

**Wittenberg #3**

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

The undersigned, having been designated by the parties pursuant to the collective bargaining agreement, was selected to serve as impartial chair of the dispute described below. The parties had a full opportunity to examine and cross-examine witnesses, to submit documentation and to make oral argument in support of their respective positions. The hearing was declared closed on August 3, 1993.

**ISSUE:**

The issue before the Board, as agreed upon by the parties, is as follows:

Did the Employer have just cause for the discharge of the Employee Employee? If not, what shall the remedy be?

**BACKGROUND**

The Employee was employed by the Employer as a Ramp Serviceman for 14 years at the time of his discharge on March 10, 1991. The Employee was terminated for failure to maintain a regular and dependable record of employment, in violation of Rules 32, 33 and 34 of the Rules of Conduct.

The applicable Rules of Conduct read as follows:

Rule 32. Failure to maintain an acceptable level of dependability. Level 1 to discharge.

Rule 33. Unauthorized absence from work. Level 1 to discharge.

Rule 34. Repeated failure to properly notify the Employer of absence. Level 1 to discharge.

The facts in this case are not in dispute. Under the Employer's Non-Punitive Disciplinary Program, there are five levels of discipline for which employees receive letters of discipline rather than traditional suspensions. Level 1 represents a letter of warning or reprimand. Level 2 represents a one to four-day suspension. Level 3 represents a five to 19-day suspension. Level 4 represents a suspension of 20 or more days, and Level 5 is discharge. An investigative review hearing is held before discipline is imposed at both Level 4 and Level 5.

The Employee's disciplinary history with the Employer is described briefly below: The Employee received a Level 4 discipline on January 29, 1987 for his attendance record. He entered a 28-day alcoholism program at that time. According to the Employee, however, the program was not successful. He did not face the fact that he suffered from the disease of alcoholism.

The Employee was disciplined for his attendance record again in 1989. He was notified on July 31, 1989 that he was scheduled for an Investigative Review Hearing on August 24, 1989. A decision was issued on September 20, 1989 to assess Level 4 discipline for violation of Rule 32. The Employee was warned in the decision that "Failure to fulfill this responsibility of maintaining an acceptable level of dependability will cost the Employee his employment with the Employer. Furthermore, violation of any of the Rules of Conduct will result in his discharge from the Employer".

When the Employee's time and attendance record did not improve he was notified of an Investigative Review Hearing scheduled for September 27<sup>th</sup>, 1990. In the time between the Employee's last discipline on September 20<sup>th</sup>, 1989 and September 1990 he had 19 latenesses and was sick nine times. The investigative hearing was postponed several times to allow the Employee an opportunity to enter an alcoholism treatment program.

The Investigative Review Hearing was held on December 5, 1990. The Hearing Officer concluded that the Employee's dependability record warranted discharge. However, he considered several mitigating factors, including the Employee's admission into a treatment program as well as his claim of sobriety for 60 days thereafter. The Hearing Officer also considered the fact that Employee was a 13-year employee in granting him a "last chance".

The Employee testified that he entered a treatment program in August, 1990. After completing his hospitalization, he moved to a structured after care facility that offered a sober environment.

After three months of sobriety, the Employee bid on a promotion to Lead which required his working the graveyard shift, from 1:15 a.m. to 9:15 a.m. The care facility made a special provision to allow the Employee to work nights; everyone else in the house worked days.

According to the Employee, the conditions at the facility were contrary to working nights. In addition, he had difficulty adjusting to the hours. As a result, the Employee's attendance record deteriorated again. He was absent on January 13, 1991 because he overslept. On January 6, 1991 he was also absent. The Employee testified that he believed he had been granted the day as a vacation day along with January 4 and 5, 1991 which had been approved by his supervisor. His vacation request indicates only that he was approved for leave on January 4<sup>th</sup> and 5<sup>th</sup>.

On January 29, 1991 the Employee was one minute late. He submitted an exception slip for the time because the gate in the south lot leading to the food kitchen was broken. The Employer does

not dispute the problem with the gate, but failed to grant the Employee an exception because he was the only employee late that evening. In any case, the Employee was unaware that his exception was not granted until after his discharge.

On January 13, 1991 the Employee overslept again and did not appear for work or notify the Employer. He claims that he overslept. Manager of Cargo Services Person 1 met with the Employee on February 14, 1991 to notify him of his proposed discharge. At that meeting, the Employee informed Person 1 that he believed he had received approval for vacation on February 6, 1991. The two met again on February 23, 1991 and the Employee asked Person 1 to reconsider his proposed discharge. Person 1 agreed to meet with the Employee again on February 26th to discuss whether he was willing to give him more time to prove himself.

On February 26, 1991 the Employee did not appear for work or notify the Employer. He was arrested that day after running a stop sign, due to outstanding warrants against him. In addition, the Employee was driving with a suspended license. The Employee came into work on his day off on February 27, 1991 to advise the Employer of what occurred the previous day.

On March 7, 1991 the Employee was notified of a pending Level 5 discipline. On March 10, 1991 the Employee was out sick and failed to call the Employer to notify them of his illness until 6:20 a.m., twenty minutes after the start of his scheduled shift. An Investigative Review Hearing was held on April 9, 1991 and the proposed discharge was sustained.

Following his discharge, the Employee remained at the care facility. He obtained construction work for several months and then returned to live with his family. According to the Employee, aside from maintaining his sobriety, he accepted Christ into his life. The Employee submitted numerous documents attesting to his continued participation in Alcoholics' Anonymous as well

as his involvement with the church. The Union requests a final opportunity for the Employee to return to his job at United on the basis of his proven record of sobriety and reliability.

### **CONTENTIONS OF THE EMPLOYER**

The Employer contends that it had just cause to discharge the Employee in March, 1991 due to his failure to maintain regular and dependable attendance. The Employer argues that it expended every effort to effectuate a change in the Employee's attendance without result. Further, the Employer gave the Employee a second last chance after he entered a rehabilitation program in an effort to face the problem that caused his irregularity in attendance.

The Employer asserts that there is no basis for mitigation in this case. While the Employee is a long term employee, his attendance problem spanned nearly his entire 14 years with the Employer. The Employer also argues that the Employee's post discharge conduct does not serve as a cause for mitigation since it is not the arbitrator's role to grant clemency.

In support of its penalty arguments, the Employer relies upon numerous prior arbitration awards dealing both with the issue of attendance as well as alcoholism. On the basis of the evidence, the Employer asks that the Union's grievance be denied.

### **CONTENTIONS OF THE UNION**

The Union does not dispute the Employee's record. It argues, however, that there is ample evidence that the Employee has overcome the disease of alcoholism and has maintained his sobriety through continued participation in AA and the acceptance of Christ into his life.

The Union contends that the Employee's mistake was to bid for promotion as a Lead and move to the graveyard shift before he was ready to accept such a radical change in his life. The Union

points out that the environment at the care facility was not conducive to evening work and that this contributed to the Employee's problem in maintaining good attendance.

With regard to the cases cited by the Employer, the Union contends that each case must be decided on its own merits. The Union asserts that the Employee's record of rehabilitation and success since his discharge demonstrates his ability to return to work as a dedicated and productive employee. The Union asks that the Employee be given one last chance to prove himself by reinstatement to his former position with the Employer.

## **OPINION**

The relevant facts in this case are not in dispute. The Employee had an unsatisfactory time and attendance record which failed to improve despite the Employer's efforts to correct the situation through its Non-Punitive Disciplinary Program.

The crux of the matter in this case, therefore, is whether the Employee's post discharge rehabilitation and demonstrated good character since his discharge on March 10, 1991 justifies his reinstatement. The Arbitrator finds that despite the Employee's accomplishments over the past two years, his discharge must stand for the reasons set forth below.

In determining whether an employer had just cause for discharge, an arbitrator generally reviews the information upon which the employer relied at the time of discharge to determine whether there was cause for termination. Post discharge conduct may be considered under certain limited circumstances either to support the employer's claim that reinstatement is uncalled for, or to bolster the union's request for a last chance.

Requests for a last chance reinstatement in cases involving substance abuse are not unique. The theory behind the request is that the misconduct which triggered the discipline was rooted in the

disease of addiction and that once rehabilitated, the employee is able to be a productive employee. The test is whether the individual, if returned to work, can be relied upon to meet his employment obligations in the future.

Decisions as to whether to mitigate discharge under these circumstances must be decided on a case by case basis. Where post discharge rehabilitation is considered in mitigation of the penalty, however, one or more of the following circumstances are normally present. One, the employee has not been counseled with regard to seeking employee assistance despite a record which indicates a possible problem. Two, the employee has not previously received treatment for his addiction. Three, the employee's recent poor record reflects a change from an otherwise satisfactory record over a significantly long tenure with the employer.

None of these circumstances is present in the case of Employee. One, the Employee was counseled several times to seek assistance for the problem causing his poor attendance. Two, he was afforded two opportunities to seek treatment for alcoholism. Three, the Employee's time and attendance with the Employer was problematic almost from the start of his employment.

Furthermore, the Employee was given a second last chance to save his job and was warned that failure to improve would result in the loss of his employment. In granting the Employee an additional last chance, the Employer made every reasonable effort to encourage the Employee to correct his attendance record. In addition, the Employer considered the Employee's length of service in granting him an additional last chance. For the Arbitrator to give the Employee an additional opportunity to return to work would render the last chance agreement to be meaningless.

The Employee commented at the hearing on the irony of the Employer discharging him when he had finally overcome his addiction. The fact of the matter is that the Employee was not fully

rehabilitated in February and March of 1991 as evidenced by his inclination to fall back into a pattern of absenteeism when faced with adversity, as exemplified by his absence on March 10, 1991.

The Arbitrator observed the Employee at the hearing with great care. She is persuaded that today, the Employee has overcome his problem of addiction to alcohol and has developed the inner strength to confront what lies before him. Moreover, tragic as his discharge was, it was the act of losing his job that helped create the circumstances of his recovery and ultimate personal success. This Arbitrator has great respect for the Employee's accomplishments. Nevertheless, I am compelled to find that the Employer had just cause for discharge in March of 1991 and to deny the grievance.

Therefore, on the basis of the record before me, I make the following award:

#### AWARD

The grievance is denied. The Employer had just cause for the discharge of Employee.