

Arbitration between:

Sweet Sue Kitchens/Sara Lee Foods Athens Facility

and

Retail, Wholesale & Department Store Union,  
AFL-CIO, CLC

FMCS Case No. 03-51023

BEFORE: PAUL GREENBERG, Arbitrator

**Appearances:**

*For Sweet Sue Kitchens/Sara Lee Foods Athens Division:*

Carla J. Gunnin, Esq., *Constangy Brooks & Smith LLC, Atlanta, Georgia*

*For Retail, Wholesale and Department Store Union:*

George N. Davies, Esq., *Nakamura, Quinn & Walls, LLP, Birmingham, Alabama*

## **DECISION AND AWARD**

The Employer, Sweet Sue Kitchens, operates a food processing plant in Athens, Alabama. On or about May 9, 2003, the Company discharged the grievant, H., for excessive absenteeism and tardiness. H. grieved his termination. The Employer and the Union, RWDSU, were unable to resolve the grievance, and arbitration was invoked.

The Employer maintains that H. incurred nine (9) attendance “points” between November 11, 2002 and May 9, 2003, based on seven (7) incidents of tardiness (one point each) and one unexcused absence on January 8, 2003 (two points). Under the Company’s attendance policy (described below), H. was subject to immediate termination if he accrued eight (8) points during this period. The Union does not dispute that H. was tardy seven times during this period; however, the Union asserts that H. took a vacation day on January 8 and therefore did not incur an unexcused absence that day under the attendance policy. In the Union’s view, therefore, the total number of points H. accrued during the period was only seven – *less* than the number required under the Employer’s attendance policy to support the discharge.

## BACKGROUND

### A. General.

At the time he was discharged in May 2003, H. had worked for Sweet Sue for about 12 years in the retort area of the plant. This is the area where Sweet Sue's canned poultry products are sealed and sterilized. In addition to his production work, H. served as the Union's Chief Steward at the plant, and had participated in the negotiation of several collective bargaining agreements.

Under the labor agreement between Sweet Sue and RWDSU, management has the authority to discharge employees for just cause, including violations of Company rules:

The Company shall have the right, in its sole and exclusive discretion, to discharge any employee for just cause. *Just cause* for the purpose of discipline or for the purpose of discharge shall include...violation of this Agreement or *failure to comply with Company rules and regulations*. In such cases, just cause will automatically be found to exist. It is understood and agreed that the degree of discipline up to and including discharge imposed for just cause, including the reasons listed above, shall be in the sole discretion of management and shall not be subject to change by an arbitrator.

CBA Article X, §1 (emphasis added).

Sweet Sue has an attendance policy in place that is based on a point system. The official version of the Company's attendance policy is found in the Employee Handbook; a variant version had been posted for many years on a Company bulletin board used by management to provide information to employees.

Under both versions of the policy, an unexcused absence is assigned 2 points, and arriving at work late (tardiness) is assigned 1 point. An employee who accumulates 12 points during any 6 month period receives a written warning. Once a warning is issued, an employee's attendance is regulated more closely: if the employee subsequently receives more than 8 points during the 6 month period following the warning, the employee is written up and discharged. However, if the employee accumulates fewer than 8 points during the 6 month period following the warning, the worker reverts back to his or her original "unwarned" status.

Under the version of the attendance policy in the *Employee Handbook*, which the Employer asserts is the controlling policy, the sole notice that the Company gives to an employee warning that the employee's job is in jeopardy is the first written warning that is issued when an employee incurs 12 absence points during a 6 month period. In contrast, the version of the policy that was posted on the Company bulletin board stated that after an employee had received the *first* written warning (and therefore was subject to discharge upon incurring an additional 8 absence points), the employee

would be individually counseled when he or she reached 6 attendance points during the *second* 6-month period. This variant and outdated version of the attendance policy was removed from the Company bulletin board after H. was discharged.

H. received a warning letter about his attendance on November 12, 2002, because he had incurred 12 attendance points during the prior 6 month period. Based on this warning letter, H. was subject to discharge if he accumulated 8 attendance points during the 6-month period between November 12, 2002, and May 12, 2003.

H. was late arriving at work on 7 occasions during the November 2002 - May 2003 period, thereby accruing 7 attendance points for tardiness. The last of these incidents occurred on May 9, 2003, just three days before the six month warning period was scheduled to end. The Union concedes that these incidents of tardiness occurred, and that H. therefore accrued a total of seven attendance points relating solely to *tardiness* during the November - May period.

In addition to the seven incidents of tardiness, H. did not work at all on January 8, 2003. If H.'s absence from work on January 8 was *unexcused* – as the Company contends – then H. accumulated two additional absence points during his six-month warning period, for a total of 9 points: enough points to constitute a violation of the attendance policy, and warranting discharge. On the other hand, if H. was absent from work on January 8 because he had taken a *vacation day*, then his absence was excused and he did not incur enough absence points to support a discharge.

Because of his tenure with the Company, H. was entitled to 120 hours of vacation leave annually, and all these hours accrued in full on January 1 each year. According to H., he normally was required to take 80 hours of this vacation leave in pre-scheduled 40-hour blocks; however, up to 40 hours of his vacation leave (*i.e.*, one week) could be taken in smaller increments, including individual days. The established practice with regard to these individual vacation leave days is flexible. Although the collective bargaining agreement suggests that “day at a time” vacation leave should be requested from a supervisor at least one day in advance, both Company and Union witnesses testified that employees commonly are allowed to call their supervisor on the same day to request that an absence from work be excused and counted against their vacation bank. When this occurs, the employee signs a vacation request form *after* the “same day” vacation leave is used, and the request subsequently is transmitted to the Company’s payroll office. Witnesses for both sides testified that it was common practice in the retort area of the plant for the unit supervisor, Charlie Malone, to prepare the vacation leave request form himself and then give the completed form to the employee to sign.

In addition to the disputed January 8 absence, H. took a day of vacation leave on March 31, 2003. H.'s March 31 absence from work is not at issue in this case, but the procedure that H. used to request vacation leave apparently is common practice at the plant, or at least in the retort section where H. worked. According to H., he called the plant on the morning of March 31 and left a voice message for his supervisor, Malone, requesting that the day be recorded as a vacation day. Company records show that H. subsequently completed a leave request form for the March 31 absence, and

the weekly attendance record that supervisor Malone submitted to the payroll office recorded H.'s March 31 absence as a vacation day. H. received vacation pay for the missed day, and 8 hours of leave was deducted from his vacation leave bank. Because H.'s March 31 absence was recorded by the Company as vacation leave, no absenteeism points were accrued.

**B. The conflicting evidence regarding H.'s January 8 absence.**

There is conflicting evidence whether H.'s January 8 absence was unexcused (as claimed by the Company) or whether H. had requested same-day vacation leave.

The Employer presented three witnesses in its case: Peggy Gattis, the Human Resources Manager at the Athens plant; Cynthia Green, administrative assistant in the HR office; and Tracey Young, the plant superintendent in the canning and retort area where H. worked. H.'s immediate supervisor, Malone, was not called to testify. H. was the Union's sole witness.

*H.'s claim to have requested "same day" vacation leave.* H. testified that he called the plant on the morning of January 8, 2003, and requested a "same day" vacation day. According to H., he did not speak directly with Charlie Malone, but instead was routed through the plant's phone system to Malone's voice mail box and left a message advising Malone that he would not be present at work and was taking a vacation day. H. testified that he did not remember whether Malone asked him to sign a leave request form when H. returned to work. However, H. specifically recalled that Malone did not ask any questions about his January 8 absence from work. In H.'s view, Malone's failure to question him about the January 8 absence suggested that Malone understood that H. had requested vacation leave for the day.

*H.'s personal calendar.* The Union introduced a copy of a personal calendar for 2003 that H. says he maintained at the plant. The calendar records the various days that H. was tardy. The calendar also shows two days in 2003 that H. records as vacation days: the disputed January 8 absence, as well as the March 31 vacation day. H. testified that he maintained this personal attendance log because he had run into disciplinary problems in the past on one occasion when Company payroll records had been incorrect. Apart from the entries documenting the days that H. was absent from work or tardy, the only other entries on H.'s calendar reflect dates when Sweet Sue changed production codes on its products.

*The outdated leave policy posted on the Company bulletin board.* H. testified regarding the version of the Company attendance policy that was posted on the Company bulletin board up until he was discharged. As noted above, the posted version of the attendance policy was consistent with the version found in the official Employee Handbook with regard to the overall number of points that would result in a first warning (12 points in a rolling six-month period), as well as the number of points that subsequently would result in a discharge (8 points in the six months following the warning). However, the posted version of the attendance policy suggested that an employee who had been warned that his job was in jeopardy would be personally counseled when the employee subsequently accumulated 6 of the 8 points that would result in being discharged.

Although H. had received a copy of the Employee Handbook, he testified that he did not normally refer to it but instead relied on the variant version of the attendance policy posted on the Company's bulletin board. H. contends that if he had been counseled when the Company believed that he had reached 6 of the 8 points that would result in his discharge, the dispute about H.'s January 8 absence would have surfaced and been addressed earlier, well before the discharge in May 2003.

HR Manager Gattis also testified regarding the version of the attendance policy posted on the Company bulletin board. The variant version of the policy apparently had been posted for quite a long time, even though it was out of date and did not reflect Company policy. During the time that the policy was posted on the bulletin board, many employees had been discharged for absenteeism; however, Gattis testified that no employee had received individual counseling at the direction of the HR department in all the years that she had been at the Athens plant, which dated back to 1987. Gattis acknowledged that some informal counseling may have occurred at the department level within the Company, but not at the direction of Human Resources.

*The Company's payroll records, and the "vacation leave" defect in the Lawson software system.* The Company's primary evidence is payroll records. The Company has no record that H. completed a vacation request form to cover the January 8 absence, and the weekly attendance report for all employees in the retort area (prepared by Malone) shows H. as absent without excuse on January 8. In addition, payroll records show that H. was not paid for 8 hours of vacation leave on January 8. H. would have received vacation pay if his leave was an approved vacation day; instead, his paycheck for that pay period was "short" by 8 hours. In the Company's view, the fact that H. did not receive vacation pay for January 8 put H. on notice that the Company viewed the absence as unexcused.

Gattis testified concerning a software problem with the Company's payroll reports for the latter part of 2002 and the first half of 2003. The Company had changed to a new payroll system, the Lawson system. Unfortunately, the program had a significant glitch in tracking each employee's bank of vacation hours. When employees took a vacation day, they correctly were paid for the vacation day *and* their vacation bank correctly was debited for 8 hours. However, if an employee was *absent* for a day without excuse, the employee appropriately was not paid for the missed day – but, the employee's vacation bank (as reflected on weekly pay stubs) erroneously was debited for 8 hours of vacation leave. As a consequence, the vacation balance on an employee's pay stub would be reduced whenever an employee took *either* an approved vacation day *or* had an unexcused absence. Because of this error in the payroll software system, the Company concedes that H.'s pay stubs during early 2003 erroneously reflected an 8-hour reduction in his vacation bank relating to his January 8 absence, even though the Company contends that no vacation leave was taken.

Gattis testified that this software error had been a significant ongoing problem for the Company until it was corrected sometime after H.'s discharge; however, she also testified that H. (as the Chief Steward) was familiar with the problem. When employees at the Athens plant had questions about their leave balances or numbers of absences, the established practice was for the

union stewards (including H.) to personally review attendance and leave records in the payroll office. Gattis testified that the software problem was widely known, and that H. specifically had spoken with her about it. Therefore, in the Company's view, H. cannot credibly claim that he was entitled to rely on the erroneous vacation balance reflected on his pay stubs.

H. disputed Gattis' testimony, asserting that he had not spoken with Gattis about the problem with the payroll software.

In addition, H. testified specifically that he was unaware that he did not receive vacation pay for January 8. H. explained that his pay was direct-deposited into his account at the credit union. H. testified that his normal practice was to contact the credit union each pay period to make sure that his pay had been received, and to determine the balance in his checking account; however, H. testified that even though he received a "hard copy" of his pay stub each week, he generally did not look closely right away to see whether his pay was correct. Thus, according to H., he did not notice that his pay for the week that included January 8 did not include 8 hours vacation pay, because (in his words) the net pay for the 8 hours of straight-time work "wouldn't add up to that much." H. also testified that because his pay stubs throughout 2003 reflected an 8-hour reduction in his vacation leave bank for all pay periods following January 8, he had assumed that his January 8 absence had been posted as vacation leave and therefore had no reason to question the Company's payroll records.

### **ISSUE PRESENTED**

Whether Sweet Sue Kitchens violated the collective bargaining agreement when it terminated Joe H., Jr.? If so, what shall be the remedy?

### **POSITIONS OF THE PARTIES**

#### **A. Employer position.**

The Company contends that H. did not request vacation leave to cover his absence on January 8, that the absence therefore is unexcused, and that H. incurred sufficient points to merit discharge. In the Company's view, much of H.'s testimony simply is not credible.

Sweet Sue notes that there is no payroll documentation supporting H.'s claim that he took off work on January 8 as a vacation day. The leave and pay entries showing that H.'s absence was unexcused were provided by H.'s immediate supervisor, Malone. The Company notes that H. did not receive any vacation pay for the pay period that included January 8, which immediately placed him on notice that the Company viewed the absence as unexcused, and not a paid vacation day. The Company notes that while H. specifically testified that he left a message for his supervisor on January 8, H. never testified that he actually completed a vacation request form, but merely

suggested that he might have filled out such a form and the Company might have lost it.

According to the Company, H. did not claim that his January 8 absence had been misclassified by the Company until after he was terminated in May 2003; in the Company's view, H.'s belated claim to have used vacation leave on January 8 suggests that it is fabricated.

Company HR Manager Gattis frankly acknowledged the problems with the Lawson payroll system, but the Company asserts that H. knew about this problem, and that Gattis and H. had talked about it because of H.'s position as Chief Steward. The Company argues, therefore, that H.'s claim that he was unaware of the software problem or that he relied on the erroneous vacation leave balance on his pay stub is not credible, and that H. knew that his absence was unexcused because he did not receive vacation pay for January 8.

With regard to the differing versions of the attendance policy, the Company notes that H. admits having received a copy of the official Employee Handbook. Moreover, the Company asserts that as Chief Steward, H. knew that employees who had received notice that their jobs were in jeopardy *did not* receive personal counseling when they reached 6 (out of the 8) final attendance points, and cannot credibly claim that he had expected such counseling.

The Company challenges the reliability of H.'s personal calendar. In the Company's view, "it is quite amazing that [H.] would keep such meticulous records on a calendar, yet not bother to ensure that he was paid the proper amount on his pay stub."

## **B. Union position.**

The Union argues that the discharge is improper because H. made a same-day vacation leave request on January 8 by calling and leaving a message in supervisor Charlie Malone's voice mail box. The Union argues that H.'s claim to have left a voice mail message for Malone on January 8 is not directly rebutted by the Company. In light of the Company's implicit claim that H. did *not* leave such a message, the Union asserts that the "best evidence" on this question would have been testimony from Malone himself – yet Malone was not presented as a witness.

In the Union's view, H. reasonably believed that his vacation request had been granted because the vacation leave balance on his pay stub showed that he had been charged for a vacation day.

With regard to the competing versions of the attendance policy, the Union argues that H. was entitled to rely on the absenteeism policy that the Company posted on its bulletin board; under the posted version of the policy, H. should have been counseled if Company records showed that he was in danger of discharge. While H. acknowledged that he had been given a copy of the current Employee Handbook, he testified that he didn't know where his copy of the Handbook might be and that he relied on the version of the attendance policy posted on the Company bulletin board. In the Union's view, H.'s reliance on the Company's posted version of the attendance policy was

reasonable because “the grievant should not be required to pay for the Company’s sloppiness with the loss of his job.” Moreover, the Union contends that “by posting and expecting . . . employees to rely on a policy different from the one in its [H]andbook, [the Company] has denied Mr. H. industrial due process.”

In addition, the Union notes that H.’s personal attendance records – *i.e.*, the calendar that he maintained at the plant – corroborate his claim that he took a vacation day on January 8.

## DISCUSSION

### A. Just cause; burden of proof.

Under the collective bargaining agreement, management has the right to “suspend, discipline or discharge employees for just cause . . .” Citing Abrams and Nolan, Towards a Theory of Just Cause in Employee Discipline Cases,” 1985 Duke L.J. 594, 612 (1985), the Union notes that discipline such as discharge must further one or more of three legitimate management interests: (1) the rehabilitation of a potentially satisfactory employee; (2) deterrence of similar conduct, either by the disciplined employee or other employees; and (3) protection of the employer’s ability to operate the business successfully. Abrams and Nolan also suggest that the concept of just cause requires that discipline be progressive (except in cases involving extreme breaches of fundamental understandings between the employer and employee), and that discharge is warranted only when lesser penalties will not protect legitimate management interests because (1) the employee’s past record shows that unsatisfactory conduct will continue; or (2) the most stringent form of discipline is needed to protect the system’s work rules; or (3) continued employment would interfere with the successful operation of the employer’s business. *Id.* at 611-612.

Regular attendance unquestionably is a legitimate management concern, and Sweet Sue’s attendance policy (whether considering the “official” version in the Employee Handbook, or the variant version that had been posted up until the time of H.’s discharge) clearly satisfies conventional understandings of progressive discipline and fairness in the workplace. The system provides clear notice to employees with attendance problems that they might be subject to discharge under circumstances that are objective and clearly spelled out. H. personally was closely familiar with the policy: both the Union and Management acknowledged that he had an established track record of relatively frequent tardiness or absenteeism over a period of many years. There can be little question that H.’s discharge would be consistent with the basic principles of just cause *if* H. violated the Company’s absenteeism policy because he incurred excessive “points” between November 2002 and May 2003.

The Union also contends (1) that management has the burden of proof in this discharge case, and (2) that management must show that H. violated the absenteeism policy “beyond a reasonable doubt” (citing *Union Camp Corp.*, 71 LA 883, 884 (Hardy 1978)) or by “clear and convincing evidence” (citing *Beverly Enterprises*, 100 LA 522, 528 (Berquist 1993) and *Vernors, Inc.*, 80 LA

596, 599 (McDonald 1983)).

In the labor arbitration field, most arbitrators agree that employers bear the burden of proof in disciplinary adverse action cases where just cause is required, including discharge cases like the instant dispute. FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION (R. Schoonhoven ed., 4th Ed. 1999) at 273-75; *see also* cases cited in ELKOURI AND ELKOURI, HOW ARBITRATION WORKS (5th Ed. 1997) at 949 n. 119. However, there is disagreement regarding the quantum of proof that employers must produce in order to prevail.

Discharge unquestionably is a significant disciplinary sanction, and there are a few arbitrators who take the view that employers must produce an elevated standard of proof (such as "beyond a reasonable doubt" or "clear and convincing evidence") to sustain any discharge simply because of the severity and finality of the penalty, a sanction that some arbitrators characterize as "economic capital punishment." *City of Cleveland, Ohio*, 108 LA 912 (Skulina 1997); *see also Professional Med Team, Inc.*, 111 LA 457 (Daniel 1998); *Greene County Dep't of Human Services*, 109 LA 1160 (Sergent 1997); *Drummond Co.*, 106 LA 250 (Sergent 1996); *Grand Rapids Area Transit Authority*, 107 LA 1132 (Daniel 1996). More commonly, however, arbitrators tie the quantum of evidence to the nature of the charge. For standard disciplinary and discharge actions, arbitrators commonly will sustain the employer's action if the "preponderance of the evidence" (the standard of proof in most civil litigation) supports the employer's case. *E.g., Fernald Environmental Restoration Management Co.*, 104 LA 596 (Cocalis 1995); *Rittman Nursing and Rehabilitation Center*, 113 LA 284 (Kelman 1999). Frequently, however, arbitrators will require employers to prove their case under an elevated standard if the charge against the employee alleges employee activity that might be punishable under criminal law, or where the charge otherwise involves a failure of morals or conduct that is socially stigmatizing. *E.g., Vista Chemical Co.*, 104 LA 818 (Nicholas 1995) (employee discharged for alleged sexual harassment); *Yellow Freight Systems, Inc.*, 106 LA 1062 (Briggs 1996) (employee accused of dishonesty); *Georgia-Pacific Corp. Building Products Division*, 106 LA 470 (Hooper 1996) (employee accused of bringing marijuana to worksite); *Chicago Transit Authority*, 110 LA 403 (Wolff 1997) (conductor accused of assaulting passenger).

The employer's charge in this case is straightforward absenteeism, and it is my view that the employer's burden in this case therefore is evaluated under a basic "preponderance of the evidence" standard. Recognizing the severity of the discharge sanction, the grievance warrants close scrutiny of all the evidence presented, but ultimately does not require the employer to prove its case under an elevated burden of proof.

**B. Whether Sweet Sue has proven that it had just cause to discharge H..**

This case revolves around the factual question whether H. took a vacation day when he was absent from work on January 8, 2003. Sweet Sue and RWDSU each presented witness testimony and documentary evidence in support of their position, along with rebuttal argument. The conflicting evidence is described in detail in the Background section, *supra*.

Based on the evidence, there appear to be two conflicting stories surrounding H.'s January 8 absence. I note that H. had ample vacation leave available to him throughout the first portion of 2003, and – in light of the Company's liberal policy of allowing employees to request "same day" vacation leave simply by calling their supervisor – there seems to be little doubt that H. *could* have used his vacation leave at any time to insure that he was not fired. Thus, it is likely that either of two scenarios occurred:

1. H. *did* leave a voice message for Malone requesting vacation leave on January 8, as H. claims, but Malone failed to complete the paperwork for a vacation leave request and erroneously recorded H.'s January 8 absence as unexcused. In other words, the Company erred.
2. H. *did not* leave a voice message on January 8 requesting vacation leave, and simply lost track of the total number of absence points that he accrued during the six-month period following the November 2003 warning write-up. Under this explanation, the Company's attendance records are correct, the discharge is justified, and H.'s testimony and documents are after-the-fact fabrications intended to shift responsibility away from himself and onto the Company.

Several factors are key in assessing this case, including the credibility of witness testimony (*e.g.*, demeanor, consistency of the testimony, corroboration and simple believability), as well as the quality of the evidence.

I found the testimony of each of the Company witnesses to be straightforward and candid, and highly credible. The presentation of the Company's principal witness, HR Manager Gattis, was especially compelling in its frank acknowledgment of facts that were not helpful to management's case, including (a) the defects in the payroll software that caused unexcused absences erroneously to be charged to an employee's vacation leave bank; (b) the longstanding posting of the outdated version of the attendance policy on the Company bulletin board; and (c) an acknowledgment that the Company once had taken action against H. for absenteeism, yet had retracted its action when the Company recognized that its payroll records were wrong.

H. was the sole witness in his defense. While I did not find H.'s demeanor suspect, I nonetheless found his credibility to be problematic in a number of areas. For example:

1. H. claimed that he relied on the version of the absenteeism policy that was posted on the Company bulletin board, rather than the "official" version found in the Employee Handbook, and the Union contends that H. therefore expected to be counseled after he accumulated 6 of the 8 attendance points during the period when his job was in jeopardy. But the Company successfully demonstrated that many employees had been terminated for absenteeism in recent years without receiving counseling from the HR office; if H. and the Union seriously believed that the Company was bound by the posted version of the attendance policy, then it is difficult to imagine that there would not have been a grievance

on this question long before H.'s May 2003 discharge.

2. H. claimed that he was unaware of the software defect in the Lawson payroll system, in direct contradiction to Gattis' testimony that H. had spoken with her about the problem. Inasmuch as this software defect affected all employees at the plant who experienced an unexcused absence during the latter part of 2002 and early 2003, and in light of H.'s testimony that, as Chief Steward, he frequently was asked by bargaining unit members to review their records in the Company's personnel office to make sure that the records were correct, it is difficult to believe that H. was unaware of this systemic problem.

3. In its case, the Company demonstrated that while H.'s payroll records for the week including January 8 reduced his vacation bank for 8 hours, the pay stub for this period would have shown that H. was not *paid* for January 8. H. testified that he did not routinely review his pay stubs each week, and therefore he did not notice that he did not receive vacation pay for January 8. In light of (1) H.'s testimony that the Company had recordkeeping problems, (2) his regular practice (as Chief Steward) of checking payroll records at the request of other bargaining unit workers, and (3) his prior experience with mistakes in his personal payroll records, it is hard to understand why a worker in H.'s position would not review each week's pay stub closely to make sure that it was correct. Moreover, as an employee who was "on notice" that his job was in jeopardy if he missed too much time during the six-month period from November 2002 through May 2003, it would have been logical (and certainly in his best interest) for H. to review all his pay stubs closely to make sure that he did not run into trouble.

4. The Company questions the personal attendance calendar that H. claims that he maintained at the plant, commenting that "it is quite amazing that he would keep such meticulous records on a calendar, yet not bother to ensure that he was paid the proper amount of money on his pay stub." The circumstances around this calendar are mixed. On one hand, H. had a long record of attendance problems at the plant, and therefore had good reason to track his absences; in addition, the Company acknowledged that it once had initiated adverse action against H. based on attendance, only to withdraw the action when H. demonstrated that the Company's records were wrong. On the other hand, there is no evidence corroborating H.'s claim that the calendar was maintained on an on-going basis. The calendar records *only* absences and a few dates when product codes were changed at the plant. The January 8 entry showing a "vacation day" taken could have been made at any time; indeed, the entire calendar could have been created *after* H.'s termination in an effort to bolster his case. Without some corroborating evidence, the personal attendance calendar therefore has minimal value in support of H.'s claim.

5. H. testified that he was unsure whether Malone provided him with a vacation leave request in connection with his January 8 absence. Malone's weekly attendance report for the canning and retort unit clearly shows H. as absent without excuse for January 8, suggesting that Malone did not generate a leave request for H. to sign, and that Malone at that time did

not believe that H. had requested vacation leave. In light of H.'s Chief Steward status, and his personal encounters with absenteeism issues, it would be logical to expect H. to be careful to make sure that the proper paperwork was submitted to document "same day" vacation leave; H.'s uncertainty regarding whether this post-absence documentation was generated raises doubts about his claim to have called for Malone on the morning of January 8.

Although I am skeptical of portions of H.'s testimony, I do not conclude that his testimony is wholly unbelievable. The weaknesses in his testimony and supporting evidence primarily go to the question of the weight they are given.

Which brings us back to the central question in this dispute: Whether H. left a voice message for Malone on January 8?

The Company's evidence on this question is entirely indirect and circumstantial – the absence of a vacation request form; the weekly attendance report showing an unexcused absence; H.'s failure to complain when he did not receive vacation pay for January 8; Supervisor Young's testimony that when H. was given the discharge notice on or about May 9 and escorted from the plant, H. did not immediately object that the Company must have made an error. H. himself provided the only direct (although uncorroborated) evidence regarding the voice message issue.

Fact finders sometimes are inclined to accord more weight to credible direct evidence in preference to indirect and circumstantial evidence. However, arbitrators in labor and employment disputes frequently have noted that a strong circumstantial case may be more convincing than weak direct evidence:

Circumstantial evidence has been stated by one arbitrator to be "often far more persuasive than direct testimony." *Lone Star Steel Co.*, 48 LA 949 at 950. . . . The question is what reasonable inferences may be drawn from the circumstantial evidence used. One arbitrator has suggested, for example, that in evaluating circumstantial evidence an arbitrator "must exercise extreme care so that by due deliberation and careful judgment he may avoid making hasty or false deductions." *South Penn Oil Co.*, 29 LA 718 at 721. Nevertheless, in drawing reasonable inferences from circumstantial evidence, the circumstantial evidence need not be so strong that it excludes every reasonable theory except the guilt of the Grievant.

*Farm Stores, Inc.*, 81 LA 344, 347 (Hanes 1983).

In evaluating the evidence presented, both direct and circumstantial, arbitrators also appropriately consider the *motivation* of witness. This is particularly true in disciplinary cases, especially discharges. Thus in *Meridian Medical Technologies*, Arbitrator F. Craig King, Jr.,

acknowledging the contributions of Arbitrator Howard Shulman and the Professors Elkouri, observed:

[T]he incentive of any grievant to lie in a disciplinary arbitration case is obvious. A grievant's job tenure and financial security are at stake, whereas no such motivation confronts the employer's supervisory personnel. A grievant's continued job tenure is sufficient motivation, in and of itself, to lie. Contrary to Grievant in the case at hand, none of the witnesses called by the Company had any incentive to place their credibility on the line simply to sustain his suspension and avoid paying him back-pay. . . .

. . . [M]any arbitrators have also recognized that supervisors and disinterested witnesses have a higher goal than attempting to sustain the suspension of an employee. Thus, in resolving credibility, this Arbitrator may consider not only the demeanor of the witnesses, but the motivation of those witnesses as well.

115 LA 1564, 1571 (King 2001).

In light of my concerns about H.'s credibility, I do not conclude that his direct testimony on the voice message question trumps the Company's substantial and credible indirect evidence in support of its position. But while I find the Company witnesses to be more credible than H., I cannot conclude that the Company has proven its case on the key fact question at issue in this dispute, *i.e.*, whether H. left a message for Malone on January 8.

Significantly, the Company did not call H.'s supervisor, Malone, to testify at the hearing, even though he continues to work for the Company and was available to testify. It became clear soon after H. was discharged that the January 8 absence was central to this dispute. The Company's discharge action revolves around Malone's characterization of H.'s January 8 absence as "unexcused" on the weekly attendance report. Malone was in a position to testify directly about the events of January 8, and the reason that he recorded the absence as unexcused. In addition, Malone could have rebutted H.'s testimony that he (H.) had left a voice message for Malone on the morning of January 8. Malone also could have responded to H.'s claim that Malone never questioned the reason H. was absent from work on January 8.

Adjudicators (including arbitrators) often draw adverse inferences when a party fails to call a key witness (*Advance Transportation Co.*, 105 LA 1089 (Briggs 1995); *Schlage Lock Co.*, 88 LA 75 (Wyman 1986)), or conclude that the failure to call a key witness weakens a party's case. *Cal-Compack Foods*, 105 LA 865 (Oestreich 1995).

In this instance, I decline to draw any inferences about what Malone would or would not have testified had he been called in this case. However, the Company carries the burden of proving by

a preponderance of the evidence that it had just cause to discharge H. for violating the Company's absenteeism policy, and I find that the Company did not meet this burden.

The Company demonstrated that its contemporaneous payroll records do not include any evidence that H. requested leave; in response, H. testified that the Company's records are wrong, and that he relied on standard procedures when he called and left a message for Malone on January 8. Malone's testimony might have offered very helpful insight into this question, yet the Company's sole rebuttal to H.'s testimony are witness accounts suggesting that H. did not claim that January 8 was a vacation day until *after* he was discharged on May 9. This is weak rebuttal evidence on such a central question. Based on the record before me, it appears that the *sole* direct evidence suggesting that H. might have known that the Company viewed January 8 as an unexcused absence was that he did not receive 8 hours vacation pay for the day. Yet as a practical matter, the only way that H. was likely to know this was to review his weekly pay stub. While I find H.'s claim that he did not closely examine his pay stubs each week to be surprising, inasmuch as H.'s total pay changed regularly because employees in the retort area frequently worked overtime, it is not completely unbelievable.

Further complicating the picture is the software problem in the Lawson payroll system. The Company concedes that H. began 2003 with a leave balance of 120 hours, and that H.'s pay stub for the week including January 8 (and every week thereafter) showed an 8-hour reduction in his leave balance relating to the January 8 absence. While I am persuaded that H. (as Chief Steward) was aware of the problem, the practical result of the software error is that whether H.'s January 8 absence was excused *or* unexcused, the leave balance that appeared each week on his pay stub was the same, and suggested that January 8 had been attributed to vacation leave. Therefore, if H. did not review his pay stub and realize that he had not received vacation pay for January 8, then it follows logically that he would have had no reason to speak with Malone or the payroll office about his January 8 absence because each and every pay stub after January 8 showed that his leave bank had been debited for a January 8 vacation day.

Payroll records, and the process of generating pay checks and pay stubs, are critical administrative tools within the control of company management. Management has a basic obligation to make sure that it maintains records in an orderly fashion, recognizing that employees typically rely on these records to be complete and accurate. There can be little doubt that questions about H.'s January 8 absence would have been raised and resolved long before May 2003 *if* the Company's payroll office had been generating accurate reports. Instead, H. was receiving information from the Company each week suggesting that he had used a vacation day on January 8, and perhaps leading him to mis-count the number of absence points that he had accrued during the period after he had received the attendance warning.

**AWARD**

Because the Company has not proven that H. was absent without excuse on January 8, 2003, I find that the Company did not have just cause to discharge H. pursuant to its attendance policy and the collective bargaining agreement. Accordingly, the Company shall reinstate H. to his position with such back pay as will make him whole for the net financial loss resulting from his discharge (taking into account any income he has earned in other employment and unemployment compensation received), and with no loss in seniority or benefits.

---

Paul Greenberg, Arbitrator  
Washington, D.C.

July 21, 2004