. He has had two one-day suspensions. One of those was for multiple violations. These prior disciplines have thus demonstrated a level or progression in their application. They have been designed to correct Grievant's behavior as it affects being able to make timely deliveries. The one-day suspension here is of similar severity for similar conduct of Grievant in the past. One suspension was in 1999 and the other in 2002. The one-day suspension here is not more severe than the two previous one-day suspensions. It reasonably reflects the Company's interests and Grievant's employment history. It is not unreasonable or unjustified. The Company had just cause in imposing the one-day suspension.

Because the Company had just cause in imposing the one–day suspension when Grievant left work and did not immediately report to Concentra pursuant to Article 14 of the labor agreement, the Company did not violate the agreement. Accordingly, based upon the evidence and arguments in this case I issue the following

AWARD

The grievance is denied and the case is dismissed in its entirety.

Dated at Madison, Wisconsin, this 3rd day of July, 2007.

Paul Gordon, Arbitrator

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