BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and its LOCAL 578, UAW

and

OSHKOSH TRUCK CORPORATION of OSHKOSH, WISCONSIN

Case 16
No. 69916
A-6413

Appearances:

George F. Graf, Gillick, Wicht, Gillick & Graf, Attorneys at Law, 12725 Cardinal Crest Drive, Brookfield, Wisconsin 53005, for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local 578, UAW, which is referred to below as the Union.

John Haase and **Annie Raupp**, Godfrey & Kahn, S.C., Attorneys at Law, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, for Oshkosh Truck Corporation of Oshkosh, Wisconsin, which is referred to below as the Company or as the Employer.

ARBITRATION AWARD

The Union and the Company are parties to a collective bargaining agreement that provides for final and binding arbitration. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to resolve Grievance 521-1-09, filed on behalf of Lance Gitter. Hearing on the matter was held on October 7, 2010, in Oshkosh, Wisconsin. Janet D. Larsen filed a transcript of the hearing with the Commission on October 13, 2010. The parties filed briefs and reply briefs by December 20, 2010.

ISSUES

The parties did not stipulate the issues for decision. The Union states the issues thus:

Whether Grievant Lance Gitter was discharged for just cause?

If so, what is the appropriate remedy?

The Company states the issue thus:

Did the Company have cause to terminate Mr. Gitter?

I adopt the Union's statement of the issues.

RELEVANT CONTRACT PROVISIONS

ARTICLE 5 - GRIEVANCE PROCEDURE

. . .

The arbitrator shall have the authority to interpret and apply this Agreement to the extent necessary to adjudicate the grievance but shall not have the authority to add to, deduct from, or alter the provisions of this Agreement. The decision of the arbitrator, if within the scope of his/her authority, shall be final and binding on the parties . . .

ARTICLE 8 – SENIORITY

. . .

Section 2: An employee shall forfeit all of his/her seniority rights for anyone of the following reasons:

. . .

b. When he/she is discharged for just cause.

. . .

ARTICLE 10 – LEAVE OF ABSENCE

1. Extended Leave of Absence

Upon application to the Company, an employee may be granted a leave of absence for good cause not to exceed (60) days. . . .

2. Medical Leave of Absence

An employee with established seniority who . . . suffers an occupational or non-occupational injury supported by satisfactory evidence will be granted leaves of absence for a continuing period not to exceed his/her seniority, or three (3) years, whichever is less . . .

ARTICLE 13 - TERMINATION OF SERVICE

Section 1:

a. The Company may discharge or otherwise discipline an employee, without prior warnings, for willful or negligent misconduct of a serious nature. In all other disciplinary cases, before the Company discharges or gives a disciplinary layoff to the employee, the employee shall be given at least two (2) written warning notices for similar offenses (absence and tardiness are expressly included as examples of similar offenses) or three (3) written warning notices where there may be different types of offenses. Warning notices which are more than one (1) year old may not be used as one (1) of the two (2) or one of the three (3) warning notices required above, but are part of the employee's record and appropriately considered in the exercise of discretion in determining discipline. They may not be used as a step in the progressive discipline process. . . .

b. Where an employee has not been absent for all or any part of a day for a period of ninety (90) consecutive calendar days, his/her most recent absence is to be stricken from his/her record for disciplinary purposes.

. . .

ARTICLE 18 – INSURANCE

. . .

ARTICLE 22 - MANAGEMENT RIGHTS

Section 1: It is agreed that the management of the Employer and its business and the direction of its working forces is vested exclusively in the Employer, and that this includes but is not limited to the following: to . . . discipline or discharge employees for cause . . . and to make, modify and enforce reasonable rules and regulations . . .

CODE OF CONDUCT
OSHKOSH TRUCK CORPORATION

. . .

SPECIFIC REQUIREMENTS

. . .

7. Adhere to Attendance Policy and notification requirements (see below).

NOTIFICATION POLICY

Notification Policy: When it is necessary to miss work employees must call into Oshkosh Truck Security prior to the start of their shift. Indicate name, clock number, supervisor's name, reason for absence, and date of expected return to work. Employees must call in each day of an extended absence. Failure to meet the notification policy requirement will result in disciplinary action as follows:

In a twelve (12) month period
First occurrence: Written warning
Second occurrence: Final written warning
Third occurrence: Termination

ATTENDANCE POLICY

Introduction: As with any company, Oshkosh Truck expects employees to be reliable and have regular attendance. However, Oshkosh Truck also understands that there are circumstances beyond an employee's control that can create the need to miss work. For this reason we have developed an attendance policy that allows employees to take time off for legitimate reasons when necessary. This policy is also designed to address employees whose absence become excessive.

This policy is a no-fault attendance policy with a point system. When an employee misses work, points will be accumulated. Employees should understand that having a small number of points on their record is not detrimental. In fact, Oshkosh Truck expects employees may miss work occasionally for legitimate reasons. However, when the points become excessive, the matter will be addressed.

Points Assessment: (exemptions are listed below)

. . .

Exemptions to the assessment of points: Qualifying family or medical leave, bereavement leave, military leave, scheduled vacation, jury duty, paid leave, A&S, and worker's compensation.

Discipline:

- Points are accumulated for a consecutive / rolling 12-month period. **(**Example: an employee receives a point on March 14, 2007. That point will be removed from their record after March 14, 2008)

  7 points = Written warning
  8 points = Final written warning
  9 points = Termination

- Where an employee has not been absent for all or any part of a day for a period of ninety (90) consecutive calendar days, his/her most recent absence will be stricken from his/her record for disciplinary purposes. . . .

- Accumulation of four (4) attendance written warnings in a 12-month period will result in termination.

PROGRESSIVE DISCIPLINE

Adherence to the behavior standards is required of all employees as a condition of employment. In case of violation, progressive discipline will be used to provide the employee with the opportunity to correct behavior. For similar or dissimilar code violations within a 12-month period (excluding attendance), the following procedures will be used:

1. Acknowledged verbal warning;
2. First written warning;
3. Second written warning;
4. Final written warning (which may, but is not required to, include suspension) places the employee on disciplinary probation for the remainder of the 12-month period.
5. Discharge:
   a. Any violation of the code of conduct during disciplinary probation will result in discharge.
   b. If an employee is on disciplinary probation, the 9th or higher unexcused absence will result in discharge**. . . .**

BACKGROUND

The grievance alleges a violation of "Articles 5, 10, 13, 18, LOA, Attendance Policy, all others pertaining . . ." regarding the Grievant's termination. It seeks as remedy that the Grievant be made whole and his record expunged of any discipline for violating "his probation by not calling in 6-23-09, 6-24-09, and 6-25-09." The grievance form adds that,

> The Company was clearly aware that Lance was out on A&S leave. . . . There are numerous cases where people are out on A&S and are told not to call in anymore & that the Company knows it's approved leave.

The grievance focuses on events following the Grievant's ankle injury during a fast-pitch softball game on the evening of June 18, 2009 (references to dates are to 2009, unless otherwise noted), but their arguments span his entire employment history. The background facts are largely undisputed, while the conclusions the parties draw from them are not.

The Company is primarily a defense contractor that builds large military vehicles for the federal government. It maintains four primary production facilities in Oshkosh. In June and July, the Company's defense business segment had roughly 2,200 production workers and was adding roughly 700 more production workers to meet the demands of a new contract.

The Company hired the Grievant in July of 2004. At the time of his discharge, he worked first shift as a 301 Assembler at the Company's South Plant, where four and five axle trucks are manufactured and assembled. The South Plant includes an assembly line and a number of subassembly areas. A 301 Assembler can work on the assembly line or in the subassembly areas, and is responsible for troubleshooting different parts of the fabrication process to assure the quality of the finished product.

The bulk of the Grievant's personnel file concerns attendance issues. In two letters dated June 10, 2005, the Company issued the Grievant a verbal warning and a written warning for accumulating a seventh and an eighth unexcused absence. He received a verbal warning dated January 16, 2006 for accumulating a seventh unexcused absence on December 19, 2005. He received a written warning dated March 15, 2006 for accumulating an eighth unexcused absence on February 16, 2006, and a written warning dated April 6, 2006 for accumulating an eighth unexcused absence on March 17, 2006. He received another verbal warning dated August 15, 2006 for accumulating a seventh unexcused absence on June 15, 2006. He received another written warning dated September 19, 2006 for accumulating an eighth unexcused absence on July 17, 2006. He received another written warning dated October 18, 2006 for accumulating a ninth unexcused absence on September 22, 2006. In a letter dated October 24, 2006, he received a final written warning for accumulating a tenth unexcused absence on October 16, 2006.

The Grievant's level of unexcused absences led to a meeting involving the Grievant and Company and Union representatives on October 31, 2006. Wayne Alexander, Company Human Resources Manager, summarized the meeting in a November 1, 2006 letter which states:

> . . . I explained the reason for your suspension. You have accumulated ten unexcused absences, and the Attendance Policy in the Labor Agreement provides for probation/suspension. You also have accumulated six active written warning letters and Article 13 of the Labor Agreement provides for termination. We are not planning to terminate you today, however.
>
> The reasons for your absences are not necessarily important to us. What is important however is that you change your behavior and commit to regular attendance in accordance with the Labor Agreement. If you fail to do that, you cannot work here, and you will be terminated.
>
> You will be on probation for one year, ending October 31, 2007. While on probation, any violation of the Labor Agreement resulting in formal discipline will be cause for your termination. . . .

In a letter dated December 1, 2006, the Company issued the Grievant a final written warning for accumulating an eleventh unexcused absence on October 26, 2006. In another letter dated December 1, 2006, he received a final written warning for accumulating a twelfth unexcused absence on October 27, 2006.

The Grievant's attendance record improved over the course of his 2006-07 probation period. However, in a letter dated February 11, 2008, he received a written warning for accumulating a seventh unexcused absence on January 31, 2008. In a letter dated March 11, 2008, he received a final written warning for accumulating an eighth unexcused absence on February 18, 2008. In a letter dated July 24, 2008, he received a final written warning for accumulating "your 8.5 unexcused absence on 7/1/10/08." In a letter dated September 26, 2008, the Company issued the grievance a letter of suspension, "because you recently accumulated your 9.5 unexcused absence on 9/12/08" and directed the Grievant to schedule "a disciplinary review with Human Resources."

On October 2, 2008, the Grievant met with Company and Union representatives to discuss his attendance. Katie Engleman handles labor relations for the Company's defense business segment, and summarized the meeting in a letter dated October 11, 2008, which states:

> The reason for your suspension is accumulating 9.5 attendance policy points. As a result of your absences and in accordance with the Attendance Policy and Labor Agreement, you are to be terminated.
>
> Lance, regular and consistent attendance is a requirement of your position. Your unexcused absences not only affect you but directly impact your co-workers that have to cover for your absences. Employees are expected to be at work and we do not staff extra people to cover absences. Every employee's circumstances are different and it is your responsibility to maintain a good work record.

> During the meeting you stated the reason for missing work was as a result several family / home issues. We are not disputing the reason for your absences as the Attendance Policy is a no-fault policy that allows for absences. It only becomes a problem when your absenteeism becomes excessive, which is clear by your record that it has.
>
> After the break, I explained that in lieu of termination, you will have one last chance to turn your attendance around. You will, however, be on a disciplinary probation for twelve months ending October 2, 2009. Any violation of the labor agreement resulting in formal discipline during this time frame will be cause for termination. We agreed that you would return to work on October 3, 2008.
>
> Additionally, you are required to set up an appointment with the Confidential Employee Assistance Program and follow their recommended course of treatment. The EAP counselor will need to contact me to confirm your fulfillment of this commitment . . .

This sets the background to the events following the Grievant's ankle sprain.

On Friday, June 19, the Grievant went to his doctor, who advised the Grievant that the sprain was significant and that he should not work before June 29. The Grievant then phoned Harold Hansen, the Company's Claims Manager. Hansen was not in, but Hansen's voice mail reminds employees that the Company's Notification Policy requires absences to be reported to Security. The Grievant left a voice mail message for Hansen regarding the injury and his doctor's advice, then phoned the Security Department and told a Security Guard that he had been injured and would not be able to work prior to June 29. On Monday, June 22, the Grievant again phoned Security to report his absence. The "Absence Call Slip" generated by Security on June 22 notes this call in, states the "Reason" as "A&S", and states "When Returning To Work" as "Mon 6/29".

On June 23, the Grievant received an "Accident and Sickness Wage Continuation Claim Form" mailed from Hansen. The form states, "It is your responsibility to telephone me *immediately* after each office visit while you are unable to work" and, "It is important you call in and continue to communicate with us during your recovery period." Attached to this form were documents for the Grievant's doctor to complete regarding the injury. The Grievant submitted the forms to his doctor and upon their completion delivered them to the Company's Harrison Street Facility on June 24. He did not call in to Security on June 23, June 24 or June 25.

In separate letters dated June 25, the Company issued the Grievant a "written warning" for "failing to call in your absence prior to the start of your shift on 6/23/09" and a "final written warning" for "failing to call in your absence prior to the start of your shift on 6/24/09." In a letter dated June 30, the Company issued the Grievant a "suspension letter" which noted as a "*Third Occurrence*" the Grievant's "(*No Call on 6/25/09*)" and stated "*Termination*" as the sanction for the violation of the Notification Policy. The June 30 letter adds that the Grievant was to be suspended "pending a disciplinary review with Human Resources."

At the time of the ankle injury, the Grievant had accumulated three points on the Attendance Policy. When he returned to work in mid-July, roughly one and one-half hours into his shift, he was approached by Brad Stein, his immediate supervisor. Stein handed him the three letters referred to in the paragraph above, took the Grievant's identification badge, and informed him that he should report to a meeting with Human Resources personnel and the Union. This was the first time the Grievant saw the letters referred to in the paragraph above.

Katie Hess was the Company's representative at the meeting the Grievant attended after Stein pulled him from his duties. Hess was, at that time, a Human Resources Generalist. Prior to the meeting, she reviewed the Grievant's personnel file. She conducted the meeting to advise the Union and the Grievant of her conclusions and to afford them opportunity to offer information and opinion regarding her review. After the Union and the Grievant had addressed her concerns, she took a break from the meeting. During that break she spoke with Hansen and consulted Engleman. Hansen informed Hess that he had not excused the Grievant from the call in requirements of the Notification Policy and Engleman confirmed her conclusion that the Grievant's failure to call in his June 23, 24 and 25 absences constituted a violation of the Notification Policy and thus of his most recent probation. Hess returned to the meeting, and informed the Union and the Grievant that the termination would stand.

Hess issued the Grievant's termination letter, which is dated July 21, and states:

> On July 16, 2009 we met to discuss your suspension. Present at this meeting were Matt Kufel, Katie Hess, Andy Schaller, you and I.
>
> Back on October 2, 2008, you were put on one year probation for violating the Attendance Policy. The terms of your probation outlined that "<u>any</u> violation of the Labor Agreement resulting in formal discipline will be cause for termination". For 6/23/09, 6/24/09, and 6/25/09 you received written warnings for failing to call in your absence prior to the start of your shift, which is a violation of your probation and according to the notification policy you are to be terminated.
>
> After we took a break, I explained to you that as a result of violating your probation and violating the notification policy, you will be terminated, effective immediately, in accordance with the Labor Agreement. . . .

The Grievant received a copy of this letter in August.

The balance of the **<u>BACKGROUND</u>** is best set forth as an overview of witness testimony.

<u>Katie Engleman</u>

Engleman highlighted that the Notification Policy has been part of the Code of Conduct for at least three and one-half years. The Company's call in procedure routes all employee

absence calls to a phone number in the Security Department. From there, Security employees route the specifics of an absence to the Human Resources Department for distribution throughout management, including the Team Coordinators, who supervise as many as fifty production workers. The production effort is continuous and demands consistent staffing. Breaks in staffing can adversely affect strict production and delivery requirements. The daily call requirement reflects the depth of the Company's staffing requirements, is stated in the labor agreement, and is included in new employee orientation.

Engleman noted that the Company explained to the Grievant in October of 2008 that his probation was "all-encompassing", to stress that any violation of the labor agreement that produced discipline during the twelve-month period "would result in his termination" (Tr. at 30). The Company, Union and the Grievant agreed to the imposition of this probation period to avert the discharge the Company would otherwise impose. She also noted that the Company was entitled to discharge the Grievant in November of 2006 for accumulating ten unexcused absences and for having six active written warnings for absenteeism.

Hess phoned Engleman during the investigatory meeting in July to discuss whether or not the Grievant should be discharged. Engleman was responsible for the discharge decision and informed Hess that she agreed the Company had no alternative, given the Grievant's disciplinary history. In her view, the only exceptions to the daily call requirement are a Company approved leave of absence or an approved physician's excuse from work. Hansen is responsible for approving a leave of absence, and had not granted one for the absences of June 23, 24 and 25. She and Hess agreed that the Grievant had violated the terms of his probation. In her view, the Company has consistently enforced the call in requirements demanded during probation periods.

Harold Hansen

Among his duties as Claims Manager, Hansen manages the Company's Accident and Sickness Disability Plan (A&S). Hansen is responsible for approving A&S leaves and can release employees from their daily call in responsibility. In his view, a pre-approved leave of absence or verified doctor's documentation can exempt an employee from the daily call in required under the Notification Policy. The submission of medical documentation does not relieve an employee of the call in obligation prior to Hansen's approval.

Hansen's June 19 phone log confirms that the Grievant phoned to advise the Company of an injury that would keep him from work through June 29. His voice mail informs an employee of the need to call in an injury to Security on a daily basis until he has approved a leave of absence. Hansen did not receive the Grievant's documentation regarding the ankle injury until June 25. At the point Hansen received and reviewed these documents, the Grievant was relieved of the responsibility to call in daily. He typically does not confirm this with employees, but noted, "Normally the employees contact me right away to see if they have to call anymore" (Tr. at 88). The volume of employee absences precludes the possibility of individual notice. At no point prior to his receipt of the medical documentation on June 25 could, or did, Hansen approve the Grievant's leave of absence.

Katie Hess

During the July 16 meeting, the Grievant confirmed that he had not called in on June 23, 24 or 25. She did not ask why, but confirmed that prior to June 25 no one excused him from calling in daily or approved A&S benefits. During the break in the July 16 meeting she confirmed this with Hansen. She also confirmed that Engleman agreed that the Grievant had been given more than ample time to improve his work record.

The Grievant

The ankle injury was not the Grievant's first significant injury while a Company employee. In 2007, the Grievant missed roughly one month of work due to a significant calf injury. The injury was not work-related, but caused him to leave his shift early. He saw his doctor the following day, then phoned Hansen to obtain A&S paperwork, and then called Security to advise his supervisor of the absence. After receiving the A&S forms, he took them to his doctor, who completed the forms and faxed them to Hansen. He did not make further calls, except after periodic doctor appointments, after which he would call Hansen to report on his recuperation. He did not receive any discipline for a failure to call in daily.

He did not call in on June 23, 24 or 25 because he believed he had met "the instructions that were given to me by Harold Hansen and from what his voice mail had stated" (Tr. at 116). He kept in periodic contact with Hansen as directed by the A&S forms. His prior experience confirmed that this was what the Company expected of him.

His attendance problems in 2007 and 2008 were traceable to a contentious dispute regarding the custody of his son. His attendance improved significantly during the 2008-09 probation. He did not dispute the extent of his prior attendance problems, and acknowledged that he was aware he could have been discharged under the Attendance Policy in 2006 and again in October of 2008. He understood in June that he was working under a probation period and understood that the Notification Policy requires daily call in of an injury. He acknowledged Hansen had not, prior to June 25, approved his A&S leave.

Perry Graves

Graves has worked for the Company since 1986 and has served as Union President since 1999. On Tuesday July 6, his doctor informed him that he needed immediate surgery to remove a cancerous tumor. The first available date was July 14. Graves spoke with Hansen on July 6 regarding the surgery and advised Hansen that he would be unable to work for some time. Hansen supplied Graves with A&S paperwork on July 13. A Union representative informed Graves' wife that it would be advisable for someone to call in the absence because Graves was working under a probation period. She may have called in on the Monday or Tuesday following the surgery. She supplied Hansen with documentation of the surgery on July 19 or 20. Hansen informed her then that he had told Graves the week before that Graves need not make the daily call in. Graves has also missed worked due to a shoulder injury. The injury occurred at work,

and demanded immediate treatment at an emergency room. Under Company policy, Graves' supervisor accompanied him to the emergency room. Graves missed at least two months of work, but was never required to call in daily.

Carl Rose

Rose has worked for the Company for twenty three years. Due to foot surgery, Rose missed work from May 21 through August 2. The surgery was not for a work related condition. Rose scheduled the surgery at least a week in advance, completed A&S forms and advised his supervisor of the anticipated absence prior to May 21. Rose submitted medical documentation to Hansen's office several days prior to the surgery. The documentation he submitted included the date of surgery, and a doctor's documentation of the circumstances. Hansen did not approve A&S benefits or a leave of absence prior to the surgery, which took place on Friday, May 21. Rose called in his absence for May 23, and his supervisor told him not to bother calling in daily while he recuperated. Hansen approved A&S benefits during the week after the surgery.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Company's Brief

After an extensive review of the evidence, the Company contends that the Grievant "violated the terms of his probation by violating the Notification Policy." It is evident the Grievant was aware of and understood his probation. It was the second in three years; had been explained to him on October 2, 2008; and had been detailed in writing. By agreeing to the probation, the Union and the Grievant acknowledged that "any violation of the Notification Policy . . . would be cause for termination". Against this background, the Grievant's failure "to comply with the Company's work rules" is incredible. He failed to call security and failed to call in at all for the absences of June 23, 24 and 25, 2009. There is no valid defense for this failure: Hansen did not approve the absences in advance; and Hansen did not receive medical documentation for the absences until June 25.

The Notification Policy "is reasonable and consistently enforced." Its reasonableness is firmly rooted in the defense work performed by the Company, which demands "continuous production", which in turns rests on consistent staffing. Beyond this, the Company has consistently enforced its Notification and Attendance Policies. Exceptions asserted by the Union are distinguishable. Graves met with Hansen prior to his cancer surgery and was excused from calling in each day of absence. Rose missed three months due to foot surgery, but submitted documentation regarding the absence well in advance of the surgery, which is "a pre-approved leave of absence."

The Notification Policy "contains a progressive discipline schedule" which demands that two warnings precede a termination. The separate warnings issued by the Company for

the Grievant's failure to call in on June 23, 24 and 25 establish all that is necessary to meet the demands of the Notification Policy. Even in the absence of the Notification Policy, these warnings meet the demands of Article 13 and thus establish cause to terminate.

The two element analysis applied in VERNON COUNTY, DEC. NO. 6766 (McLaughlin, 1/05) underscores that the Company had cause to discharge the Grievant. His failure to meet the Notification Policy requirements in June of 2009 establishes conduct in which the Company has a disciplinary interest. Beyond this, his employment history reveals "continuing attendance problems". Against this background, "the *only* form of discipline that would appropriately reflect the Company's disciplinary interest in this case is termination." On two occasions in the last three years of the Grievant's employment, "the Company had cause to terminate his employment." By not terminating the Grievant on those occasions, "the Company went above and beyond its duties under the Labor Agreement" to salvage the Grievant's employment. It is evident that the Grievant demonstrated an inability to comply with work rules or to respond appropriately to progressive discipline. Beyond this, the evidence shows the Company has terminated twenty employees for violating the terms of a probation period. It follows that the discharge is reasonable.

Because the Grievant's violation of his probation "provides the foundation for just cause", it necessarily follows that "the Union's grievance must be denied."

The Union's Brief

A review of the evidence establishes that "Company policies included in the contract booklet are not negotiated." To affirm the Company's position on the grievance would "effectively deny (the Grievant) due process" and would "wipe out perhaps the most important provision of the Collective Bargaining Agreement, the right of an employee to be discharged only for just cause."

A review of the evidence shows that the Grievant's earlier attendance problems were understandable and that since October of 2008, "his attendance record has vastly improved". The Grievant advised Security of his ankle injury on June 19. He left a message confirming a June 19 doctor's appointment, at which the Grievant learned he could not work until June 29. The Grievant did not make a daily call in for the 2007 leg injury. On June 22, the Grievant phoned Security, as he had been advised via Hansen's voice mail, to advise them of his absence through June 29. An absence slip, dated June 22, advised the Grievant's supervisor that the Grievant would not report for work until June 29. Gitter received A&S paperwork from Hansen on June 23 and returned it to the Company on June 25. Hansen and the Grievant maintained contact during his recovery and none of the paperwork supplied by Hansen to the Grievant advised him that his job was in jeopardy.

Against this background, the grievance "is quite simple and is based on undisputed facts." The evidence shows the Grievant "faithfully fulfilled his reporting obligations." The Notification Policy rests on "timely reporting of absences . . . so supervisors could manage their manpower needs." The Grievant's conduct met the Policy's purposes.

The evidence thus dictates that the discharge is based solely on the Notification Policy's requirement "for daily call-ins." This basis "must be rejected for a number of reasons." The Notification Policy is not "a negotiated condition of employment" and must be subjected to analysis under the "negotiated just cause provisions of the Collective Bargaining Agreement." The evidence makes it "crystal clear that (the Grievant) did nothing wrong." He behaved responsibly regarding his attendance and regarding reporting the ankle injury. He timely reported to Security and "kept in close contact with Hansen as instructed." The Company's warning letters for June 23, 24 and 25 stand in stark contrast. The Company did not notify the Grievant of "the warning letters until he returned to work on July 13."

Significantly, the Grievant's actions do not violate the Notification Policy. In 2007, the Company did not require him to make a daily call in. The correspondence Hansen mailed to the Grievant underscores the reasonableness of his conclusion that he did not have to make such call-ins. Examination of the Company's conduct with other employees further underscores this point.

It follows, "(b)ased upon the undisputed facts" that "there is no basis for finding that the Company had a right to discharge (the Grievant)." It follows from this that the Grievant "should be reinstated and made whole for any losses he has suffered."

The Company's Reply Brief

The Company asserts that the Union's brief "misstates certain facts and ignores (the Grievant's) admitted failures to comply with the attendance and notification policies." More specifically, the Company rejects Union assertions that "it objected to the . . . second probationary period." Review of the evidence establishes that both the Grievant and the Union agreed to "the terms of the probation" discussed on October 2, 2008 and memorialized subsequently via letter.

Nor will the evidence support the assertion that the Grievant somehow complied with the Notification Policy. Leaving a voice-mail for Hansen cannot be considered compliance. The unambiguous terms of the Policy confirm this, as does the Grievant's and Hansen's testimony. Hansen's voice-mail itself establishes the need to meet the Notification Policy by calling Security. No reliable evidence exists to support an assertion that the Grievant could reasonably conclude a single call in, by which he reported the anticipated length of the injury, meets the Notification Policy. That the Grievant again phoned in the absence on June 22 confirms this. At no point prior to June 25 did the Grievant even plausibly meet the requirements of the Notification Policy.

Examination of the evidence, including the labor agreement, fails to disclose an exemption "in the Notification Policy for employees on A&S leave." Even if an employee secures A&S leave approval, the daily call-in requirement under the Notification Policy continues in effect for the entire absence up to the point at which leave is approved. The assertion that the Grievant's experience in 2007 establishes an exemption to the daily call-in

requirement "lacks any meaningful foundation." The Grievant's testimony on how he called in or what response he received is vague, and affords no defense to the clarity of the terms of the Notification Policy. The assertion he was unaware of the daily call-in requirement "is self-serving and unbelievable." The evidence establishes that the Grievant knew in June of 2009 that he was on probation and at risk of losing his job for failing to comply with work rules.

Viewed as a whole, the evidence establishes cause to discharge. The agreement for a second probation period "modified the just cause standard as applied to (the Grievant)." The terms of that agreement established "just cause" under Article 13 as it applies to the Grievant. The facts establish that the Grievant committed three violations of the Notification Policy during the term of that agreement.

That the Notification Policy is a work rule does not render it meaningless. The parties discussed it, whether or not it became a negotiated condition of employment. Beyond this, "the Attendance and Notification Policies have been attached to the Labor Agreement for years" and the "contractual effect of the work rules contained in the Code of Conduct has previously been acknowledged", including OSHKOSH TRUCK CORPORATION, DEC. NO. 7024, (McLaughlin, 8/06).

Even if the parties had not agreed to the second probation, the facts meet the two element analysis applied by this arbitrator in VERNON COUNTY. The County's disciplinary interest rests on the June, 2009 violation of the Notification Policy as well as "ongoing attendance problems". The Grievant's inability to comply with "the Company's reasonable attendance rules" establishes the existence of conduct in which the Company has a disciplinary interest as well as the reasonableness of the Company's conclusion that progressive discipline had not, and could not, modify that conduct. It follows that the Company established just cause to discharge the Grievant and that "the Union's grievance must be denied."

The Union's Reply Brief

The Union notes that "there is absolutely no need to file a formal Reply Brief", but in light of the briefing schedule, offers brief comment on the Company's initial brief. Noting the parties' statements of the issue stipulate a just cause issue, the Union reaffirms that the evidence will not support a conclusion that the Grievant's actions "warranted discharge." A review of the evidence establishes that "the Company was supplied all the information it needed to deal with any staffing problems (the Grievant's) absence might cause." The failure to call-in on June 23, 24 and 25 rests on the Grievant's experience in 2007 as well as Hansen's voice message and his June 19 Memorandum.

There is no need to dispute the analysis of VERNON COUNTY to question its application to the facts posed by this grievance. The two-element analysis applied in that case points to a contrary result in this case, since the evidence posed here establishes that "there was no basis to fire (the Grievant)."

The significance of the Union's due process concerns are underscored by an arbitration award in OSHKOSH TRUCK CORPORATION, FMCS CASE # 07-5894, GRIEVANCE NO. 202-1-06, (Yaeger, 9/08), which establishes the Company's obligation "to timely supply an employee with warning notices." The Grievant did not receive "his three warning letters until July 13 when he returned to work."

The Union's due process concerns should not obscure that "the main reason for setting aside (the Grievant's) discharge is that he conscientiously gave notice of his absence and its duration." Based on his 2007 experience, he reasonably concluded he did not have to call in on each day of his absence. There is no proven violation of the Notification Policy. It is thus necessary "to sustain the grievance in this case."

DISCUSSION

I have adopted the Union's statement of the issues. The labor agreement establishes there is no significant difference between the parties' statements of the issue on the merits. Article 22 refers to "cause" while Article 8, Section 2 refers to "just cause". There is no reason to create conflict between the sections and neither party seeks to. Beyond this, the Union's statement has the virtue of making potential remedial issues explicit.

In the absence of the parties' stipulation, I view just cause to consist of two elements. The first is that the Employer must establish conduct by the Grievant in which it has a disciplinary interest. The second is that the Employer must establish its discipline reasonably reflects the disciplinary interest. This does not impose a non-contractual definition of just cause, but states a skeletal outline to be fleshed out by the bargaining parties' arguments.

Application of the two elements to this record is, in a sense, straightforward. There is no dispute the Grievant called in on June 19 and June 22, but not on June 23, 24 or 25. The dispute is whether his failure to call in constitutes conduct in which the Company has a disciplinary interest. The Union asserts that the Grievant met the requirement on June 19 and 22 by advising Security of the expected duration of his absence.

This contention has force, but cannot be accepted without reading the Company's interest in the Notification Policy out of existence. It is undisputed that the Company's defense work and continuous production schedule warrant a call in procedure to permit the Company to react to absences. There is no dispute regarding the clarity of the Notification Policy's daily call in requirement. Whether or not it is independently enforceable, the evidence establishes the requirement is well-known in the workplace. The Grievant acknowledged he was aware of it. If the Grievant's call to Security on June 19 or 22 met the Notification Policy standing alone, then any employee could secure an approved leave of absence without verification. It does not impugn the Grievant's character to note that such a system could not even screen a fraudulent call-in and would work as a blank check for anyone who claimed illness or injury spanning more than a shift. That the Grievant supplied A&S documentation to the Company on June 24 cannot obscure his failure to call in on June 23. Hansen can excuse daily call ins, but he received the

Grievant's medical documentation on June 25. There is, then, no evident basis to conclude that the Company excused the June 24 call in requirement.

The Union's assertion that the Grievant's 2007 experience relieved him of the duty to call in prior to Company approval of A&S leave in June has greater weight as a matter of argument than the evidence will bear. The Grievant left his shift due to a non-work related injury in 2007, and called in after visiting his doctor, who faxed documentation to Hansen. Even ignoring the understandable vagueness of the Grievant's recall, it is unclear when Hansen received the fax. Unlike the June situation, the Company knew of the injury prior to the Grievant's or his doctor's confirmation of its expected duration. Whenever the Company received verification, the 2007 experience is distinguishable from the June experience.

More significantly, the record does not establish that the Grievant believed his 2007 experience met the call in requirement. If the 2007 experience excused the June 23 or 24 call in, it is unclear why the Grievant called in on June 22, since he had already called in the absence and its expected duration on June 19. In any event, the force of the Union's contention is less that the failure to call is not disciplinable conduct than that the Company overstates its interest in it. This prefaces application of the second element.

The Union contends that the Company's disciplinary interest is minimal. In its view, the Grievant twice advised the Company of the expected duration of the absence, and whatever the production basis may be for the daily call in requirement, its application to the Grievant is hyper-technical. Beyond this, the Company applied it to the Grievant in a fashion inconsistent with its application to other employees. To the Union, the strength of the Company's disciplinary interest is the Grievant's compliance with the Attendance Policy and the Grievant effectively changed his behavior on that point. The Company counters that its production needs are significant and more than sufficient to demand daily call ins. It required no more of the Grievant than to call in absences until excused directly by Hansen or indirectly by filing medical documentation with him. To the Company, the Grievant's work record affords no hope for the application of progressive discipline, since he averted discharge on no less than three occasions prior to June. The Company has, in any event, consistently applied the Notification Policy to employees and the policy is clear on its face.

On balance, the Company's arguments are better founded in the evidence. While the Union's arguments have considerable persuasive force on broader contractual issues, they are undermined by specific application to the Grievant. If Company assertion of a daily call in risks elevating form over substance, the Union's defense of the Grievant risks putting full control over absence notification in the hands of any employee for any length of absence. It is unpersuasive to conclude the Company lacks a legitimate interest in employee notification of multi-day absences. Viewed more factually, the Grievant's willingness to call in on June 22, but not on June 23 or 24 affords little defense to the Company's legitimate interest in notification of absence. He knew of the requirement and knew his probation put him on thin ice. It is not evident why he could not call in until he supplied Hansen with verification of the injury's duration. His 2007 experience cannot explain why he would call in on June 22, but not on June 23. Whatever is said of his

probation, his attendance record speaks for itself. His unexcused absences are not readily distinguished from his failure to obtain an excuse from the Notification Policy's requirements. He testified that court proceedings on a custody issue prompted his attendance problems, but the time period covered by that testimony does not explain his first probation, and spans 2007, a period when his attendance improved. Grave's and Rose's experience establish their own conscientiousness in meeting the Notification Policy's requirements more than affording support for the Grievant's failure to meet them.

The Grievant was a notably candid witness. His credibility establishes reason to believe he can be held accountable for his actions and can be expected to modify them. This cannot obscure that credibility bears strongest on finding fact, and fact is not in significant dispute. The difficulty posed regarding the second element is that finding discharge an inappropriate sanction affords the Grievant at least a third trip back from the brink of discharge over a relatively short period of employment. The two elements of just cause are ultimately a reasonableness review of the Company's exercise of disciplinary discretion under Article 22. A conclusion that the Grievant should be returned from the brink of discharge can be based on his candor, but this ignores that the Company did so on at least two prior occasions. The Grievant's June conduct affords a tenuous basis to question the reasonableness of the Company's view that progressive discipline had run its course.

In sum, the Grievant's failure to call in on June 23 and 24 constitutes conduct in which the Company has a disciplinary interest. The degree of that interest is more debatable as a general matter than as applied to the facts posed by the Grievant's conduct. His June 19 and 22 call ins cannot mask his failure to call in on June 23 and June 24. Whether or not this failure could warrant discharge standing alone, the conduct does not stand alone. Viewed in the light of his employment history, the Company could reasonably conclude that the violation was "the last straw." It follows that the Company has met each element of just cause.

This application of the two elements skirts broader issues raised by the parties, and it is appropriate to tie it more closely to their arguments. Union concern with the relationship of the Notification Policy and just cause is well stated. In my view, the concern is addressed by the application of just cause to the grievance. Whether the Notification Policy sets a unilaterally established condition that must yield to the negotiated provision of just cause is, in the abstract, a significant issue. It does not, however, pose an issue to be resolved in this grievance. Under Article 22, work rules must be "reasonable". Just cause states a reasonableness review. The two must be interpreted in a manner that gives meaning to each.

More to the point, the Company's assertion of an independent basis to discharge the Grievant under a strict application of the Notification Policy is flawed. The Company's delivery of three disciplinary letters to the Grievant on his return to work tenuously conforms to the Notification Policy. That the Grievant returned medical verification forms to the Company on June 24 complicates finding that he failed to meet Notification Policy call in requirements regarding the June 25 absence. Hansen does not individually notify employees that they are excused from the call in requirement, but does treat verified documentation of injury as an

excuse. There is no dispute the documentation supplied by the Grievant resulted in Hansen's approval of A&S benefits. This makes strict application of the Notification Policy tenuous for the Company. The difficulty for the Union is that the Grievant acted at his own risk on June 23 and June 24. His failure to call in stands in marked contrast to the conduct of Graves and Rose, and his disciplinary history affords a tenuous defense to the Company's legitimate interest in being notified of employee absence, whether or not the Notification Policy is strictly enforced. The strength of the Union's arguments as a matter of contract is thus undermined by the evidence. The force of the Company's position is that its discharge decision can withstand a reasonableness review, including treating the Notification Policy as a work rule that must be reasonable in its application and reconcilable to the case-by-case reasonableness review that is just cause.

Similar considerations apply to the Company's assertion of the Grievant's probation periods. Viewed broadly, the relationship of the Attendance or the Notification Policy to just cause is a troublesome point. The conclusions reached above do not rest on whether the imposition of a probation period modifies the contractual cause standard. Rather, they rest on specific application of the cause provision. The evidence affords no persuasive reason to affirm a strict application of the Grievant's probation. Company documentation of the Grievant's absences through October 26, 2006 does not demonstrate strict application of the Attendance Policy. The November 1, 2006 letter imposing a one-year probation asserts that it will be strictly applied, but the December 1 disciplinary letters do not bear this out. The October 11, 2008 letter confirming a probation period states a similar "all encompassing" requirement, but the Company's actions following it manifest ongoing exercise of discretion regarding the Grievant's conduct. This does not establish a contractual flaw concerning just cause. Rather, it demonstrates that the Company exercised case-by-case discretion in disciplining the Grievant. Review of its discretion must be through the two-element application of just cause. Whether or not the Attendance or Notification Policies can be strictly enforced in the abstract, they were not strictly enforced here. What is at issue is not the enforceability of probation periods, but whether the Company had just cause to conclude the Grievant's failure to call in on June 23 and June 24, viewed in light of his employment history, made discharge reasonable.

The relationship of the probation periods to Article 13 poses a similar issue. The Grievant's warning notices and discipline regarding the Notification Policy arrived at the same time, well after the violations. As the Union notes, this makes strict application of Article 13 a considerable point. However, the evidence does not support strict application of its requirements. Ignoring ongoing production requirements, the volume of employee absences and accompanying notification documentation is evident. Hansen routinely mails A&S forms on notification of absence, without regard to whether A&S will be granted and without regard to whether Notification Policy requirements are met. This is not remarkable given the size and complexity of the Company's operations. That the Company's paper trail did not keep pace with ongoing events affords something less than a reason to deny it any interest in the Grievant's failure to call in his absences.

More to the point, strict application of Article 13 could reasonably be posed by a grievance regarding the October 11, 2008 letter verifying the probation period, but cannot

reasonably be posed by this grievance without turning the agreement noted in the October 11, 2008 letter on its head. Whatever the parties agreed to on October 2, 2008 did not include strict application of Article 13. This makes just cause review of Company discretion regarding the Grievant's discipline more persuasive than strict application of Article 13. This does not read Article 13 out of existence. Article 13 expressly refers to the exercise of Company discretion in the imposition of discipline, which is the source of just cause review. It also imposes a two or three prior notice requirement on the Company for disciplinary conduct other than "willful or negligent misconduct of a serious nature." It is not necessary to give the June 25 warning notices independent validity to note that Company warnings on attendance issues in July and September of 2008; Company imposition of a probation period in place of termination in October of 2008; and the June 25 warning notices constitute process within the one year period of Article 13, Section 1 that essentially meet its notice requirements.

In sum, the grievance poses a regrettable, but straight-forward issue on its merits. The relationship of the Attendance or Notification Policies to just cause poses a number of broad interpretive points, but the grievance does not implicate those broad issues. The grievance questions whether the Company had cause to discharge the Grievant. If the evidence demonstrated the Grievant faithfully fulfilled his reporting requirement, the grievance could have merit. However, his failure to call in his absence on June 23 and June 24 establishes conduct in which the Company had a disciplinary interest, and because the Company reasonably concluded its imposition of progressive discipline had failed, the discharge withstands just cause review.

AWARD

Grievant Lance Gitter was discharged for just cause.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 7th day of January, 2011.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

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