Shaw #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

THE ISSUE

The issue in this case is stipulated to be as follows: "Was the Employee discharged for just cause? If not, what shall be the remedy?" The initial grievance dated September 9, 1997, states "I grieve this termination which is without just cause and did not receive a fair and impartial hearing." The grievance was denied on September 10, 1997. A hearing was held on September 29, 1997, and the Employee was notified on October 1, 1997, that as a result of the hearing the Employer had decided that his employment had been terminated. The grievance was appealed to arbitration, and a hearing was held on January 27, 1998. The parties agree that the case is properly before the arbitrator.

FACTS

The Employee was employed as a Line Service Technician at the Employer's Airport 1 facility at the time of his discharge; he had held the position since 1983. On February 16, 1997, the Employee signed a Coaching Document that had been prepared to record that he had been a "no call no show" on February 11 and February 12, and that he had been coached to make it clear that he should call in the event of consecutive days of absence. The document recorded that a next occurrence would result in a written warning.

On Monday, August 18, 1997, Employee called in to work to report that he would not he in that day because of a wrist injury. On August 18, the Employee consulted with Doctor 1 at Chiropractic Clinic 1, and was given a note saying that he should not work for two days. On August l 9, he called in again to say he would not be in either that day or the next, and Operations Supervisor Person 1 recorded the call in his "Sick Book," noting that the call for August 20 had been made on August 19. The Employee was not told that he could not report out for more than one day at a time; Person 1 testified that he accepted the multiple-day call because, despite the policy that an employee must call in each day, it was his usual practice to accept multiple-day calls in case of an injury that he suspected might result in a Workman's Compensation claim, and he thought Employee might have injured his wrist on the job.

Apparently the Employee was not scheduled to work on August 21, 22 or 23. On Friday, August 22, the Employee went to his primary physician, a Doctor 2, who sent him to Clinic 2 for an x-ray-- an employee there gave him a note documenting the x-ray in the name of Person 2, and corrected the name later on request. The Employee testified that on Saturday, August 23, his wrist was still swollen so he called Doctor 1, who told him he should come in to his office on Monday, August 25, and that he should tell the Employer he would be out for another week. He saw Doctor 1 on August 25, and was given a note saying he should not work for an indefinite period of time, that he was being given a referral for ortho consult/ treatment and that he should not work until further notice.

After talking with Doctor 1 on August 23, the Employee called in to work on the morning of Sunday, August 24, to report out sick. He called the supervisor's office, but the telephone was answered by an acting supervisor, Person 3, who told him nobody else was available. He told Person 3 that his wrist was injured and asked her to have him put in the Sick Book and to tell his

fellow employees in the line shack that he would be out. The Employee testified that he told Person 3 that his doctor had said he needed to be out at least a week. Person 3 suggested that he should leave his message on voice mail, which he then did. The Employee testified that he distinctly remembered leaving on the supervisor's voice mail the message that his wrist was still swollen, that his doctor had said he would need to he out at least a week, and that he also left his telephone number and asked that the supervisor call if there was any concern.

Supervisor Person 4 logged the Employee in the Sick Book as having called in on August 24; he did not make any notation of having been told that the Employee would be out for mare than one day. Person 4 testified that he did not recall whether he had talked to the person the Employee said he had called, and that he did not clearly recall either getting the Employee's voice-mail message or the message's contents, and admitted under cross examination that the voice-mail message could have said that the Employee would be out for several days. However, Person 1 said that it was his usual practice to record in the Sick Book any notice of more than one day if it was given; he testified that because he had not made such a notation for the Employee on August 24 he believed any message he received had not indicated more than a one-day absence. Person 1 testified that if the Employee had told him he would be out for the next three days it would have been okay, and that in that event he would have arranged to replace the Employee "if needed," but that in fact he had not made any arrangement for replacement.

The Employee did not report for work nor did he call in on August 25, 26, or 27, his scheduled work days. At some point during the August 25-27 period, Person 1 reported him as a no-call, no show to Operations Manager Person 5, who ordered that the Employee not be allowed to punch in when he returned to work and that he be told to report to Person 5 the next day. The Employee reported to work on August 31, wearing a wrist brace; he had made the decision that he was able

to return to work without getting a clearance from a doctor, and has never presented the Employer with any document to certify that he is able to return to work. When the Employee reported for work on August 31, he was told by supervisor Person 6 that he could not clock in, that Person 5 had instructed that he be sent home because he had abandoned his job. The Employee gave Person 6 his doctor's note; Person 6 called Person 5 and Person 5 told the Employee to come to see him on Tuesday, Sept. 2. When the Employee told Person 5 he had pre-scheduled vacation time for September 2 through September 7, Person 5 agreed to meet after the vacation. On September 8, the Employee called and then met with Human Resources Director Person 7 and learned that he would not be allowed to return to work. He filed the instant grievance on September 9, 1997.

The Employee visited an orthopedic surgeon on September 19; the surgeon put the Employee's wrist in a cast, and the cast was removed three days later. The Employee visited the orthopedic surgeon again on October 10, and has not seen him since. The Employee testified that he still wears the wrist brace occasionally.

RELEVANT CONTRACT LANGUAGE AND APPLICABLE POLICY

Those portions of the Labor Agreement and applicable Policies relevant to the instant grievance are as follows:

Labor Agreement

> Article XI V
>
> 1. New employees shall be regarded as probationary employees.... During this probationary period, an employee may be discharged for any reason, and such action shall not be subject to the grievance procedure....
>
> 8. Seniority status shall be lost and the employee's name removed from all seniority lists upon which it may appear if:

He is absent from work for three (3) consecutive scheduled days without notifying the General Manager or another so appointed by him of the receipt of such notification, unless he presents a reasonable excuse.

***

Employee Information Guide

To Collective Bargaining Members

The Collective Bargaining Agreement between your Local and the Employer supersedes any areas of this Employee Information Guide where the Agreement and the Guide address the same specific policy or procedure.

Personal Conduct:
The following behaviors constitute grounds for disciplinary actions....

4. Unexcused absence or lateness totaling in excess of attendance policy standards....
if you have to miss a portion of your scheduled workday or be absent for the entire shift due to illness or some other reason, you are to notify your Supervisor at least two hours prior to start of your shift...

If you are absent for three (3) consecutive work days without notification, the Employer will consider this behavior as your resigning employment with Employer.

***

Attendance Policy

II. Definitions:

Prior Notice- An employee must first report an absence to his or her immediate supervisor. If the supervisor is unable to be contacted after a reasonable time period, a manager may be approached....Exceptions may be considered for extraordinary circumstances which are verifiable and can be reasonably explained.

Verification- Any legitimate illness, accident or emergency can be substantiated by reasonable and appropriate means. Proper verification would be a doctor's certificate, insurance report, police report, etc.

III. How the Points System Works:

1.0 Total Points—are assessed for each unexcused absence. This would include employee illness, personal accident, personal business, voluntary military duty or similar absence. Additionally, and important to note, the second and any subsequent days of an extended absence caused by illness or accident are not counted if the absence is verified.

Note: If an employee is off for an extended period for a personal illness or accident, he or she will only be charged 1.0 point (for the initial absence) if the illness or accident can be

verified. The second and subsequent days absent for the same verified illness or accident, so long as they are consecutive, are not assessed additional points.

4.0 Total Points—are assessed for each unexplained absence. Unexplained absences are time away from work for which the individual employee does not provide reasonable explanation or fails to meet the prior notice requirement.

Trigger Points

An employee will be subject to disciplinary action of at least a verbal warning upon accumulating 5 points. If absenteeism or tardiness continues, further disciplinary action will be taken for totals of 7, 9 and 11 points. Disciplinary action could range from a counseling session to a warning letter, suspension or termination. Severity of the discipline will depend on the circumstances of the particular attendance problem and the employee's overall performance record. The Employer reserves the right to proceed directly to a more severe disciplinary action in cases where the employee commits consecutive unexplained or unexcused absences.

POSITIONS OF THE PARTIES

THE EMPLOYER

It is the Employer's position that the Employee violated a clearly stated policy that employees are required to call in each day of any absence, and that when he was absent for three consecutive days without calling in on any of those days, without a reasonable excuse, he was subject to discharge under the terms of both the Employer's Attendance Policy and the Employee Information Guide's Personal Conduct rules, both of which it contends are consistent with the terms of the Labor Agreement.

Supervisor Person 4 testified that the decision to terminate the Employee, in which he participated only by making a recommendation, was based on the Guide, and that the Employer is empowered by the Agreement to establish such rules. He conceded that the Agreement supersedes the Guide in case of conflict, but testified that it is not within his discretion to make judgments on any conflict that may exist between the contract and Employer rules; in any case, he found no conflict with the Agreement's provision that seniority would be forfeited for three

such no-show, no-call incidents only if there was not reasonable excuse, because he did not consider bringing a doctor's note after such incidents to be a reasonable excuse.

Operations Manager Person 5 testified that he made the decision to dismiss the Employee jointly with the Human Resources office, because the Employee had been absent for three consecutive days without calling in. He considered the Employee to be subject to discharge because the Guide provides that three days of absences without calling in entitles the Employer to consider the employee to have resigned his position, and also because under the Attendance Policy the Employee had accumulated 12 points, enough to warrant discharge, by missing three days without calling in. Person 5 testified that he listened to the Employee's account of the incident by telephone on August 31; that the Employee told him he had reported off for a week, and conceded that the Employee might have thought that he had a reasonable excuse for not calling in each day, but said that he would interpret this as a "reasonable excuse" for not calling in each day only in a situation in which the absentee would be incapable of making a phone call. The Employee was not incapable of calling in and therefore he found no reasonable excuse for not calling each day, and no conflict with the language of the Labor Agreement. He also testified that he did not consider the Employee's excuse for his absence to be a reasonable one. Upon cross examination as to whether the Employee had been notified that he would be fired if he didn't come in or call, Person 5 said that the February 12 Coaching Document had given the Employee such notice. Person 5 referred to a February 25, 1997, memorandum he issued to all employees after the Coaching Document was given to the Employee, which stated that:

> "...it is the responsibility of the employee to contact their immediate Supervisor at least two hours prior to the start of his/her shift each day the employee does not report to work ...."

to support his position that the policy of calling in each day was clear. However, he conceded that even after that memorandum the Employer had accepted a multiple-day call-in from the

Employee at least once since February 12. Other employees who failed to call in each day have been excused but only when they had called in for multiple days and the call had been noted by a supervisor in the Sick Book. Person 4 referred to a similar memorandum, issued to all employees on August 19, 1997, which stated that "...It is imperative that a call is made for EVERY DAY of work that will be missed."

Further, the Employer contends that the Employee reported out for only one day on August 24, so that even had it found a multiple-day call acceptable he would be subject to termination because he did not make such a call. The Employer rejects the Employee's claim that he left a message that he would be out for at least a week both with an acting supervisor and on the supervisor's voice mail, because the employee in question does not recall the message and because Supervisor Person 4 did not record the call as a multiple-day call when he made a note about the call in the Sick Book- his usual practice when receiving a call that an employee would be out for more than one day. The Employer argues that there is no conflict with the Labor Agreement's provision for exception from the three-day standard when there is a reasonable excuse, because a doctor's note brought in after an absence is not a reasonable excuse; additionally, the Employer suggests that there are inconsistencies in the various doctor's notes and the Employee's statements about the nature of his injury and when he knew he would be unable to work. The Employer acknowledges that it has deviated from its rule that an absent employee must call in each day of an absence, but points out that the Employee had been given a specific warning in February, 1997, that he must call in each day and that he had in fact done so except when he had a Worker's Compensation case earlier in August. The Employer concludes that the Employee was discharged for just cause because he was absent for three consecutive

days in violation of a clearly stated and reiterated policy, known to the Employee, that is consistent with the Labor Agreement, and requests that the grievance be denied.

The Employer points out that the Employee has never submitted a doctor's release for him to return to work, and requests that for this reason, should the grievance be upheld, no back pay be awarded.

THE UNION

The Union argues that the Employee did in fact make a multiple-day telephone call-in to the Employer on August 24; that he left a message that he would be out for at least a week both with the acting supervisor and on the supervisor's voice mail. It points out that the Employee testified to a clear recollection of the call, while Person 4 admitted that he did not remember what he heard on the voice-mail message. The Union contends that the Employer has been inconsistent in implementation of its stated call-in policy, pointing out that it acknowledges having accepted multiple-day call-ins in the past. The Employer has even accepted such calls from the Employee after he had been given a Coaching Document, and after Person 5's issuance of a memo stating that calls must be made each day. For these reasons they content that the multiple-day call-in an August 24 should have been accepted for August 24 and for the rest of the week, covering the three days in question.

The Union cites the Employer's references to Employee's having "abandoned his job" to support the acknowledgments of Person 4 and Person 5 that the termination was made on the basis of the Employee Information Guide rather than on the basis of the accumulation of points under the Attendance Policy, and points out the guide's recognition that the Labor Agreement is to prevail in case of conflict. The Union argues that the Labor Agreement requires that a reasonable excuse

must be allowed to exempt an employee from discharge in the event of three consecutive days absence without notification, and that the Employee did provide a reasonable excuse for his absence when he presented his doctors' notes to the Employer upon returning to work on August 31. The Union suggests that the Employee, having made the August 24 call-in, and in view of the fact that the Employer had continued to accept multiple-day call-ins (in fact accepting one from the Employee as recently as the previous week), had a reasonable excuse not to call in again on August 25, 26 or 27.

The Union concludes that the termination of the Employee was not for just cause and requests that he be reinstated to his job, with compensation.

DISCUSSION

Despite the Employer's stated policy that an absent employee must call in each day he or she is absent, as expressed in Person 5's February 25, 1997 memo and Person 1's August 19, 1997, memo, it is clear that it has continued to accept multiple-day call-ins. Person 4 testified that it would have been okay for the Employee to miss work on August 25, 26 and 27 if the Employee had indeed told him on August 24th that he would be out on those days. The expectation implied in the February 12, 1997, Coaching Document, which stated that the Employee understands he needs to call in for each day he is absent, was effectively negated by the Employer's later acceptance of multiple-day call-ins, and the question to be determined is whether the Employee did tell the Employer on August 24 that he would be out for the following three days as well as August 24.

As to whether the Employee was terminable under the Attendance Policy, he could not properly have been charged with accumulation of 12 points for the three days in dispute, because he did

present verification, in the form of appropriate doctors' notes of explanation, which showed that his absence was caused by his wrist injury. Under the Policy, an employee is assessed only one (1) point for a verifiable unexcused absence; the Attendance Policy implicitly acknowledges that there may be "second and ...subsequent days" within any one "extended absence," and explicitly states that "the second and subsequent days for the same verified illness or accident, so long as they are consecutive, are not assessed additional points." In any event, the Employer asserts that the basis for the Employee's termination was not the Attendance Policy, but the Employee Information Guide, so it is not necessary to consider the Attendance Policy further.

Did the Employee tell the Employer on August 24, 1997, that he would be out on that day and for the rest of the week, including the days herein at issue, August 25, 26 and 27? It is necessary to weigh the Employee's emphatic recall of having both told the acting supervisor and left a message on the supervisor's answering machine that he would be out for the rest of the week against Person 4's assertion that the Employee had not called out for more than one day. This assertion was based on Person 4 not having recorded a multiple-day call-in in the Sick Book as is his usual habit when an employee reports that he will be out for more than one day. Person 4 testified that he did not remember the voice-mail message and acknowledged that it could have contained the information that the Employee would not be in for the entire week. The Employer questioned how the Employee could have known on August 24 that he would need to be out for a week when he did not see the doctor until the following day, August 25, the date on the doctor's note saying that the Employee should not work until further notice. The Employee convincingly explained that when he called the doctor on Saturday, August 23, to tell him his wrist was still swollen, the doctor told him to stay out of work at least another week and to come in to the office on Monday, August 25. The Employer suggested that further support for Employee's not having

given notice for the whole week could be found in the fact that Person 4 did not make arrangements to replace the Employee, but Person 4 testified that, had the Employee given such notice, he would have made such arrangements if needed. There was no evidence as to whether Person 4 did not schedule somebody else to work because he did not know the Employee would be absent, or because a replacement was not needed. The testimonies of both the Employee and Person 4 were credible and convincing, but Person 4's deductions about the motivations for his own behavior can not substitute for a clear recollection of the contents of the voice-mail message, which would be a minimum requirement to contradict Employee's testimony. It must be concluded that the Employee did notify the Employer on August 24 that he would not be at work on August 25, 26 and 27, and the three days of absences were not just cause for discharge under the provisions of the Employee Information Guide.

In the event of failure to give the Employer notification of an absence of three days, the Labor Agreement, which must prevail in the event of a conflict with the language of the Guide, provides that loss of seniority status, tantamount to termination since it leaves the employee subject to discharge for any reason and without recourse to grievance action, will result "unless be presents a reasonable excuse." This language does not require that the employee give notice on each day of an absence, but simply that he must give notification. Had the Employee not called in at all, or had he called in for only one day and then not called in again on August 25, he would not have had a reasonable excuse for not calling on August 25 because, as Person 5 pointed out, he was not incapable of making the call, and he would be subject to termination. However, given that the Employee is found to have notified the Employer on August 24 that he would be absent for the rest of the week, including the three days at issue, the requirement imposed by both the Agreement and the Guide was met. There is in this case no question of a

possible conflict between the provisions of the Guide and the Agreement's additional provision for reasonable excuse for not giving timely notice, because notice was in fact given. Additionally, the Employee had a reasonable excuse for not calling in on every day of the absence because, despite the Coaching Document he had signed and the policy set forth in Person 5's February memo, the Employer admits that it has not consistently enforced the policy, and the Employee himself had been allowed to make a multiple-day call-in as recently as the previous week. Once the Employee had made the multiple-day call-in on August 24, it was reasonable for him to believe that he need not call again at least for the rest of the week. Indeed, Supervisor Person 4 testified that no action would have been taken against the Employee if the Employer had believed that he had made a multiple-day call-in. Insofar as "reasonable excuse" might be deemed to refer to the question of reasonable excuse for the absence itself, the Employee has provided ample documentation that he did indeed have a wrist injury that was a reasonable excuse for not working on August 24-27.

CONCLUSION

The Employer has no convincing basis for its contention that the Employee did not give proper notification on August 24, 1997, that he would be out of work because of a wrist injury on that day and for the rest of the week, including August 25, 26 and 27. The Employee's supervisor could not testify with certainty that the Employee’s voice-mail message had not included the notice that he would be out for the entire week, and his deductions about the message derived from his own record-keeping habits are not sufficient to warrant termination. The Employer's position that the contested three days of absences constituted voluntary resignation under the language of its Employee Guide is therefore untenable.

To the extent that the termination was based on the Employee's failure to call in each day that he was absent, the termination was not for just cause, because the Coaching Document given to the Employee in February of 1997 did not clearly state that he could expect termination for a repeat violation and the policy requiring the daily call-ins was not consistently enforced either against the Employee or against other employees. The Employee had a "reasonable excuse" for not calling in repeatedly, namely that even as recently as the previous week he had not been required to call in on each day he was absent after having reported that he would be out for more than one day due to an injury.

The appropriate remedy in this case is reinstatement of the Employee to his job, with the restoration of all benefits and seniority and compensation for work lost because of the improper termination. However, the calculation of the amount of work lost shall begin with the time when the Employee can document that he would have been able to obtain a medical release to return to work. The Employee's attempted return to work on August 31, 1997, was undertaken without his having obtained a doctor's release to return to work, despite his having submitted a doctor's note ordering no work until further notice; in fact, he was still wearing a wrist brace when he attempted to return to work. The Employee testified that he had had a cast applied to his wrist by an orthopedic surgeon on September 19, 1997; that the cast was removed three days later; and that he had been back to the orthopedic surgeon on October 10. While it is reasonable to assume that the Employee would not have taken a doctor's release to the Employer after he was terminated, certainly not after he was notified on October 1, 1997, that the Employer had decided, after conducting a hearing on the matter, to uphold his termination, it is also reasonable to assume that the same injury that led a doctor to order no work until further notice would have kept the Employee away from work so long as the wrist was being treated for the injury.

Determination of seniority, benefits and compensation for lost earnings shall be made so as to leave the Employee in the same position he would be in had the Employer not terminated his employment on August 31, 1997, and shall be such as to accord him the same treatment he would have received had he attempted to return to work on that date without a medical release but with no penalty assessed for the three-day absence on August 25, 26 and 27. Back pay shall be lost earnings calculated from the time the Employee can document he could have obtained a medical release to the time of his reinstatement, less any earnings in alternative employment and benefits such as Worker's Compensation and Unemployment Benefits. Consideration of the Employee's ability to return to work shall include application of the language of Article XIV, paragraph 13, addressing the right of employees to be given light duty assignments when unable to perform their normal work.

In the event that the parties are unable to agree on the date from which lost earnings should be calculated or on the specific benefits to be restored to the Employee, the arbitrator will retain jurisdiction in this case for the purpose of hearing arguments and making a determination of the appropriate date and benefits.

AWARD

The Grievance is sustained. The discharge of the Employee was not for just cause. The Employee shall be reinstated with his seniority and lost benefits restored, and shall be compensated for lost earnings calculated from the time at which he can document that he could have obtained a medical release to return to work until the time of his reinstatement, less any earnings in alternative employment and benefits such as Unemployment Insurance or Worker's

Compensation payments that he might have received during the period for which earnings were lost.

The arbitrator will retain jurisdiction until the terms of the award are implemented as described in "Conclusions" above.