BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SUNCOKE ENGERGY, INC.
INDIANA HARBOR COKE COMPANY

and

UNITED STEEL WORKERS LOCAL UNION 1010-05

(Crim Termination Grievance)

Arbitrator: Paul Gordon

Appearances:

Mr. Matt Beckman, Grievance Vice-Chairman, 7047 Grand Avenue, Hammond, IN 46323 appeared on behalf of United Steelworkers Local 1010.

Attorney Philip B. Phillips, Foley & Lardner LLP, 500 Woodward Avenue, Suite 2700, Detroit, MI 48226 appears on behalf of SunCoke Energy, Inc., Indiana Harbor Coke Company.

ARBITRATION AWARD

SunCoke Energy, Inc., Indiana Harbor Coke Company, herein the Company or Employer, and the United Steelworkers Local Union 1010-05, herein the Steelworkers or Union, are Parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Parties jointly selected Paul Gordon to serve as Arbitrator for a grievance filed by the Union concerning the termination of employment of one of its members, Randy Crim, herein Crim or Grievant. Hearing in the matter was held in Hammond, Indiana without a court reporter on February 25, 2020. The Parties agreed to a briefing schedule and briefs were filed by March 25, 2020 when the record was closed.

ISSUES

At the hearing the Parties stipulated to a statement of the issues as:

> Whether the Employer had just cause to terminate Grievant, Randy Crim for violation of the attendance policy?

In its brief the Union states the issue as:

> Did the Company properly discharge the Grievant for cause, for violations of the Company no fault attendance policy, pursuant to Article 5 Section J of the current BLA. If not, what is the appropriate remedy?

In its brief the Company states the issues as:

> Whether the Company had just cause to discharge grievant Crim for violation of the Attendance Policy?

The issue as stipulated at the hearing is broad enough to cover the statement of the issues in the Parties' briefs, and by its nature encompasses the provisions of the collective bargaining agreement, which is the Basic Labor Agreement. The record best reflects a statement of the issues as:

> Whether the Employer had just cause to terminate Grievant, Randy Crim for violation of the Attendance Policy?
>
> If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE FIVE – WORKPLACE PROCEDURES

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Section H. Adjustment of Grievances

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5. If arbitration is timely demanded, IHCC and USW shall attempt to agree upon the selection of an arbitrator to hear the dispute. Absent such an agreement, the arbitrator shall be designated in accordance with the rules and procedures of the Federal Mediation and Conciliation Service. It is agreed that at the request of either party a meeting shall be convened for the purpose of reviewing the position of the parties with respect to any grievance appealed to arbitration. The representative for the Union shall be the Union's advocate; IHCC may be represented by its advocate or its Manager of Human Resources. Such meeting, if requested in a timely manner, shall take place before the arbitration date is scheduled. Attendance at the meeting, other than by those advocates, shall be by mutual agreement. It is the intent of the parties that this meeting shall result in a thorough exchange of positions and pertinent facts relied upon by each party so that neither party shall be disadvantaged in arbitration as a result of a new position taken or a new fact being relied upon. In reaching a decision, the arbitrator shall be restricted to the specific terms of this

Agreement and shall not have the authority to add to, subtract from, or in any way alter or modify the terms of this Agreement; this provision for arbitration, moreover, shall not apply to any dispute as to the terms or provisions to be incorporated in any proposed new agreement between the parties. The arbitrator's power to render a decision shall be limited to the interpretation and application of this agreement and the decision of the arbitrator shall be final. The arbitrator's fees and expenses shall be divided equally by the parties.

* * *

Section I. Discharge and Discipline

1. In the exercise of its right to discharge Employees for cause, IHCC agrees that an Employee shall not be peremptorily discharged, but in all instances in which IHCC may conclude that discharge is warranted, the Employee shall first be suspended for a period of five (5) consecutive days and notified in writing that he is subject to discharge at the end of that five (5) consecutive day suspension; a copy of the written notification shall also be given to IHCC's Grievance Committeeman and Grievance Chairman of the USW Local Union 1010.

2. During the five (5) consecutive day suspension period provided for in this Section, the suspended Employee may request and be granted (sic) statement of his or her offense and a hearing before IHCC's Plant Manager or his designate. IHCC's Grievance Committeeman and an official of the USW shall, upon request of the employee, be permitted to attend and participate in that hearing. At such hearing, facts and circumstances shall be disclosed to and by both parties. If no hearing is requested within the five (5) consecutive day suspension period, the discharge shall be final and shall not be subject to review under the grievance and arbitration provision of this Agreement.

3. If a hearing is requested and held as provided for in Paragraph 2 above, minutes of that hearing shall be taken by IHCC which shall recite the facts presented; the positions of the Employee, the USW, and IHCC; contractual provisions relied upon by each; and the rationale for IHCC's final decision on whether such suspension shall culminate in discharge or whether it should be modified, extended or revoked. The employee and the Grievance Committeeman shall be provided with a copy of such minutes. IHCC's decision shall thereafter be subject to arbitration; those minutes shall constitute IHCC's written response under Section H, Paragraph 4 and, thus, the USW shall have fourteen (14) days from that decision to demand arbitration.

4. If IHCC's discharge decision is revoked, the Employee shall be returned to his regular position and shall be compensated on the basis of an equitable lump sum payment mutually agreed to by the parties or, in the absence of mutual agreement, made whole for the period of his suspension or discharge. In instances where an employee is entitled to reinstatement and backpay as a result of an Arbitration Award or a grievance settlement, earnings of such an employee from employment outside IHCC during any part of the period in question shall not be deducted from the amount owed the employee.

* * *

6. Justice and Dignity

A. In the event the Company imposes a discharge, and the Union files a grievance within five (5) days after notice of the discharge the affected Employee shall remain on the Job to which his/her seniority entitles him/her until there is a final determination on the merits of the case.

*** * ***

Section J. Management Rights

Except as specifically limited by other Section of this Agreement, IHCC shall retain the sole right to manage its business without interference or further obligation. That right includes, without limitation, the rights to direct the workforce; to hire, assign, transfer; layoff or promote; to demote, discharge or discipline bargaining unit members for cause; to determine size and composition of the workforce; to introduce new and improved methods of work, machinery, materials, tools and/or appliances; to purchase, install, change, or remove equipment; to fix standards of quality and quantity of work done; to determine work schedules, number of shifts, and type of work; and to make reasonable rules and regulations for the purposes of efficiency, safety practices and discipline.

* * *

BACKGROUNDAND FACTS

The Company has a facility known as the East Chicago Plant. Grievant has worked there for approximatively ten (10) years and was in the Maintenance Mechanical Department at all times material herein. On June 6, 2019 the Company suspended Grievant's employment subject to discharge for accumulation of nine (9) occurrences of absenteeism or tardiness under the Company Attendance Policy which subjects an employee to discharge for eight (8) occurrences in a rolling 12 month period as of March 21, 2019. Grievant has remained on the job pending this arbitration pursuant to the Justice and Dignity clause, Article Five, Section 6 (A) of the CBA.

The Company Attendance Policy states in pertinent part:

POLICY AND PURPOSE:

One of our greatest responsibilities is to come to work regularly and be at your workstation, properly attired at your assigned time. Our attendance and punctuality standards are based on a no fault system. We are concerned only about the frequency of occurrences, not the reasons for absences or tardiness…..

OCCURRENCE DEFINED:

With the exception of approved leaves of absences, any absence will result in one occurrence for each day the employee is absent. Each tardy will be considered one-half occurrence. Failure to work at least one-half of your shift or an entire scheduled workday will result in one occurrence. In the event of any absence, you personally must notify your supervisor vial call off (219-397-2207) line prior to the start of your shift each day. Failure to notify your supervisor via the call off line of your absence as promptly as possible before the start of your shift will result in a one half occurrence, failure to notify your supervisor at all will result in two occurrences (no call no show).

An absence of three (3) consecutive days or less due to illness or injury shall count as a single occurrence, provided that the employee has both: (a) provided medical documentation of the need for the absence; and (b) has properly reported the absence. Occurrences of greater than 3 days will also require a clearance from the ArcelorMittal Clinic and or appropriate medical authority.

What are the limits? Employees are allowed up to **TWO OCCURRENCES** in a 12-month period before a counseling session and first written verbal warning takes place. At **FOUR OCCURRENCES** the employee will be given a written warning and be notified that a final written warning at **SIX OCCURRENCES** is the next step in the progressive disciplinary process. A total of **EIGHT OCCURRENCES** in a 12-month period equals termination.

Are there exceptions? The following absences will not result in occurrences if you follow the procedures as defined in this policy:

* * *

3 Approved FMLA or other Healthcare related Leave

* * *

With the exception of an approved leave of absence, you are to personally call in your absence each day that you must be off unless you are totally incapacitated and have documentation evidence of this condition. It is the employee's responsibility to give proper notice and provide any relevant information regarding an absence when seeking approval and or relief from potential discipline in a timely manner.

* * *

Warnings and Discipline for Absenteeism and Tardiness
Warnings for absenteeism and tardiness for employees will be administered as follows:

1. **Counseling Session and Verbal Written Warning**: when you have accumulated **Two (2)** occurrences. This warning will remain in effect for one calendar year from the date of the warning or the reduction of occurrences, whichever comes first.

2. **Counseling Session and First Written Warning**: when **Four (4)** occurrences have been accumulated. This warning will remain in effect for one calendar year

from the date of the warning or the reduction of occurrences, whichever comes first.

3. **Counseling Session and Final Written Warning**: when **Six (6)** occurrences have been accumulated. Three day suspension (commuted) This warning will remain in effect for one calendar year from the date of the warning or the reduction of occurrences, whichever comes first.

4. **Termination***: an employee is subject to discharge when **Eight (8)** occurrences have been accumulated.

*Prior to making the decision whether to discharge an employee with eight occurrences in a 12 month period, the Company will review the circumstances of each absence in the rolling 12 month period to determine whether discharge would be warranted. During the Union/Company meeting to discuss the possible discharge of said employee, the employee will be afforded an opportunity to be heard before the discharge decision is made.

The Company will make every effort to insure that progressive discipline steps are issued promptly barring any instances when an employee is on vacation, off on a leave of absence or otherwise unavailable.

OCCURRANCES REMAIN IN EFFECT FOR A 12-MONTH, ROLLING PERIOD FROM THE LAST INCIDENT.

* * *

The policy is subject to change at management's discretion with appropriate notice.

The above Attendance Policy was in effect at all times in this matter.

On August 24, 2018 Grievant was issued a Counseling and Verbal Waring and issued 2 points at level 1 for absences occurring on November 7, 2017 and July 9, 2018.

On October 3, 2018 Grievant was issued a Counseling Session and First Written Warning and an additional 2 points, for a total of 4 points at level 2, for absences occurring on September 4, 2018 and September 13, 2018.

On November 9, 2018 Grievant was issued a Counselling Session and Final Written Warning and an additional 2 points, for a total of 6 points level 3, for absences occurring on September 21, 2018 and October 8, 2018.

For each of the above three Counseling and Warnings there is a three page document covering the dates and points of occurrences and the nature and level of the discipline. The first page contains some instructions to the supervisor conducting the corrective action for discussing it with the employee, in this case the Grievant. It also contains the provisions:

As this action is both discipline and a counseling session, a best practice that we expect from first line leaders is to hold a two-way discussion with the employee and cover the following points:

Discuss the reasons for the employees' absence. Ask him what is going on? Why does it seem like they are starting to miss time.

Share with the employee the consequences of their absence:

-Who had to work over in their place?
-What schedule changes were needed to provide coverage
-How was production hurt / disrupted by the employee's absence?
-Remind the employee we are counting on him/her to be here every day. We need them!

Ask the employee what action they intend to take to prevent further absences that burden co-workers and hurt production?

Company Human Resources Manager Rhonda Dehaarte testified at the hearing that she did not know if the supervisors issuing the above disciplines to Grievant actually engaged in the counselling items as noted on the first page of the disciplines. Grievant had refused to sigh each of the three discipline documents. Each contains the statement: "Your signature on this document is an acknowledgement that this matter has been discussed with you and you have reviewed this document prior to inclusion in your personal file." Each also instructs the supervisor to sign the document after the corrective action is discussed with the employee. The three disciplines are signed by the supervisor.

The Union filed a grievance concerning the November 9th Counselling Session and Final Written Warning discipline. The grievance is dated 1/5/2019, and contends Grievant should not be at this level of discipline as the occurrence dated 11/13/2017 should have fallen off his record putting him at a written warning. The Company denied the grievance. Union Griever Will Revera testified that the Company has a standard answer to attendance grievances which includes the statement: "The Company modified the policy to reflect these changes, and the grievant will be given an opportunity to explain any mitigating circumstances upon accumulation of eight occurrences."

Grievant was absent from October 8 through October 10, 2018 without prior excuse. That was part of two series of days of absences. One concerned October 8 through October 10, 2018. The other concerned October 15 through October 19, 2018.

These absences later became the subject of review by the Company after Grievant was assessed by the Company with two (2) occurrences for a no call/no show for an overtime shift on March 21, 2019.

The Company assessed Grievant points for a no call/no show for an overtime shift on March 21, 2019. The Parties disputed whether the March 21, 2019 no call/no show was properly assessed against Grievant.

Grievant's normal work schedule for that week was Tuesday through Saturday day shifts. The last shift Grievant worked prior to March 21st was the previous Friday, March 15th. He testified he had not been to work until he came to work on Thursday, March 21st. He testified that he had called Brian Ashford to schedule overtime for March 19th and 20th, Tuesday and Wednesday overtime midnight shift – Monday night to Tuesday; Tuesday night to Wednesday. Grievant later called off for the overtime and day shifts, four in total, for March 19th and 20th. Grievant had a discussion with Brian Bain on March 21st about the no call no show, and he told Bain he had not seen the posted schedule until March 21st. Grievant said to Bain that if he gets charged with these points he would probably be in trouble. He has never before had a no call/no show.

The Company had allowed overtime shifts to be requested by telephone call. As of January 23, 2020 the Company no longer allowed overtime requests by phone. The Union understood this was because there had been too many mistakes made by using phone calls to request overtime shifts, and felt Grievant's case fit within that. The Company posted a written notice, calls for OT requests will no longer be accepted, at its written overtime schedule which employees use to check their overtime requests.

The Company counted the March 21, 2019 matter as a 2 point occurrence. This would put Grievant at or above the 8 point level for termination. The Company felt he had accumulated 9 points in a rolling 12 month period. The Company occurrence history report of 6/3/2019, Exhibit C-5, shows occurrence points of 1 each for 7/9/2018, 9/4/2018, 9/13/2018, 9/21/2018, 10/10/2018, 10/16/2018, and 1/8/2019. The document has a hand written entry for 3/21/2019 for 2 points as a NCNS of OT shift 8 hrs. (scheduled). The total of all the points on the document is 9. Dehaarte hand wrote the March 21st occurrence points on the report because if she had entered it into the system on March 21st it would have automatically generated a termination and been sent out to all the Managers. She had not yet meet with Grievant and the Union to determine if discharge would be warranted.

The same Exhibit, C-5, which shows an accumulation of 9 occurrence points in a 12 month rolling period, also shows 2 approved FMLA absences for March 19, 2019 and 2 approved FMLA absences for March 20, 2019. It also shows a total of 42 other absences from 7/9/2018 through 3/20/2019 which were approved for FMLA or otherwise not counted as occurrences under the Attendance Policy.

On March 21, 2019 Union Assistant Griever Sean Castor sent an email to Company management, Brian Baine and Brian Ashford, about Grievant's issuance of a no call/no call for what Castor described as overtime he had not signed up for. The email asked for any documentation the Company had regarding the phone conversation about the no call/no show. He got no response. On March 26, 2019 Castor spoke with Brian Bain requesting a meeting for the following day. The meeting did not occur. On March 27, 2019 Castor spoke with Brian Ashford about the no call/no show. Ashford had taken a phone call from Grievant to schedule the overtime shift. Castor testified at the hearing that Ashford told him he probably or most likely wrote down

the wrong overtime shift for Randy Crim, and he was concerned that he'd most likely be in trouble for that but could not talk to him directly because his supervisor informed him to not answer any questions because of the email Castor sent.

Pursuant to the Attendance Policy, the Company meet with Grievant and the Union on April 5, 2019 to determine if discharge would be warranted. On April 5, 2019 Castor meet with H. R. Manager Dehaarte and Grievant. The Parties' respective witnesses at the hearing testified differently as to whether the no call/no show was discussed. Castor testified he twice brought up the no call/no show, but Dehaarte ignored this and continued to talk to Grievant about medical issues. Grievant did not say anything about the conversation between Castor and Ashford. Castor testified that he did not mention in the meeting anything about Ashford writing down the wrong shift for Grievant. Dehaarte testified that before Castor's hearing testimony he had never made the representation or claim about Ashford writing down the wrong shift, and that no one from the Union had.

Part of that meeting process reviewed the circumstances of each absence in the rolling 12 month period. Grievant contended at the meeting that he had reported off the October 2019 dates as FMLA to the ReedGroup, which tracks approved leave. The Company advised Grievant that he needed to provide evidence that he reported this to the ReedGroup.

On October 29, 2018 Grievant's Doctor had faxed to the Company two brief notes dated 10-29-18 stating "under my care from 10-8-18 to 10-10-18" and, "under my care from 10-15-18 to 10-19-18."

The Company sought to obtain information from Grievant's Medical Doctor for these dates, writing to him by letter of April 9, 2019 to determine if Grievant was unable to work on those dates and if so, why. The Company also wanted to know from the Doctor if Grievant's absences were due to a disability, and if so the nature and severity of his condition. The Company asked the Doctor to reply by April 16, 2019. He did not reply by that date.

On May 7, 2019 the Company wrote to Grievant about not having heard back from his Doctor. The letter reminded him of the April 5th discussion and his need to provide evidence that he reported those dates off the ReedGroup and that to date he had not provided the requested evidence. The letter also stated that the ReedGroup confirmed that it has no record of him reporting off FMLA leave for October 10, 2018 or October 16 – 19, 2018. The letter asked Grievant to follow up with his Doctor to provide the requested information for absences of October 19 and October 16 – 19, 2018 by no later than May 14, 2019.

On May 9, 2019 the Company received two brief notes from the Doctor dated 5-9-10 stating "unavailable to work from 10-8-18 to 10-10-18" and "unavailable to work from 10-15-18 to 10-19-18." After that the Company did not receive any other information from the Doctor.

By letter of May 24, 2019 The Company informed Grievant of its receipt of his Doctor's notes dated May 9, 2019 and that they are insufficient as they fail to provide information regarding why he was unavailable for work, suggesting several examples. The letter said the statement that he was "unavailable to work" does not provide information to allow the Company to determine

whether the absences were due to a disability or for some other reason. The letter requested Grievant to follow up with his Doctor to ensure the Company was provided the requested information by not later than Friday, May 31, 2019. It also contained in bold face type the statement:

> If the requested information is not provided by Friday, May 31, 2019, your employment will be terminated in accordance with the Attendance Policy.

After the above letter was sent, the Company did not receive any further information from the Doctor, Grievant or the Union.

The Company ultimately assessed 1 occurrence point each for the 10-8-18 to 10-10-18 series of dates and the 10-15-18 to 10-19-18 series of dates, for a total of 2 occurrence points, under the Attendance Policy.

By letter of June 6, 2019 the Company wrote to Grievant regarding suspension subject to discharge:

> On March 21, 2019, you have accumulated a total of 9 points within a rolling 12-month period; resulting in Step 4 termination under the attendance policy. Based upon the repeated nature of your actions and supported by the progressive attendance discipline process, this incident subjects you to discharge; therefore pursuant to Article V, Section I – Discharge and Discipline of the Collective Bargaining Agreement, you are being issued a five (5) consecutive day in-house suspension pending discharge.

Pursuant to Article V, Section I. 2, Grievant sought a hearing on the suspension and pending discharge. The Company, Grievant and the Union attended the hearing. The Company did not revoke the discipline.

Dehaarte testified that in the post termination and grievance meetings after April 5th, where meeting minutes were kept and exchanged by the Parties, none of the minutes indicated that the Union claimed Ashford had stated he probably wrote down the wrong shift for Randy Crim. Those meetings were June 19th, October 30th and November 6, 2019. Rather, she testified, the focus of the meetings was on Grievant's Doctor's notes. Castor testified that he could not say without his notes that at the post termination meetings he was at, that he or anyone from the Union said anything about Ashford probably writing down a wrong shift for Grievant. He did testify that he did not recall one way or the other if anyone from the Union brought it up.

Castor testified that throughout time in talking with Dehaarte about other cases, Castor let her know in a general sense what had happened to Grievant, that there were issues with Mr. Ashford and he brought up Grievant as well. Castor testified that he specifically stated to Dehaarte about Ashford having said he probably wrote down the wrong shift for Crim.

Grievant testified to meetings with the Company and the Union after his termination notice. He was present at all the meetings. Grievant did not talk during the meetings and he did not tell

the Company during those meetings anything about Ashford indicating to Castor that he had probably written the wrong shift or anything to that effect. Grievant also testified that he did not recall anyone from the Union saying this at those meetings. Grievant believes it was the 2 occurrence points for the no call/no show that lead to his termination. He testified that the focus of the meetings was on his Doctor's notes. After getting the notice of discharge Grievant never indicated to the Company, with or without the Union, that he was not scheduled to work overtime on March 21, 2019. He testified it was part of the first meeting when he and Castor went in.

The Company made a final decision to discharge, leading to this arbitration.

Additional facts are in the Discussion.

POSITIONS OF THE PARTIES

The Company

In summary, the Company argues that the evidence established just cause to discharge Grievant for violating the Attendance Policy after following its progressive discipline system. Grievant had multiple opportunities but never provided any reason why discharge was not warranted. The Union failed to present admissible evidence that Grievant did not violate the Attendance Policy warranting discharge.

The Company argues that Grievant was progressively disciplined and eventually discharged after receiving nine (9) occurrences in a rolling twelve-month period in accordance with the Attendance Policy. On August 24, 2018, he was issued a Counseling Session and Verbal Written Warning after receiving two (2) occurrences. On October 3, 2018, he was issued a Counseling Session and First Written Warning after receiving four (4) occurrences. On October 9, 2018, he was issued a Counseling Session and Final Written Warning after receiving six (6) occurrences. On March 21, 2019, he was a no-call/no-show for his overtime shift, which resulted in two (2) additional occurrences under the Attendance Policy. (Employer Exhibit # 5) The no-call/no-show resulted in a total of nine (9) occurrences in a rolling twelve-month period.

The Company argues under the Attendance Policy before the Company makes a final decision whether to discharge an employee, a meeting will be held between it, the Union and the employee to discuss each occurrence, give the employee the opportunity to be heard, and determine whether discharge is appropriate. And the Collective Bargaining Agreement grievance process also provides additional opportunities for employees to be heard regarding the reasons for discharge. The employee and Union are entitled to a hearing with the Company, at which time the facts and circumstances leading to discharge, and the positions of the parties are to be discussed. In addition, if arbitration is demanded, the Parties are afforded yet another opportunity, prior to arbitration, to present any facts relevant to the discharge and to avoid any new positions or claims being asserted for the first time at an arbitration hearing.

The Company argues that it met with Grievant and the Union to discuss each occurrence, give them the opportunity to be heard, and determine whether discharge was appropriate. At the

Attendance Policy meeting and the meetings after termination the Grievant and the Union did not claim he was not a no call/no show, or that the scheduler said he had probably wrote the wrong overtime shift.

The Company argues that arbitration is not an abdication by management of its duties regarding discharge and the arbitrator does not have authority to re-determine the matter by his own standards, citing arbitral authorities. Determining whether the Company had just cause to terminate Grievant's employment must be made based on the information the Company had at the time its deciding was made, citing arbitral authority.

The Company argues the evidence established that the Company had just cause to terminate Grievant's employment for violation of the Attendance Policy. The Union's claim that the Maintenance Scheduler allegedly stated that he "probably" wrote down the wrong overtime shift for Grievant is not evidence and should not be considered. The Scheduler's statement is hearsay and speculative. It doesn't refute the basis for discharge. It is not credible and lacks corroborating evidence. Being brought up for the first time during the hearing, it is contrary to the spirit of the CBA requiring disclosure of all facts supporting respective positions. At no time during the pre-termination meeting or during the grievance meetings did Grievant or the Union claim Grievant was not a no call/no show or that the scheduler probably wrote down the wrong shift. The Parties had multiple opportunities to discuss their respective positions and the basis for the same. The Company can only make its decision based on information available at the time. The testimony must be rejected.

The Company argues that the evidence presented during the hearing established that it had just cause to terminate Grievant's employment for violating the Attendance Policy.

The Company requests that the grievance be denied.

The Union

In summary, the Union argues that the facts in this case do not support that the Grievant accumulated eight or greater occurrences in a 12-Month period, therefore the Company cannot meet the burden to prove cause for the discharge, citing arbitral authority as to burdens of proof.

The Union argues Company did not perform counselling sessions. In the three discipline statements issued the Company intentionally attempted to conceal their obligations under the policy to conduct counselling sessions. The Union presented the cover page. Company witness Dehaarte did not know in all of the discipline statements if the counseling sessions had been done. The counseling sessions never occurred, which is in the policy.

The Union argues that in every discipline statement, the Company notified the Grievant around a month after the triggering occurrence. In the 2015 Award the Arbitrator mandated prompt steps to be followed in progressive discipline. (Arbitration included).

The Union also argues that the March 21, 2019, no call/no show used to discharge is not recorded in the Occurrence History dated May 7, 2019. The only date on the failure to report off

is handwritten documentation, which again never appears in the record. As late as January 16, 2020, the no call/no show is still not documented in the Occurrence History.

The Union further argues that the Company did not present any evidence that the no call/no show did in fact take place. No first hand testimony was provided from the shift supervisor that signed the Grievant up for the overtime shift (the BLA prevents the Union from calling Managers as witnesses). The Union presented evidence using the Company documentation as well as testimony that the Grievant had in fact, not signed up for the day he received the handwritten no call/no show.

The Union contends the Company advanced the position that the Union had not filed grievances at the earlier steps and produced a grievance without a Company response. The Union submits that Dehaarte's credibility should be put in question based on the standard answer she gives to all grievances filed for absenteeism. The Union produced the standard response for all grievances:

> "The company modified the policy to reflect these changes, and the grievant will be given an opportunity to explain any mitigating circumstances upon accumulating eight occurrences. The grievance is without merit and denied."

This is a clear example of the Company attempting to set a moving target for the Union. Finally, in this instance the Company attempts to advance a procedural issue with the Union case. The errors made by the Company taken separately may seem inconsequential but taken together are significant when they are the basis for the termination of a ten (10) year employee.

The Union also argues that the process for signing up for overtime recently changed. Employees are no longer authorized to call in overtime shifts. This is because numerous mistakes made by Shift Supervisors recording the shifts. This was unrebutted by the Company. The Union is stating this is what happened in this case (Union Exhibits 4 and 5). Sean Castor testified that he sent an email to the Company attempting to resolve the no call/no show. Mr. Castor then contacted the Maintenance Manager Brian Bain to set up a meeting to discuss the no call/no show. He then contacted the Shift Supervisor Brian Ashford to discuss the no call/no show. Castor was told by Mr. Ashford he may have made a mistake and that he may get terminated for this and could not talk about it anymore. The Company did not present any of these witness for the Union to question or to impeach Mr. Castor's testimony in the grievance process or in arbitration. Therefore the Arbitrator must take Mr. Castor's testimony as fact.

The Union contends that Grievant's testimony as to his shifts is consistent with the Occurrence History introduced into the record, by the Company, for FMLA report offs. Rather than what he said to Bain on March 21st, what is important is Grievant's actions. He then contacted his Union Rep. Sean Castor and the facts of the entire situation began to be reviewed and action began to take place by the Union and Grievant. Castor testified he contacted management about this on March 21 the very same day. The Union argues that no credence should be given to the conversation with Management when Grievant immediately found out he was going to be receiving discipline, and that his response is normal given the situation and the facts. The Grievant did not ignore the no call/no show, he challenged it immediately. It must also be noted that the

Union has challenged the no call/no show from the outset of the grievance procedure, which is documented in the email and corrections document attached to the brief.

The Union argues what is the most controlling though is that the Company could not prove that the Grievant did in fact have a no call/no show for an overtime shift. Without the no call no/show on the Grievant's record, he would have reverted to good standing and have zero occurrences on his record at the time of the hearing.

The Union requests that the Company be ordered to cease and desist, and be directed to adjust the Grievant's record to reflect zero occurrences as documented on the January, 2020 Occurrence History.

DISCUSSION

The issue in the case is whether the Company had just cause to terminate Grievant's employment for violation of the Company Attendance Policy. The Company contends Grievant accumulated 9 occurrence points in a rolling 12 month period to reach level four, which subjects an employee to discharge when 8 occurrences have been accumulated. The Company records of Recent Occurrence History, Exhibit C-5, shows this. The Union contends that Grievant did not accumulate 9 points because the 2 point occurrence for a March 21, 2019 no call/no show should not have been assessed, leaving Grievant with fewer than 8 occurrence points so he was not subject to discharge.

During the meeting between the Company, Grievant and the Union at the pre-discharge decision, post discharge decision and pending arbitration stages, the Parties reviewed and discussed the occurrence points assessed for the absences surrounding Grievant's Doctor's notes. At the hearing and in its written arguments and brief the Union has not pursued a challenge to those 2 points and that will be considered abandoned. Those 2 occurrence points, 1 for October 10, 2019 and 1 for October 16, 2019 will remain as assessed.

It should be noted that in this arbitration the Union submitted a document with its written brief that concerns the note taking in the meeting which is called for under Article 5, Section I.3 of the CBA. This document was not presented by the Union at the hearing in this case and there was no agreement between the Parties or consent of the undersigned to have this document submitted into evidence after the hearing concluded. The document hasn't been subject to foundation by the Union or cross examination by the Company. Considering it for any purpose would be prejudicial to the Company and these proceedings. It has not and will not be considered in this Arbitration Award for any purpose. It was mentioned very generally in the Union Position of the Parties herein because it was referred to in the Union argument. However, no weight or further consideration is given to it here for factual, argumentative or any other purpose.

The Company has the burden to establish just cause for discipline and discharge, and there are cause provisions in Article 5, Section I.1 and in Article 5, Section J of the CBA. The CBA also provides that the Company has the right to make reasonable rules, Articled 5, Section J, and specifically, reasonable rules for absenteeism in Article 5, Section C.2. The Company Attendance

Policy is a progressive discipline policy used by the Company pursuant to the rights it has under the CBA. Under the Policy, after the accumulation of 8 occurrences in a 12 month rolling period, the Company still conducts a review of the circumstances with the employee to determine whether discharge would be warranted prior to making a decision to discharge.

Generally, just cause involves proof of wrongdoing and, assuming guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, whether the punishment assessed by management should be upheld or modified. See, *Elkouri & Elkouri,* HOW ARBITRATION WORKS, Sixth Edition, p. 948. In essence, two elements define just cause. The first is that the employer must establish conduct by the Grievant in which it had a disciplinary interest. The second is that the employer must establish that the discipline imposed reasonably reflects its disciplinary interest. In this case the Parties have in their CBA provisions for the Company to establish the Attendance Policy which helps guide how just cause is applied here.

The Company certainly has an interest in the attendance of its employees and absenteeism. Some of those interests are set out in the written disciplines it uses such as: investment in development of skills; depending of employees to report to scheduled work; absences creating hardships on co-workers, and; difficulties in satisfying customer expectations. When employees are absent or tardy without approved leave the Company has a disciplinary interest in those absences.

The Company has established a disciplinary interest in the absenteeism of Grievant. In the 12 month rolling period before March 21, 2019 Grievant had accumulated 7 occurrence points under the Attendance Policy. The question is whether he should be assessed 2 occurrence points for a no call/no show for the overtime shift on March 21, 2019. The Company would also have a disciplinary interest in those.

The Company did present a prima facie case that Grievant accumulated 9 occurrence points in a rolling 12 month period making him subject to discharge. Through the credible testimony of Human Resources Manager Dehaarte, the Recent Occurrence History dated 6/3/2019, Exhibit C-5, established this. The March 21, 2019 2 occurrence points for no call/no show was for a scheduled 8 hour overtime shift, the one at issue here. The assessment of these 2 points generated the April 5th meeting between Dehaarte, Grievant and Union Rep. Castor. After that meeting and series of communications concerning the Doctor's notes, the Company made the decision to discharge. The 2 occurrence points for March 21, 2019 were a necessary part of that decision as they placed Grievant at level 4. No other evidence presented by the Company supported the March 21, 2019 no call/no/show for those points.

There was other evidence on the March 21, 2019 matter that was presented by Grievant and the Union. Grievant testified that he called in to request overtime shifts for March 19th and March 20th. These would be in addition to his regular shifts for those days. Any cross examination on this point did not undermine his testimony. There is no other evidence as to what dates Grievant requested when he called in. Other than Exhibit C-5 there was no documentation presented as to schedules or calls that directly covered Grievant's schedule for March 21, 2019.

This Arbitration Award does not consider the Union evidence and arguments about the purported statement of Brian Ashford purporting a mistake made in writing down the requested overtime. The fact matter concerned here is only what Grievant said and did, and not what the Union offered by way of Castor's conversation with Ashford. Although the hearsay Ashford statement was admitted into evidence, it is given no weight. This is primarily because the assertion that Ashford made the statement was not made by Grievant or the Union in the several meetings surrounding the discharge and arbitration proceedings, similar to the proffered and unconsidered document the Union submitted with its written brief and argument. Both Grievant and Castor testified they did not bring it up at any of the meetings and had no recollection that anyone brought it up. Dehaarte testified that it was not brought up at those meetings. The CBA requires the Parties to provide the positions and pertinent facts relied upon by each at the post discharge meeting under Article 5, Section I,2, and Article 5 Section H.5. Both Sections use the word "shall." The Union did not abide by these provisions of the CBA as to the purported Ashford statement and that statement cannot be used.

Grievant and the Union did however, continue to challenge the discharge generally throughout the meetings. The notes of the post discharge meetings were not presented as evidence and, although Dehaarte testified the Ashford matter was not mentioned and the focus was on the Doctor's notes, there is insufficient evidence to make a determination that Grievant's general challenge to the occurrence totals was not mentioned.

Besides Grievant's testimony as to requesting overtime shifts for March 19th and March 20th, he also testified that he called off those 2 overtime shifts as well as his 2 regularly scheduled shifts for those days. That testimony was not impeached. It is supported by the Company record which does show that he called off those shifts and that was approved for FMLA. These consistencies support his testimony as to the dates for which he requested overtime shifts.

Exhibit C-5 also show the 42 absences that were not counted as occurrence points from 7/9/18/through 3/20/19. This shows that Grievant was fairly diligent in managing his absences even if he had accumulated 6 or 7 occurrence points in that time period. He normally handled it correctly.

It is also instructive that when Brian Bain and Grievant spoke on March 21, 2019 about the no call/no show, Grievant indicated to Bain that he would probably be in trouble. This was in reference to his points under the Attendance Policy. Grievant had been given several written warnings setting out how many points he had. Exhibit C-3 shows that he was given written notice that he had 6 points as of November 9, 2018. He had an additional unexcused absence for January 8, 2019, putting him at 7. This supports him knowing that he had at least 6 or 7 occurrence points prior to March 21, 2019. His statement to Bain makes sense in that regard. He had not been at work since March 15, 2019 and had not seen the overtime schedule. It is not likely that he would knowingly fail to call or appear for a work shift being at the level he was.

Grievant also immediately contacted his Union to respond to being notified on March 21, 2019 that he was a no call/no show for that date, and the Union made some attempt to promptly investigate that. That reaction is also consistent with him not having requested March 21st for overtime.

An important matter of evidence is the change the Company made in January, 2020 to no longer allow overtime to be requested by phone call due to mistakes being made in that manner. It shows that mistakes in scheduling phone call requests for overtime were happening during the time Grievant made his phone request. This supports Grievants's position that he called for March 19 and March 20, not March 21, 2019 and that he should not have been scheduled for an overtime shift on March 21, 2019.

In order to find that Grievant had a no call/no show on March 21, 2019 it would be necessary to conclude that he lied in his testimony. There is nothing in the record to demonstrate that he lied. His testimony as to his requested overtime dates is not his only evidence. His testimony, the context of properly calling off other scheduled shifts, particularly those for March 19, 20, 2019, his reaction on March 21st, and the Company taking policy actions to prevent mistakes being made in calling for overtime requests all mitigate against a finding that he lied, even if his job is at stake.

Weighed against this is the Company record at Exhibit C-5 and little else. The Company does argue that the no call/no show was not brought up by Grievant or the Union at the April 5, 2019 pre-discharge meeting with Dehaarte. Grievant and Castor testified that it was at least broached, even though the Ashford statement was not mentioned. A close review of Dehaarte's testimony was that the Ashford statement was not mentioned, and that has already been established. She actually was not asked if the no call/no show itself was brought up, as opposed to the Ashford statement. The purpose of the meeting under the Attendance Policy requires the review of the circumstances of each absence. Thus, the March 21, 2019 no call/no show would be expected to be brought up. I am persuaded that Dehaarte did follow the Attendance Policy and reviewed March 21, 2019 even if it was not reviewed in any detail. A good faith effort on Dehaarte's part to provide Grievant every benefit of the Attendance Policy can be seen in the effort and detail she went to in reviewing the Doctor's notes matter. This and the testimony of Grievant and Castor that the no call/no show was brought up at the April 5th meeting is persuasive that it was mentioned. The Parties and witnesses may have differently observed and remembered the events. That does not mean that any of them are not being truthful or that they lied at the hearing.

Ultimately, considering the Company's evidence of a no call/no show on March 21, 2019 against the Grievant's evidence, and considering the Company has the burden of proof and persuasion on whether Grievant was a no call/no show for the overtime shift on March 21, 2019, I am not persuaded he was absent from a shift he had called in to work. I am not persuaded that he was properly assessed 2 occurrence points for an overtime shift absence on March 21, 2019. This would place him back to 7 occurrences and not at level 4 subject to discharge. The Attendance Policy does not call for discharge at 7 occurrences. The Company has not established conduct of accumulating 8 or more occurrences in a rolling 12 month period that could justify discharge and in which it had a disciplinary interest.

The Company is correct in that a review for just cause must be made with the information the Company had at the time it made its decision, and not information gathered at some later date. This is most clearly the case when other alleged bad acts by an employee are discovered after a discipline has been issued. Those other acts usually cannot be used as an added reason for an

initial discipline decision. The Company made its decision after the April 5th meeting and its attempt to get further information about the Doctor's notes. By June 6, 2019 the information the Company had at that time is what it used. While the Union may have barely raised enough defense in the post discharge decision meetings to keep the issue procedurally open, it is the decision the Company made to suspend pending discharge on June 6, 2019 which is must be analyzed. As discussed above, the discharge decision made then is not supported by just cause.

Because the Company did not establish a disciplinary interest in 8 or more absence occurrences in a 12 month rolling period, the penalty of discharge is not reasonably reflected by Grievant's conduct. There is no just cause for the suspension and discharge.

The Union has raised several other arguments, none of which are deemed to have merit and need not be discussed in any detail given the just cause decision.

Accordingly, based on the evidence and the arguments of the Parties, I issue my

AWARD

1. The grievance is sustained.

2. Grievant's suspension and discharge is set aside and he is otherwise to be fully reinstated.

3. The 2 occurrence points assessed against Grievant for a no call/no show on March 21, 2019 are to be removed from his work history.

Dated this 18th day of April, 2020 in Fuquay Varina, NC

/S/ Paul Gordon

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Paul Gordon, Arbitrtator