

## **Popular II #2**

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

### **BACKGROUND**

Pursuant to a demand for arbitration under the terms of the applicable collective bargaining agreement between Employer and the Union an arbitration hearing was held February 24, 1998 concerning the discharge of Employee. The undersigned arbitrator was selected by the parties by mutual consent.

The February 24, 1998 arbitration hearing provided both parties the opportunity to present their respective positions supported by sworn testimony and such evidence as they deemed appropriate. Both parties agreed to waive post hearing briefs; therefore the record was closed at the conclusion of the hearing.

### **ISSUE**

Was the Employee discharged for just cause? If not, what should the remedy be?

### **RELEVANT CONTRACT LANGUAGE**

Article 4: Management Clause: Subject to the provisions contained herein, the right to manage the Employer and direct its operation is vested in and retained by the Employer.

## Article 11: Sick Leave

(a) The Employer agrees that sick leave shall be paid to employees who are actually sick according to provisions of this Article, and abuse by any employee of this sick leave privilege will be grounds for summary discharge.

(c) 2. Employees shall only be eligible for five (5) days of paid sick leave each year.

(f) An employee will not be paid for sick time unless he notifies his supervisor at least two (2) hours prior to the start of his scheduled work shift except when beyond the individual's control.

(i) When in doubt of a valid claim, the Employer may require an employee to furnish a medical certificate as proof of bona fide illness.

## Article 12: Grievances

(a) No employee who has been in the service of the Employer for more than ninety (90) days will be disciplined to the extent of loss of pay or discharge without a hearing, and shall be advised in writing of the charge or charges preferred against him...before a written warning or letter of reprimand concerning his job performance is given to an employee, he will be advised and may request a hearing at which he shall have a Union representative present.... When a written warning is given to an employee, a copy will be given to the Local Lodge President and/or District assigned representative. Upon reasonable request, the Local Lodge President and/or District representative may examine an employee's personnel record....

An employee or group of employees, other than a probationary employee, who believes that he/they have been unjustly dealt with..., will present the grievance in writing....

(c) In the event that mutual agreement is not reached...the grievance may be referred to arbitration within thirty (30) days after receipt of the proper answer referred to above.

(g) In the event of a discharge, the arbitrator shall only have the right to determine if just cause existed for a discharge. If just cause did not exist, the employee shall be reinstated with full back pay and seniority rights....

## **FACTS OF THE CASE**

This dispute concerns the November 25, 1997 discharge of the Employee for an unsatisfactory record of absenteeism and tardiness between 1995-1997. The Employee worked as an aircraft

"Fueller" at Airport 1 on the day shift during this period of time. During this 3 year period, 12 of 15 "sick days" were taken in conjunction with scheduled days off. There was uncontroversial testimony that the "sick days" taken by the Employee were not for "medical reasons" but rather were taken for "personal reasons".

1. The undisputed record of absenteeism, sick leave abuse, and tardiness is as follows (Joint Exhibit 2):

1995: 5 Sick Days; 6 Unauthorized Absences; 15 tardy incidents.

1996: 5 Sick Days; 5 Unauthorized Absences; 10 tardy incidents. 1997: 5 Sick Days; 2 Unpaid Sick Days; 2 Unauthorized Absences; 6 tardy incidents.

2. The undisputed record of progressive discipline includes a one week disciplinary suspension for "Excessive Absence" "Lateness" and "Poor Attendance" issued July 5, 1995 and a final warning notice dated December 15, 1995 which stated:

"It is the Employer's decision to once again warn you to immediately establish and maintain a satisfactory level of attendance to avoid serious disciplinary action including termination."

3. Person 1, DCA Operations Manager testified that several meetings were held with the Employee during 1996 concerning his absenteeism and tardiness. He testified that the Employee acknowledged that his record was unsatisfactory and promised to improve his attendance. A leave of absence request dated September 26, 1996, was granted by the Employer. The Employee's handwritten signed request stated as follows:

"I request a leave of absence in regards to personal problems outside my work place. It has caused a poor attendance record which is need of correction along with the personal problems. I will be taking care of this problem in what ever form needs be. I request at least two weeks off to do what needs to be done. I will seek professional help to obtain better work attendance and better employee."

4. Following return to work from the leave of absence, the Employee had no sick days, tardiness or unexcused absences until a sick day on January 31, 1997. Subsequent to that date, four more sick days were taken March 11, 25, 26 and April 1. Person 1 testified that he issued an "Attendance Review" memo on April 7, 1997 which warned that further absences or tardiness were subject to disciplinary action up to and including discharge. He further testified that he confronted the Employee concerning his tardiness of March 14, May 30, June 24, July 22, September 4 and November 11, 1997 (Joint Exhibits 2 and 3).

5. On November 19, 1997, a disciplinary hearing was held to review the Employee's "Attendance Record" and past disciplinary record. The Employee was terminated from employment by letter dated November 25, 1997 (Joint Exhibit 2). The Union filed a grievance requesting reinstatement which was denied by the Employer. Timely notice was provided of intent to arbitrate.

6. Union witnesses Person 2 and Person 3, both of whom are Union stewards, testified concerning inconsistent practices pertaining to tardiness between different employees, supervisors and shifts. Both witnesses testified that some employees who are late to work are allowed to make up the time by working beyond the end of their scheduled shift. They alleged that in such instances there is no "docking" of pay or notations of "tardiness" on "Attendance Records". Both testified that Person 4 was normally late while assigned to the 11-7 shift and that his supervisor routinely scheduled Person 4 to work beyond the end of his shift to make up for the time he was late. On cross examination Person 3 acknowledged he had no knowledge whether Person 4 was docked.

7. Both Union witnesses testified that two employees whose starting time is 2:30 p.m. were observed by them coming to work 10 to 15 minutes late on numerous occasions over a period of several months. Both testified that they questioned supervision about the tardiness of these two employees. Both alleged that these employees had not been "docked" or disciplined for their tardiness. On cross examination, Person 3 conceded that he had no direct knowledge as to whether the two employees had been docked or disciplined. Responding to a question by the arbitrator, Person 1 testified that the one of the employees was warned at a hearing last month but he had no knowledge of the other employee or his work record.

8. The Employee testified that his "personal reasons" for poor attendance and tardiness were related to childcare and the need to provide transportation for his wife and child. He asserted that alternative arrangements have been made pertaining to his wife and child which would negate any future disruption to his work schedule. As such, he stated there would be nothing to interfere with his future ability to be at work on time with regular attendance. At no time during testimony did the Employee deny Person 1's testimony concerning counseling, progressive discipline, or his "Attendance Records" of 1995-1997.

## **EMPLOYER POSITION**

1. In its exercise of management's rights to direct the workforce, the Employer has the right to discipline or discharge employees for the violation of reasonable work rules or employee work related misconduct. Article 11, Section (a) of the labor agreement provides "...abuse by any employee of sick leave privileges will be grounds for summary discharge."

2. The Employee's record of attendance and tardiness was unsatisfactory between 1995-1997. During that time progressive discipline was initiated which warned the Employee of the possible consequence of discharge if he failed to improve his attendance.
3. The Employee never made an attempt to change his shift or work schedule as a means to cope with his personal scheduling conflicts which contributed to his absenteeism and tardiness.
4. The Union's allegation of "disparity of treatment" concerning tardiness was not raised during the grievance hearing nor was it supported by irrefutable evidence, therefore should not be deemed relevant as a mitigating factor in considering "just cause" for the Employee's discharge.
5. The Employee's continued record of absenteeism and tardiness constituted just cause for discharge.

## **UNION POSITION**

1. Management's right to discipline employees for just cause is based on the principle that employees are held to the same standards for compliance with Employer rules. A key element of "just cause" is consistency in the administration of disciplinary action for similar offenses between employees.
2. There is un-rebutted testimony by Union witnesses concerning disparity of treatment between employees for tardiness. Two employees were repeatedly tardy with no consequence of disciplinary action. Another employee who was frequently tardy was allowed by supervision to work beyond the end of his regular shift to compensate for tardiness at the beginning of his shift.
3. The disparity of treatment for tardiness between the Employee and the three employees cited in Union witness testimony is indicative of unfair and inconsistent administration of discipline. Based on the Employer's inconsistent practices of enforcing rules and discipline pertaining to

tardiness, the Employer's action of terminating the Employee did not meet the standard of fairness necessary to "just cause" for discharge.

4. Consistent with Article 12 (g) of the applicable labor agreement, the Employee should be reinstated to his former job with back pay and seniority.

## **OPINION AND AWARD**

The issue before the arbitrator is whether the Employee was discharged for just cause. The Union asserts that inconsistency in handling tardiness results in disparity of treatment between employees, thus raising the question of whether the Employer met the requirements of just cause for discharge. The basic elements of "just cause" known to both arbitrators and labor relations practitioners were reduced to seven tests 'by Arbitrator C.R. Daugherty over 30 years ago (i.e., "Arbitration Times", American Arbitration Association, page 2, Spring 1988). These seven tests are applicable to this case.

1. Notice: Did the Employer give the employee forewarning of the possible or probable consequence of the employee's disciplinary conduct?
2. Reasonable Rule or Order: Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the business, and (b) the performance that the Employer might properly expect of the employee?
3. Investigation: Did the Employer, before administering the discipline to an employee, make an effort do discover whether the employee did in fact violate or disobey a rule or order of management?
4. Fair Investigation: Was the Employers investigation conducted fairly and objectively?
5. Proof: At the investigation, was substantial evidence or proof obtained that showed the employee was guilty as charged?
6. Equal Treatment: Has the Employer applied its rules, orders and penalties even handedly and without discrimination to all employees?

7. Penalty: Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Employer?

Based on the evidence and testimony presented at the hearing the Employer satisfactory met the standards of the first five tests. The 6th and 7th "tests" ---"Equal Treatment" and "Penalty" warrant examination and discussion.

The 6th test "Equal Treatment" poses the question "Has the Employer applied its rules and penalties even handedly and. without discrimination to all employees?" The Union asserts that it has not, calling to question the practice of allowing employees who are tardy to make up the time at the end of their shift with no notation of "tardiness" their on Attendance Records. Two Union witnesses cited knowledge of Person 4's work schedule while on 11-7 as a specific example of the "holdover" practice.

The Union witnesses also testified that they observed two employees who were repeatedly late for work and called it to the attention of supervision. The Employer's only rebuttal questioned whether the two witnesses had direct knowledge as to whether management had "docked" or otherwise disciplined those employees. Given the fact that Article 12(a) of the labor agreement requires copies of written warnings be provided to the Union, it is logical to conclude that neither of the two employees had received written warnings. Although Person 1 testified that a hearing was held with one of those employees, beyond that there was no further Employer testimony to rebut Union testimony.

Management stated that absenteeism and tardiness are viewed together in evaluating an employees "Attendance Record". Tardiness is being late for work; absenteeism is not being at work. There is no dispute about the absenteeism record or the accuracy of "tardiness" cited on the Employee's "Attendance Record". The Employee's supervisor recorded dates the Employee



was tardy and the combination of those dates contributed to the overall unsatisfactory record which resulted in the Employee's discharge.

The issue of disparity of treatment takes two forms: the "holdover" practice and the scenario of alleged favoritism/ discrimination. If employees who are late to work have no recorded tardiness on their "Attendance Record," because their supervisor elected to allow them to make up the time at the end of their shift, that raises a question of consistency. In effect, this practice reflects that such instances of tardiness are excused by management in exchange for "holdover" work to make up the time the employee was late. While this practice is not intended to be discriminatory and may serve the legitimate needs of management, the net result is a dual system of handling tardiness.

If indeed, some supervisors do not "dock" employees known to be late and/or fail to record tardiness on "Attendance Records" that raises a fundamental question of fairness. Such practice produces inaccurate "Attendance Records" and flawed information for management to monitor employee records, all of which undermines the premise of fairness in the administration of discipline. Disparities in supervisory practices recording "tardiness" and how that practice can result in different consequences for the same offense is relevant to consideration of the "Equal Treatment" test of just cause in the instant grievance.

The "Penalty" test of just cause calls to question whether the penalty of discharge was reasonably related to the seriousness of the offense and the record of the Employee in his service with the Employer. Both parties indicated regret that Employee, a 23 year employee who was considered a "good worker when he is here", had personal problems which led to an unsatisfactory record of attendance and tardiness. The Employer presented unrequited evidence of the Employee's poor

"Attendance Record" between 1995 and 1997 and a well documented record of progressive discipline. Person 1 went the extra mile in attempting the deal with Employee's problems. Based on the foregoing discussion, the arbitrator finds that the Employer had just cause to discipline the Employee. It is the arbitrator's determination that the penalty of discharge was too severe considering the employees length of service and previous discussion pertaining to disparity of treatment relative to "tardiness". Consistent with the parties' agreement empowering the arbitrator to determine an appropriate remedy, it is the arbitrator's decision that the Employee be reinstated to his former job without back pay with conditions.

## **AWARD**

1. The Employee shall be reinstated to employment without back pay with restoration of seniority and any benefits due under the applicable labor agreement. Reinstatement shall be no later than 10 days after receipt of this arbitration award.
2. The November 25<sup>th</sup>, 1997 letter to the Employee shall be revised to (a) reflect the penalty of a disciplinary suspension for the period of time the Employee was off work, and (b) include a sentence which states "this disciplinary action places you on notice that you will be discharged for future abuse of sick leave, unexcused absenteeism, unsatisfactory attendance, tardiness, and/or any other work related misconduct."
3. As a condition of reinstatement, the Employee shall sign the revised November 25, 1997 letter signifying that he understands and accepts its terms as a condition of return to work.
4. The arbitrator shall retain jurisdiction over this case until April 1, 1998.