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In the Matter of Arbitration Between:)
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ARCELORMITTAL,)
Conshohocken Plant)
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and)
)
UNITED STEELWORKERS,)
Local 9462.)
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Grievant: W. Probst Termination
Grievance No. 13-4
Arbitrator Docket No. 130608
Case 67

INTRODUCTION

The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. The hearing was held on November 13, 2013 in Conshohocken, PA.

Mr. Lew Dopson, Sub-District Director, represented United Steelworkers Local 9462, hereinafter referred to as the Union or the Local. Mr. Wesley Probst, Grievant, testified on behalf of the Union.

Mr. Barry Simon, Attorney, represented ARCELORMITTAL, hereinafter referred to as Arcelor, the Company or the Employer. Mr. Michael Toy, Shift Manager; Mr. Bob Damron, Manager, Finishing Operations; Mr. Dennis Sullivan, Division Manager; and Ms. Joanne Babaian, Human Resources and Labor Relations Manager, all testified on behalf of the Company.

Each Party had a full and fair opportunity to present and cross-examine witnesses and to present evidence at the hearing. The Parties presented closing arguments on December 3, 2013, at which time the hearing was closed.

Issue(s)

Did the Company violate the collective bargaining agreement when it discharged the Grievant for violating the Last Chance Agreement and if so, what shall the remedy be?

Background

At the time of his termination, the Grievant was a Service Technician for the Company and had worked for the Company and its predecessors since 1998. Under its attendance policy the Company tracks tardies and early quits separately from absences, and on December 2, 2011 the Company suspended the Grievant with the intent to terminate him for excessive violation of the tardy/early quit portion of the policy. On December 6, 2011 the Grievant, the Union, and the Company signed a Last Chance Agreement (LCA) concerning the "probationary reinstatement" of the Grievant. The LCA recognized that cause existed for the Grievant's suspension but stated that the Company was returning him to work on a last chance basis.

The terms of the LCA state that "[the Grievant] may not exceed more than 3 incidents of tardiness/and or early quits within a 12 month rolling year." The LCA also states that "these conditions will remain in effect for two (2) years." The LCA states further that violating these conditions will be considered a violation of the LCA "and will result in his discharge" and then goes on to say that "[t]he Union will take no action to reverse or otherwise modify the Grievant's discharge."

The Grievant went for the first eight months after the Last Chance Agreement without any tardies or early quits. He was terminated on January 28, 2013 for violating the Last Chance Agreement. The Company charged the Grievant with being tardy on the following dates: August 3, August 11, October 24, November 30, December 1, and January 25, 2013. In addition, the Company charged the employee with an early quit for the August 11, 2012 date as well as a tardy. The evidence suggests that Company originally charged the Grievant for reporting late on January 21, 2013, but later decided that this incident should not be counted, as it was excused under the Family and Medical Leave Act (FMLA).

The Union does not contest that the Grievant was tardy on August 3, August 11, October 24, November 30, and December 1, 2012. The Union does contest the Company hold the Grievant accountable for two occurrences for August 11, 2012. In addition, the Union contends that the Grievant's late arrival on January 25, 2013 should be excused under the FMLA. Furthermore, the Union argues that the Company engaged in lax enforcement of the LCA, waiting months to enforce it after the Grievant exceeded three incidents, therefore lulling the Grievant into a false sense of security about his employment.

The Company provided evidence concerning the January 25, 2013 tardy. The Grievant claimed that he called off that morning to Sedgwick, the Company's third-party administrator of the FMLA program. According to Ms. Joanne Babaian, Human Resources and Labor Relations Manager for the plant, when Sedgwick took over as the Company's administrator in October, 2011, the Company sent out notices to employees about the change. Those notices state that the FMLA claim filing process "remains the same and will continue at the same 24/7/365 telephonic reporting intake center number at 1-888-596-7872." One of the notices, which is marked "PERMANENT POSTING," also states that in addition to reporting to the intake center number, "You are also required to call in any FMLA and disability absence to the 'report off' number, 610-825-4939."

The evidence demonstrates that the Grievant initially applied for FMLA leave for his mother's serious health condition on January 3, 2013. He was conditionally approved for FMLA leave for an absence of four hours on January 21, 2013. The Company decided not to charge him for this absence, according to Babaian. She testified that his tardiness on January 25, 2013 was counted, however, because there is no record of him requesting FMLA leave by calling in to Sedgwick or to the Company's "report off" line on that day. She said that normally she receives

an e-mail from Sedgwick for each such leave request by an employee; she did not receive an e-mail for the Grievant for that day. In addition, the Company provided a copy of Sedgwick's records of all of its contacts with the Grievant, that included his request for leave on January 21st, but no similar request for January 25th.

The Union pointed out errors in Sedgwick's communication with the Grievant. At least one of Sedgwick's letters requesting additional information from the Grievant in relation to his FMLA leave requests was sent not to the Grievant's home address but to the address of Mr. Larry Gallagher, who works in Babaian's office. In addition the Union pointed out that Sedgwick repeatedly made the error of requesting information about the Grievant's "serious health condition," when in fact he was applying for leave in relation to his mother's serious health condition.

Babaian testified that she participated in the decision to terminate the Grievant, along with Mr. Dennis Sullivan and Mr. Bob Damron. She testified that the termination was not retaliation for the Grievant using FMLA leave, and that Sullivan and Damron probably did not even know that he was approved for FMLA leave. Babaian said that the Company should have taken action sooner to terminate the Grievant for violating the LCA; she did not become aware until late January, 2013 that he had exceeded the number of tardiness incidents allowed under the LCA earlier, and that no action had been taken. Management did not inform her of the number of his incidents until late January. However, there was no intent on the Company's part to condone or excuse the earlier incidents. Under questioning from the Union Babaian acknowledged that under the circumstances an employee might possibly conclude that the Company was condoning his conduct, when the Company failed to take action promptly.

Babaian testified about a letter from the Grievant's doctor presented shortly after the Grievant's termination, stating that over the past two years the Grievant's mother had become "progressively demented," compromising her ability to care for herself and her other son, whom the doctor described as "developmentally and cognitively challenged." The letter stated that the Grievant had stepped in to help with those needs, which over the past year had become "daily" in nature and included "a few crises from time to time, including acute medical problems." The doctor went on to state that, "[the Grievant's] role as a care-giver have increased exponentially. Before he obtained the FMLA form, he had already missed or been tardy for his own work on several occasions. All these absences were related to sudden and unexpected care needs for his mother and brother." According to Babaian, this is not the proper way in which to raise a need for leave under the FMLA, and therefore the Company did not consider this letter in reaching its decision to terminate the Grievant for violating the Last Chance Agreement.

Babaian testified that the Union had agreed that if the LCA was violated, the Union would not challenge the Grievant's termination under the LCA. When asked whether the Union may file a grievance under the terms of the LCA if the Union concludes that there is not just cause for the discharge, she testified that "technically" the Union goes to arbitration, even under the language included in the LCA. She also said that the Union may challenge whether there has been a violation of the LCA. Under questioning from the Union, Babaian agreed that the Grievant went nine months without an incident of tardiness or early quit after signing the Last Chance Agreement, and that this was a pretty dramatic improvement in his record.

Mr. Michael Toy, Shift Manager, and the Grievant's immediate supervisor, testified that he has known the Grievant since the Grievant began working for the Company. He testified that he did not give permission for the Grievant to leave early on August 11, 2012. Under questioning

from the Union, Toy said that if he were not there during the shift the Grievant could have called him at home to seek permission to leave early. He said that he does not carry a cell phone but that if he were not home when the call came in he would have returned it later.

Toy testified that he would not discriminate against an employee for taking FMLA leave, which he considers to be an important right. Toy himself has been on intermittent FMLA leave since 2002 and two or three other employees he supervises are also on FMLA leave. He testified that he received a call from Security stating that the Grievant had taken four hours of FMLA leave on January 21st. Toy did not count this absence as an occurrence. However, he did count the Grievant's January 25th absence because he did not receive a call from Security saying that the Grievant had called off on FMLA leave that day. It was at that point he looked at the Grievant's attendance and noticed that he had a number of attendance occurrences over the past several months. Toy testified that he knew that the Grievant was working under a Last Chance Agreement, but did not know the terms of it. At that point he asked his superior, Mr. Damron, if there was a problem with the Grievant's attendance.

Toy testified that the Grievant did not tell him that he needed time off on the 25th to take care of his mother. Toy did not ask the Grievant the reason for his tardiness when he saw him coming in late on the 25th. Toy said that he talked to the Grievant earlier in January, around the 10th of the month, about the Grievant taking time to move his mother into his house to care for her, and that the Grievant said at that time that he probably should apply for FMLA leave. Under questioning from the Union, Toy said that he did not know that the Grievant had applied for FMLA leave on January 3rd.

When asked why he did not report the Grievant's absences in October, November, or December, Toy testified that he did not know the terms of the Grievant's Last Chance Agreement. He said that he does the payroll and attendance for about 30 employees. Normally he records a tardy or early quit when it occurs, and then tries to return to look at it within a day or two to see if there is a problem under the attendance policy. Sometimes he is too busy to return to assess the occurrence. He testified that he never told the Grievant that he did not have to worry about his LCA, however.

Mr. Bob Damron, Manager of Finishing Operations, testified that he was brought into the situation when Toy reported to him that the Grievant had an excessive number of attendance incidents. Damron said that he consulted with Sullivan and Babaian and together they decided that the Grievant should be terminated for violating the LCA. He said that he had no knowledge that the Grievant was approved for FMLA leave; the decision to terminate was based solely on the Grievant exceeding the number of incidents allowed under the LCA. As for why he did not take action on the Grievant's attendance incidents in October, November, or December, Damron testified that the system is not automated and he relies upon the supervisors to provide him with information about incidents. He clarified that there was no problem with recording the incidents, but due to an oversight on the Company's part, he was not informed about them and they were not counted until the end of January.

Damron also testified that he could not recall whether he had given the Grievant permission to leave early on August 11, 2012, but that if he had done so he would have given that information to the supervisor. If the supervisor and Damron are not present, the employee can call Damron at home, he said, to ask for permission to leave early.

Mr. Dennis Sullivan, Division Manager, Heat Treat Finishing, testified that he approved the decision to terminate the Grievant for violating the LCA. He testified that he did not know that the Grievant had been approved for FMLA leave. According to Sullivan, the FMLA leave never entered into the discussion about the Grievant's termination.

Mr. Wesley Probst, the Grievant, testified that he had just short of 15 years of service and was working in the Rose Furnace Department as a Utility B Service Technician at the time of his discharge. He said that he was on a mandatory six-day shift at that time, Monday through Saturday. According to Probst he was working two to three 12-hour shifts per week, and usually eight hours on Saturday. He said that his crew was chronically short one to two crewmembers.

According to the Grievant, on Saturdays when there was not sufficient work to do, crew members were routinely allowed to leave early. He said that he did not recall ever being refused permission to leave early in that situation on a Saturday. He said that he had seen supervisors give permission for employees to leave, but as Utilitymen they were allowed to make that decision for themselves if they let the Operator know that they were leaving.

The Grievant testified that he knew that his Last Chance Agreement applied to tardies, but did not know that it applied to early quits. He said that he went nine months after signing the LCA without any tardies. He said that he began to accumulate incidents because his mother's health condition deteriorated. Until her health began to deteriorate, he knew little about dementia, and was surprised about some of the ways in which the condition manifests itself. He presented a letter dated December 5, 2011 from his mother's doctor stating that she had been diagnosed with "severe delirium and dementia" in the spring of 2011. (The Union stipulated that this letter was never provided to the Company prior to arbitration). At the time that he entered

into the Last Chance Agreement, the Grievant said that he did not raise his mother's health condition because she was a proud, intelligent person who did not want others to know about her condition.

On Saturday, August 11, 2012 the Grievant said that his brother called him on his way into work to tell him that his mother had fallen. He said that he called his Operator to tell him that he would be late and drove back into Philadelphia; there he said he met an ambulance which took his mother to the hospital. According to the Grievant he called the Operator because he did not have Supervisor Toy's telephone number. He said that he left work early that day to return to the hospital, telling the Operator that he had an emergency. The Grievant said that the Operator "runs the show" when the supervisor is not available. He acknowledged that he did not try to call Toy or Damron on that occasion; he thought that Damron might have been on vacation.

The Grievant testified that he was never told that he was being charged for two incidents on August 11, 2012. He also testified that he was never told in October or November or December that he had exceeded the number of incidents permitted under his LCA; he thought that he was still okay. He said that the situation with his mother continued to worsen and in January 2013 he moved her and his disabled brother into his home. He took time off on a Saturday to do so with Toy's permission.

The Grievant testified about the errors Sedgwick made in processing his FMLA leave forms. He testified that he used the same procedure to call in to Sedgwick for FMLA leave on January 21st and January 25th. When Damron told the Grievant on January 25th that he might be getting terminated the Grievant was shocked and blindsided, and asked the reason for the termination. Damron told him they would discuss it the following Monday.

The Grievant testified that the reason for his tardies and the early quit was the deteriorating situation with his mother. He said that he should have applied for FMLA leave earlier. According to the Grievant, his superiors were well aware of the situation with his mother during the summer and fall of 2012. His mother died shortly before the arbitration hearing was held.

Under questioning from the Company, the Grievant testified that he understood the terms of his Last Chance Agreement "to a certain extent." He admitted that he had had earlier problems with coming to work on time which had resulted in the LCA. He could not initially recall taking FMLA leave at an earlier point in his career with the Company. However, when provided with evidence that he had taken three months' leave for the birth of a child, he said that he recalled taking that leave. He acknowledged that he knew he could take FMLA leave based upon the medical condition of someone else in his family. He said that Toy and Damron knew about his mother's condition, even if he did not necessarily tell them that a particular tardy was tied to his care for her. On rebuttal, Toy testified that the Grievant never told him that his mother was suffering from dementia, only that he was planning to move her into his house.

Under questioning from the Company, the Grievant said that he did not have cell phone records showing that he had called the Company and Sedgwick on January 25th. He said that he no longer has that cell phone number and that it was not a cell phone company that provided monthly lists of numbers called.

The Company's Position

- The Parties disagree on the statement of the issue here. The issue is whether the Grievant violated his Last Chance Agreement, not whether there was just cause for his discharge.

- Under a Last Chance Agreement, the employer relinquishes the right to terminate the employee and the employee gives up negotiated rights under the collective bargaining agreement, except as spelled out in the LCA.

- The LCA supplants the collective bargaining agreement, and therefore the terms of the Grievant's LCA and not the bargaining agreement apply in this case.

- For this reason, the Justice and Dignity Clause of the collective bargaining agreement is not relevant in this case. It is clear from the language of the collective bargaining agreement itself that the Justice and Dignity clause applies only to just cause discharges.

- Paragraph 4 of the contractual Justice and Dignity Clause indicates that if an employee is discharged for a second dischargeable offense, the employee will not be eligible to be retained at work under the Justice and Dignity Clause. The intent of this clause is clear and should be applied here.

- In addition, the Union agreed to language in the LCA which states that "[t]he Union will take no action to reverse or otherwise modify the Grievant's discharge."

- The terms of the LCA govern this case and dictate that the Grievant must not exceed more than three incidents of tardiness/and or early quits within a 12 month rolling year. These conditions were to remain in effect for two years from the signing date of the LCA, December 6, 2011.

- The only issue here is whether the Grievant violated the terms of the LCA, and the evidence demonstrates that he did so.

- The Grievant had seven incidents of tardiness/early quits and the Union is disputing only the last two incidents. The Arbitrator may not need to reach the last two incidents if she concludes that the first five constitute a violation of the LCA.

- With regard to the August 11th incident, the Grievant testified that he received permission from the bargaining unit member to leave early. The Company may not call the bargaining unit member as a witness and the Union did not call him as a witness, to corroborate the Grievant's testimony about this date.

- Permission from another bargaining unit member to leave is not acceptable permission. Management witnesses testified that they were available by telephone to handle the Grievant's request to leave early.

- With regard to the Grievant's lateness on January 25, 2013, the Grievant had applied for FMLA leave and had been given information on how to correctly report off. The procedure was well-known to him because he correctly used it for January 22, 2013.

- The Grievant's testimony that he called into Sedgwick and to the Company on January 25 is not believable, because neither has any record of him calling in on that day.

- The best evidence of whether he made telephone calls on that day would be his cell phone records, which he did not provide.

- In addition, the Grievant had experience with FMLA several years ago, which should have given him familiarity with its requirements, although he said he could not remember his earlier use of FMLA at the hearing.

- There was no interference by the Company with the Grievant's FMLA rights.

- The Union has not demonstrated the elements of a claim that the Grievant was retaliated against for using his FMLA rights. The Company has shown that the reason for the Grievant's termination was his violation of the LCA and that this reason is only a pretext for discrimination against the Grievant for using FMLA leave.

- The Management representatives who made the decision to terminate the Grievant did not know that he filed for FMLA leave.

- The Union's argument that the Company waived its right to terminate the Grievant when it did not act immediately on his tardies or early quits may not be raised now because it was not raised during the grievance procedure. In addition, on a prior occasion leading up to the LCA, Union did not object to the Company's delay in disciplining the Grievant.

- There is no evidence in the testimony of the Grievant that he was lulled into a false sense of security by the Company's delay in acting sooner.

- The LCA does not require the Company to immediately discharge the Grievant as soon as the fourth incident occurs, although it permits the Company to do so.

- Here the Management people involved intended to comply in good faith with the LCA; they did not take immediate action because they overlooked his absences, not because they were out to get him. The Company did not willfully relinquish its rights under the LCA by failing to act immediately when it was violated.

- The core point is that the Grievant was given a Last Chance Agreement that he failed to meet and it is important for Arbitrators to enforce Last Chance Agreements.

- The Arbitrator should not consider mitigating factors, such as length of service, if there has been a violation of a Last Chance Agreement.

- The Company did not raise the issue of whether the discharge was arbitrable. The Company simply argues that for the Union to make arguments under the just cause clause is inconsistent with the LCA.

- The evidence here does not demonstrate that the Company acted in a "gotcha" fashion here; its delay in terminating the Grievant shows just the opposite.

The Union's Position

- The discharge should be overturned because of the Company's lax enforcement of the Last Chance Agreement.

- When an employee violates a rule, an employer imposing discipline must take prompt and timely action. This principle applies to all kinds of violations, including the enforcement of Last Chance Agreements.

- Here the Company took no action against the Grievant for attendance violations in October, November, or December of 2012.

- This is a fatal error which, standing alone, requires that the discharge be overturned.

- The Union relies upon arbitration awards holding that lax enforcement of rules by an Employer will result in overturning a termination.

- Lax enforcement may lead an employee to believe that his behavior is acceptable or that he will not be held accountable for unacceptable conduct.

- Here there were delays of 59 days and 90 days in the Company taking action on tardies of the Grievant.

- The Company's Human Resources Director acknowledged reluctantly in her testimony that even though she did not condone the Grievant's tardiness or early quits, she could see how an employee in that situation might be lulled into a false sense of security about his situation.

- Company Witness Toy testified that he monitors the attendance of employees and attempts to inform them when there is a problem with their attendance within a day or two. Nevertheless he could not explain why he failed to inform the Grievant of his attendance issues, even though he knew about the Grievant's LCA.

- The Grievant was led to believe that his earlier attendance issues had been condoned, as demonstrated by his shock when he was told on January 25th that he was in danger of being terminated.

- Discharge should never be a "gotcha" game, but that is what happened here.

- As for whether the Company should rely upon Sedgwick's reports concerning whether Grievant called into Sedgewick, the record is replete with evidence of many errors that Sedgewick made in processing the Grievant's FMLA claim.

- The FMLA requires that an employee report an absence or tardiness due to the FMLA "as soon as practicable" and given the Grievant's mother's situation on the 25th, he met that requirement. Toy saw him walking in that day and could have asked why he was late, but failed to do so.

- The Grievant is a long-term employee of more than 15 years. He worked nearly 9 months after the LCA was signed without a single tardiness or early quit, which demonstrates his commitment to meeting the terms of the LCA.

- The Grievant provided documentation of his mother's medical problems, which began before he actually applied for FMLA leave. He failed to bring her condition to Management's attention earlier because of her pride.

- The August 11th early departure occurred because his mother fell and had to go for stitches. It is difficult to see this as anything other than an emergency, and he had no idea until much later that the Company considered the circumstances of his departure that day as a problem.

- The Grievant handled the situation in a reasonable way, especially since it is not clear that Toy, who testified that he is "not a cellphone kind of guy," could be reached on the phone to obtain permission to leave early.

- The Company need not terminate an employee immediately under the terms of an LCA. But here the LCA called for no more than 3 instances, and the Company did not act on the 4th, the 5th or the 6th incident, and then finally acted on the 7th incident.

- The Company never took the position that the language of the LCA prevents the Union from taking a case to arbitration, and the Union believes that this principle had been established by an arbitration case involving the Union and the Company's predecessor.

- The Union has never agreed to any practice of lax enforcement of the attendance policy, as demonstrated by one of the documents in the record regarding the Grievant's attendance record.

- The Union has not raised an argument that the Company retaliated against the Grievant based upon his used of FMLA leave. The Union did claim that the January 25th incident was an FMLA-qualified absence.

- There is not just cause for the discharge, and the grievance should be sustained and the Grievant reinstated and made whole.

- Arguing solely in the alternative, the Union argues that if the Arbitrator concludes that the termination is for just cause, the Grievant should still have been able to take advantage of the Justice and Dignity clause. The Union relies upon a decision from Arbitrator Bethel to support its position in this regard, and requests relief under that provision.

Findings and Decision

This is a dispute over a termination based upon a claimed violation of a Last Chance Agreement. The Company argues that the only issue here is whether the Grievant violated that Last Chance Agreement. According to the Company, the evidence establishes that the Grievant did violate its terms, and there is no basis on which the Union may convincingly argue that the discharge should be overturned.

Last Chance Agreements provide a final opportunity for an employee with a poor work record to correct his conduct and demonstrate that he can meet his work responsibilities. Usually offered to long-term employees, the Last Chance Agreement honors the employee's long tenure with the employer by providing the employee with one last chance to keep his job. The employer benefits by avoiding the trouble and expense of discharging a long-term employee[1] and hiring and training a replacement.

Each of the parties also gives up something valuable under a Last Chance Agreement. The employer gives up its claimed right to immediately discharge the employee. The employee, on the other hand, forfeits some of the consideration he or she would otherwise enjoy under the collective bargaining agreement. The LCA usually requires the employee to adhere to special conditions or stricter rules that do not apply to other employees who are not working under the yoke of such an agreement. For the period of the Last Chance Agreement, if the employee fails to meet its conditions, the usual consequence is immediate discharge. The Union normally is prohibited by the terms of the LCA from making arguments on behalf of the employee regarding progressive discipline, disparate treatment, or mitigating circumstances (including the

[1] Costs may include the costs of arbitration, if the Union challenges the discharge.

employees' years of service) that the Union could make on behalf of another discharged employee.

The LCA represents the terms negotiated and agreed to by the parties to determine the continued employment of a particular employee. Arbitrators must enforce the specific terms to which the parties have agreed, even if those terms are harsh. In addition, enforcing Last Chance Agreements makes it more likely that another employee in a similar situation will be offered such an agreement, while failing to enforce them may have the opposite effect.

The Last Chance Agreement at issue here contains the elements of a typical LCA.[2] It establishes special, stricter conditions in regard to the attendance policy that apply only to the Grievant. Under the terms of the LCA the Grievant may not have more than three occurrences of tardies or early quits within a 12 month rolling period. If the Grievant exceeds this number of occurrences, he is considered in violation of the Last Chance Agreement, which "will result in discharge." (Under the normal attendance policy, an employee who exceeds three occurrences receives only a one-day suspension.) As is typical with LCA's, these stricter standards under the Grievant's LCA are to last for a set period of time, two years.

Under this LCA, the Union agreed that if the terms of the LCA were violated, "[t]he Union will take no action to reverse or otherwise modify the Grievant's discharge." The Parties agree that this language does not mean that the Union is prohibited from filing a grievance over the Grievant's discharge, or taking that grievance to arbitration. The language does not prohibit the Union from challenging whether the LCA has been violated. However, the language does

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[2] The Union notes that the LCA in this case states that the parties recognize that the Employer had cause to suspend the Grievant, but does not state that cause existed at the time to discharge him. It seems unlikely that the Union would have entered into a Last Chance Agreement if Union representatives did not believe at that time that the Company had grounds for termination of the Grievant. However, whether or not there was any alternative to discharge at that time, the Grievant and the Union entered into the agreement and are bound by it.

limit the Union from making some arguments that it could make on behalf of a discharged employee who is not working under an LCA.

The Company argues that it is clear that the Grievant here had more than three occurrences in a twelve-month period and therefore discharge is appropriate. According to the Employer's calculation, the Grievant violated the Last Chance Agreement on October 24, 2012, when he exceeded the three occurrences. However, the Employer failed to enforce the terms of the Last Chance Agreement at that time. In addition, Management failed to enforce its terms in November and in December, when the employee came to work late and had additional occurrences under the attendance policy. It was not until the end of January, after the Grievant's seventh occurrence, by the Company's count, that the Company finally enforced the terms of the LCA.

Thus, this is a case in which the Employer, after drafting strict conditions for the Grievant's continued employment, and requiring the Grievant and the Union to sign off on them, took a very lax approach to enforcing them. It is not clear on this record exactly why or how this happened.[3] However, all of the Management witnesses agreed that Management "dropped the ball" and permitted the Grievant to continue to work for months and rack up continued violations, after the Employer contends that he fatally violated the terms of the LCA.

The Last Chance Agreement holds an employee to very strict terms and Arbitrators normally strictly uphold such terms. In support of this view, the Company has provided a section

[3] Toy testified that he normally reviews the record and informs an employee within a day or two after an occurrence if there is a problem for the employee under the attendance plan arising from that occurrence. That did not happen with the Grievant until his sixth or seventh occurrence, well beyond the stated violation point of his LCA. Toy was not aware of terms of the Grievant's LCA, however.

of How Arbitration Works, Elkouri & Elkouri, 6th ed. However, as part of the larger section regarding Last Chance Agreements, the same authors note that the employer also has certain responsibilities regarding enforcement of a Last Chance Agreement,

> Last-chance agreements also place responsibilities, such as the duty to give notice, on employers. Failure of the employer to enforce the terms of a last-chance agreement may lull the employee into a false sense of security. He or she may believe that the employer has "acquiesced" to the employee's subsequent misconduct and that it is not subject to being used against him or her, or that the employer has waived its right to discharge the employee for violating the agreement. Similar problems may arise where the employer deviates from the agreement's express provisions, such as by waiving strict enforcement of a drug-testing policy.

How Arbitration Works, Elkouri & Elkouri, 6th ed., p.171-172.

The Company here argues that it is permitted but not required to impose the ultimate penalty of termination immediately when an employee violates the terms of a Last Chance Agreement. An employer need not immediately terminate an employee upon the first violation of an LCA, or forever waive the enforcement of the LCA. However, in this case the Employer repeatedly failed to enforce the terms of the Last Chance Agreement, for multiple violations extending over several months. The Last Chance Agreement was intended to hold the Grievant to stricter standards than other employees. Instead of holding the Grievant to stricter standards, however, the Company actually allowed him greater leniency than an employee with the same record would have received under the written terms of the regular attendance policy.[4]

In the Last Chance section of How Arbitration Works, the editors discuss the consequences of an employer's inaction in enforcing the terms of a Last Chance Agreement, citing a case very similar to the case at issue here. Standard Products Co., 112 LA 76 (Brodsky,

[4] Under the stated terms of the regular attendance program, an employee is supposed to be counseled on the third occurrence; receive a one-day suspension on the fourth occurrence; receive a three day suspension on the fifth occurrence; and be discharged on the sixth occurrence.

Arb. 1999). The grievant in that case was working under a strict Last Chance Agreement for attendance problems. She violated the conditions of the LCA multiple times through seven absences before her employer terminated her. The arbitrator in that case noted that no one from Management spoke to her after any of her violations of the LCA, informing her that Management could have terminated her at that point in time, but intended to terminate her on the next violation. Under these circumstances, the arbitrator found that the grievant had no notice that her employment was in "immediate jeopardy." Ruling that LCA's are not "self-enforcing," he concluded that notice demands on the employer's part are not completely eradicated by the existence of an LCA:

> The LCA itself gives notice of what circumstances will result in discharge under its terms. If the employee who is subject to the LCA violates the LCA and is consequently terminated, she had proper warning. If the employee violates the LCA and nothing happens, the notice provisions of the LCA are diluted and the employee must again be put on notice that additional violations will subject her to termination. Without such a requirement, an Employer would be free to "strike" at any time. For example, an employee could be absent 5 times in the first 4 months and nothing is said to her after any of the absences. Her six and seventh time within 6 months are the same. Suddenly, upon her eighth absence, the Employer says, "You fired!"(sic).

Arbitrators may set aside or reduce regular discipline when an employer has engaged in lax enforcement of rules or unreasonably delayed imposing discipline after the misconduct occurred. A rapid response to misconduct is even more important when the employee is being held to the strict standards of an LCA, in order to reinforce the serious nature of the employee's disciplinary situation. If the Employer intended to grant the Grievant here leniency until the fifth, sixth or seventh occurrence, Management should have provided him with notice of what it was doing, and that it intended to enforce the LCA going forward. When the Company ignored the enforcement of the LCA and permitted the Grievant to continue to engage in the conduct that led to the LCA and that is specifically prohibited by it, the Company sent a very unclear message to

the Employee not only about the seriousness of his conduct but also regarding whether it intended to enforce the LCA.

Under these circumstances the Arbitrator concludes that the discharge must be overturned. The evidence indicates that the Employer's inaction was the result of inadvertent mistakes, rather than an intent to surprise the Grievant with a sudden termination or to excuse the Grievant's violations. However, it is difficult to believe that any employee in that situation would not count his blessings and conclude that the Company was not interested in discharging him immediately. After months of delay and inaction in enforcing his Last Chance Agreement, the Employer may not suddenly decide to "strike" and hold the Grievant accountable, without first providing him notice that, regardless of its past inaction, it intends to begin enforcing the LCA. Therefore the Grievant's termination for violating the terms of the LCA must be overturned.

Nevertheless, the Grievant is not without fault in this situation as well. Although he had a very good record for the first nine months under the Last Chance Agreement, he had six or seven occurrences over the next five months, which is a poor attendance record, especially for someone working under an LCA. If the Company had strictly enforced the Last Chance Agreement as written, the Grievant would have been discharged in October 2012 or at the latest by November 2012.[5] Even if he were lulled into concluding that the Company was not counting all of his absences, he could hardly believe that his conduct was acceptable, especially since he was teetering on the brink of discharge. Under the circumstances, his attitude towards his attendance obligations over those months was lax and at times appears almost cavalier. He left work early

[5] By December or January he could have been terminated even under the written terms of the regular attendance policy, if strictly enforced. However, the Company has relied solely upon his violation of the terms of the LCA as a basis for termination.

on August 11th, and even at the time of the arbitration hearing, he was still arguing, without any other supporting evidence, that he had the authority on his own to determine that he could leave early, as long as he gave notice to the bargaining-unit Operator.[6] He testified but failed to provide any documents to the Company at the time, or during the grievance procedure, showing that his absences on the 11th were due to an emergency, his mother's hospitalization that day, although they should have been easy to obtain. He failed to provide evidence from his telephone records to support his testimony that he called in to request FMLA leave on January 25th.[7] He testified vaguely that his occurrences over these months were related to his mother's serious health condition. However, for most of his tardies, he provided no specific evidence about how each occurrence was related to his mother's serious health condition, and the Union did not seriously contest them.[8] He did not submit convincing evidence that he had provided the Company with appropriate notice about his need for FMLA leave until early January.

Considering all the evidence in this case, the Arbitrator concludes that the discharge must be overturned and the Grievant reinstated, but that he shall be reinstated without backpay. In addition, he will be reinstated under the terms of the original Last Chance Agreement, which will be extended by another year, from the date of his reinstatement. These actions should impress upon him the continued need to take his attendance problems seriously, if he wishes to retain employment with the Company. Because the Arbitrator has not upheld the termination, there is no need to reach the Justice and Dignity issue raised by the Union.

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[6] Even the Operator did not appear to offer testimony to support the Grievant's testimony about the events of that day.

[7] Although the Union points out several mistakes made by Sedgwick in administering the Grievant's FMLA claims, there is no evidence that other employees have had difficulty in requesting leave by telephone. In addition, there is no record that the Grievant had called the Company's Security office on that day, which is another requirement for making a leave request.

[8] In this regard the conduct of the Grievant here differs from that of the grievant in the Standard Products case, cited above, who provided medical documentation regarding each of her absences, which was accepted by her employer at the time of each absence.

AWARD

The grievance is sustained in part. The Grievant shall be reinstated without backpay. The discharge is reduced to a suspension, lasting from the time of the Grievant's initial suspension until the date of his reinstatement. The Last Chance Agreement shall remain in effect for one year from the date of the Grievant's reinstatement. The Arbitrator will retain jurisdiction solely over the remedy portion of the Award.

Jeanne M. Vonhof
Labor Arbitrator

Decided this 24th day of March, 2014.