IN RE ARBITRATION BETWEEN:

UNIVERSITY OF ST. THOMAS

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 120

DECISION AND AWARD OF ARBITRATOR
FMCS CASE # 070617-57235-3

JEFFREY W. JACOBS
ARBITRATOR
January 21, 2008
IN RE ARBITRATION BETWEEN:

University of St. Thomas,

and

DECISION AND AWARD OF ARBITRATOR
FMCS CASE # 070617-57235-3
Lori O’Brien grievance matter

Teamsters Local 120.

APPEARANCES:

FOR THE UNION:  FOR THE UNIVERSITY:
Martin Costello, Hughes & Costello Phyllis Karasov, Moore, Costello & Hart
Katrina Joseph, Hughes & Costello Martin Kappenman, Moore, Costello & Hart
Lori O’Brien, grievant Edna Comedy, Assoc. V.P. Human Resources
Robert O’Brien Kirsten Ireland, HR Partner
Brittney O’Brien Cynthia Jenkins, Building Services Worker

PRELIMINARY STATEMENT

The hearing in the above matter was held over the course of two separate days on October 26, 2007 and December 11, 2007 at the St. Paul Campus of the University. The parties presented oral and documentary evidence at that time. The parties presented post-hearing Briefs, which were e-mailed to the arbitrator on January 11, 2008 at which point the record was closed.

ISSUE PRESENTED

The issues as framed by the arbitrator are as follows: Did the University have legitimate business reasons within the meaning of Article 3, section 1 of the collective bargaining agreement to terminate the grievant? If not what shall the remedy be?
CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from February 1, 2005 to January 31, 2008. Article Three provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service.

UNIVERSITY’S POSITION:

The University took the position that it had legitimate business reasons to terminate the grievant for punching her children in and out of work on various occasions resulting in fraudulent payments to them. In support of this position the University made the following contentions:

1. The grievant has been employed as a Building Service Worker for approximately 15 years. As such, she was well aware and has been specifically advised of the University’s policies against punching other people in or out of work and of the dire consequences of doing so.

2. The University of St. Thomas, UST, Employee handbook states as follows:

   Behavior that does not promote an efficient, pleasant work environment is prohibited and may result in disciplinary action. Any conduct not appropriate to a good work environment may subject an employee to disciplinary action up to and including termination. Following are examples of inappropriate behavior; these are not intended to be all inclusive. …

   Punching time cards for others.

3. The University argued that there was clear notice to the grievant that punching time cards for others was strictly prohibited by UST and would be punished severely.

4. The University asserted that pursuant to Article 3, section 1 of the collective bargaining agreement, the standard for determining discipline and discharge is whether UST has legitimate business reasons to warrant discharge. This in fact has already been determined by this arbitrator in a previous arbitration between these parties. Thus, the standard is less than would otherwise be required in a more traditional discharge case.
5. Notwithstanding that, the University argued that there is overwhelming evidence, both circumstantial and direct that the grievant was on many occasions guilty of punching her children in and out of work at UST.

6. The University pointed out that at various times both the grievant’s children were enrolled in classes at UST and were also employed to work as custodial workers in various university buildings and facilities.

7. Following a complaint from a former student who indicated that the grievant and her two children Robert and Brittney O’Brien, were engaging in a longstanding course of conduct to essentially defraud UST of time by punching each other’s time cards when they were not in fact at work.

8. The student, a former fiancée of Robert O’Brien, informed the University that the grievant told her she was punching her children in and out. The University also alleged that she further informed UST that Robert O’Brien had told her that his mother, the grievant had been punching his time card for him when he was not at work allowing him to collect $300.00 per week in wages he was not entitled to. The University further alleged that she told them that the grievant’s daughter, Brittney had also told others that her mother was doing this as well.

9. Following this information, the University began an investigation and pulled the time cards for each of these three people. The University alleged that a comparison of these time cards shows clearly that there were many times when one or both of the children were supposed to be in class when they were punched in.

10. Moreover, Robert O’Brien was employed at Wells Fargo Bank. These time cards from Wells Fargo were compared to the time records at UST. These shows again multiple times when Robert was punching in UST and at Well Fargo. Clearly he could not have been at both places at the same time. Someone had to have punched him in or out at UST fraudulently. The person with both motive and opportunity was the grievant.
11. The University went through calendars and time records to demonstrate these allegations and based the circumstantial part of its case on these facts. UST asserted that a review of the time cards shows that frequently, the grievant’s punch out times are virtually identical to those of her son’s at times when he was working at Wells Fargo and simply could not have been at the University. Moreover, there were also such times when one or both of the grievant’s children were supposed to be in class and yet their time records showed them punched in to work. The University argued that while this part of the case was circumstantial, the only reasonable conclusion based on the hard evidence is that the grievant was complicitious in a plan to punch her children in and out of work when they were not there. UST pointed out that on the days when the children’s time records have these very suspicious times the grievant was also at work.

12. The University put on several witnesses to support the claim that the grievant’s children were not working in the building they were assigned to. Many witnesses testified that they worked in the same buildings the grievant's children were assigned to work at but that they rarely if ever even saw them there. It was clear from this evidence that the grievant’s children were rarely at work as assigned.

13. After reviewing this evidence the University called the grievant and her children in for investigatory interviews. The grievant, in an interview with Kristen Ireland, allegedly admitted that she punched her children in and out of work but that she was depressed with the death of a child and over her concern for giving them a better life than she had. The University also alleged that on the way out of the investigatory meeting the grievant again admitted her actions to Mr. Steve Uhls and added that if she “went down” she would “take others with her” or words to that effect. The University alleged that these admissions closed the circle on the circumstantial evidence and showed clearly that the grievant was guilty of punching her children in and out of work.
14. The University countered the allegation that there was a Weingarten violation in the meeting by asserting that the grievant did not specifically ask for Union representation. UST argued that caselaw does not require the Employer to offer representation and that the grievant did not ask for representation at this meeting. UST argued that Ms. Ireland was truthful at the investigatory meeting and simply indicated that it was investigatory and there was no reason to have a Union steward present.

15. Even if there was a Weingarten violation the University argued that at most the consequences of that would be to throw out the confession she made. Such a violation does not require the overturning of the discipline as the Union asserts.

16. Moreover, the University argued that the grievant again admitted her complicity in this at the Step 3 grievance meeting, when there was Union representation. Obviously even if the first confession is disregarded, the admissions made at the Step 3 meeting can still be used.

17. The University also asserted most strenuously that there is ample other evidence as described above, to establish a legitimate business reason to sustain the discipline.

18. The University reacted to the confession of the grievant’s son at the hearing by asserting that he simply cannot be believed. UST alleged Robert O’Brien has lied on so many occasions about so many things he can scarcely be regarded as credible. He lied to investigators at first, lied at the UST Judicial Hearing in order to save his own skin, lied initially about the Wells Fargo records but when confronted with them admitted his lie, lied about working and obviously lied about his working when he was not. His so-called confession cannot be given any credence or value.

19. The essence of the University’s case is thus that the evidence clearly shows that the grievant was punching her children in and out of work. They were rarely even at work and at the times they were supposedly punching in or out the grievant was there and they were not. Moreover, the grievant admitted her actions here on several occasions. Based on this clear evidence the University contends that the evidence is simply overwhelmingly in favor of a finding of guilt.

The University seeks an award of the arbitrator denying the grievance in its entirety.
UNION’S POSITION:

The Union’s position is that the grievant is not guilty of the conduct as charged. The Union’s position is that the grievant’s son and daughter colluded to punch Robert O’Brien in or out of work on the occasions charged and that the grievant had no knowledge of nor complicity whatsoever of this conduct. In support of this position the Union made the following contentions:

1. The grievant has been with the University for more than 15 years and is by all accounts a very hard working and dedicated employee. She has never, except for the incident involved in this case, been disciplined or found to be shirking her duties.

2. The Union and the grievant vehemently denied that she punched her children in or out. The grievant maintained that she was unaware that her children were engaged in this behavior and asserted in the strongest possible terms that she neither did this nor was she aware of it. The grievant even asserted that on one occasion her son asked her to punch him in but that she refused to do so.

3. The Union first asserted that the standard is still akin to just cause even though the contract calls for legitimate business reasons. The Union maintains that the actual issue should thus be whether just cause exists to terminate the grievant.

4. In any event, the Union argued that the issue is not whether the grievant’s children were or were not at work when they claimed they were. Neither is it whether the grievant’s children were punched in when they were not at work. The question, whether one uses a just cause or legitimate business reason standard, is whether the grievant is guilty of punching her son’s and daughter’s time card as alleged. The Union contends that the grievant did not.

5. The Union noted that most of the University’s case involves a series of red herrings designed to show that the grievant’s children were not at work when their time cards indicated they should be. While it was clear that on multiple occasions they were not at work that this does not prove that the grievant did anything wrong.
6. Second, it was clear that the grievant’s children skipped class on many occasions. In fact, most of the duplicitous testimony presented by the University to show that the grievant’s children were punched in when they were scheduled to be in class. The Union asserted that this evidence provided nothing more than evidentiary support for the not so startling proposition that on occasion, college kids skip class. This evidence hardly shows that the grievant fraudulently punched her children in.

7. The Union also pointed to the actual time cards and asserted that when one examines these closely, the nature of the University’s case, i.e. a completely circumstantial one, disintegrates quickly. The actual time cards and the calendars used to support UST’s case, show that it is quite possible, even more than likely, that Brittney O’Brien was the person who punched her brother in as he alleged.

8. The Union asserted that it was the son and daughter who conspired to punch each other on. In most instances, it was Robert O’Brien who was punched in when he was not at work. The Union asserted that a close examination of these records shows that they show that on the dates when Brittney is scheduled to be in class and is punched in, they could certainly show that Brittney may well have simply punched herself in and skipped class. They could also show that she punched in and went to class but failed to punch out. Clearly this should not have happened but this evidence does not under any circumstances show that the grievant punched her in or out.

9. Moreover, on those instances when Robert was punched in and was scheduled to be in class, these records also show nothing more than that Brittney could well have done exactly what they both said they did – punch each other in and out. None of this evidence showed conclusively that the grievant did this.

10. Further, in those instances when Robert was at Wells Fargo, it is clear that Brittney was at on campus and could have punched Robert in or out as alleged. The import is that the Employer’s circumstantial case showed nothing conclusive. There were thus equally plausible conclusions that could be reached based on the same evidence.
11. The Union also raised a very serious issue of a Weingarten violation in the investigation. The Union alleged that the Employer’s representative intentionally misled the grievant by telling her that the meeting they had was merely to ask a few question and that there was no disciplinary action contemplated. This was simply not true – the University was absolutely considering discipline against the grievant at that time. When she asked for a Union steward the University’s representative at that time lied to her to convince her not to seek a Union steward. The Union and the grievant vehemently denied making any confession at this meeting.

12. Further, the grievant did in fact ask for a Union steward and should have been given one at that moment. Failure to do so under these circumstances is a clear Weingarten violation. The Union first alleged that the violation should result in the complete overturning of the discipline. At the very least this violation results in the “confession” being disregarded. In any case the arbitrator must completely disregard any statements made by the grievant at this investigatory meeting between the grievant and Ms. Ireland.

13. The essence of the Union’s case is that the son and daughter conspired to punch each other in and the evidence in this case actually supports that. At the very least, the circumstantial evidence in this case is more than amenable to two equally plausible conclusions. Since the grievant’s children both testified credibly that they, not the grievant, conspired to punch each other in. There was simply insufficient evidence to establish that the grievant was guilty of the acts alleged here. Finally, that any so-called confession or statements made at the investigatory meeting must be disregarded due to the clear Weingarten violation that occurred.

The Union seeks an award reinstating the grievant to her former position with the University with full back pay and all accrued contractual benefits.
DISCUSSION

This matter was without question one of the most difficult matters to decide this arbitrator has ever heard. There were enough factual and evidentiary inconsistencies, exaggerations, last minute surprise confessions, irrelevant and immaterial assertions and out and out lies to keep a first year evidence student busy for a month. There was also a significant issue of a Weingarten violation as will be discussed below. Suffice it to say that the parties and their respective witnesses were in stark disagreement on virtually every aspect of this case.

Initially there was some disagreement on the standard to be applied in determining this issue. As accurately noted by the University however, this question has already been determined and is clearly set forth in the parties’ labor agreement. Article 3, Section 1 provides in relevant part as follows; The Employer shall have the ability to discharge an employee for legitimate business reasons and shall give at least one (1) warning notice in writing to the employee affected and the Union. No warning notice needs to be given to an employee before discharge if the cause of such discharge is of dishonesty, major violation of the Employer’s rules which do not conflict with this Agreement … ” The Union did not raise any issue with the question of whether there needed to be a prior warning given in this case as the allegation was clearly for dishonesty or a major violation of a work rule. The Union did however allege that the “legitimate business reason” standard must mean something akin to just cause and alleged that the issue should be re-framed to one involving just cause.

The Union’s argument does not find any support in the labor agreement. As discussed in a prior decision between these parties, the standard is legitimate business reasons. Having said that however it is apparent that while this means something short of a full-blown just cause analysis, there must be some legitimate demonstrable and justifiable reason to terminate the grievant. At the very least, it must mean that there is proof of the guilt of the offense charged. Also, this standard does not mean the abrogation of clearly established statutorily or legally guaranteed rights such as those guaranteed by the Weingarten doctrine.
The next issue raised that must be discussed before embarking on a review of the evidence is whether there was a Weingarten violation in the investigatory meeting held between Ms. Ireland and the grievant and if so what the consequences of that are. The evidence showed that after receiving the complaint from Ms. Arias the University began looking at the time cards for the grievant and her two children. They also called the grievant in for the purpose of asking her about these and scheduled meetings with the children in succession so they could not discuss the questions asked between these meetings. The grievant met with Ms. Ireland to discuss these allegations. The parties’ versions of what happened and what was said at this meeting diverged but it was absolutely clear that this was no mere investigatory meeting. It was rather a meeting designed to determine whether discipline would be meted out to the grievant. Well prior to the meeting the Employer had a suspicion that the grievant had been punching her children’s time cards and had already begun to find support for this. In fact Ms. Ireland testified that she had reviewed the time cards and made at least a preliminary determination that the grievant had some complicity in this.

The grievant claimed that during this meeting she clearly asked for Union representation. Employer Exhibit 12 was reviewed. This exhibit shows for one thing that it is not a transcript nor even a running set of notes made at the meeting but rather a synopsis of the meeting prepared by Ms. Ireland herself. It was also clear that only Ms. Ireland and the grievant were at this meeting making it exceedingly difficult to determine what was said given the conflicting nature of the testimony about it. These facts did not help this determination.

Moreover, it was clear that the issue of a Union steward was brought up at this meeting. There is a clear statement that “Ms. O’Brien asked if she needed to have a Union steward present.” The grievant claimed that she asked for one to be present. The question of what was actually said on this record is moot. It was clear that this meeting was one designed to gather facts to discipline the grievant and that she asked for a steward.
The statement allegedly made by Ms. Ireland that “this meeting [was] not a discipline meeting, only an interview as part of an investigation” was misleading at the very least. At worst it was a misrepresentation of a material and very significant fact about the meeting. An Employer may not on the one hand assert that the employee did not specifically request a Union steward at an investigatory meeting and on the other hand misrepresent the nature of the meeting itself in an effort to mislead the employee and give them a false sense that they are not under investigation. Not only was the grievant under investigation she was in fact about to be disciplined as a direct result of the investigation already under way.

Under *NLRB v Weingarten*, 402 U.S. 251 (1975) a Union member must be given a Union representative if they request one during an investigatory meeting when the employee reasonably believes that the interview may result in disciplinary action against him or her. Here either the grievant clearly asked for a Union representative in which case the interview should have been immediately stopped and a Union steward could be found or the grievant was misled into thinking that she was not under investigation directly when she in fact clearly was. Obviously, as the Union asserts, even if a Union member does not clearly ask for Union representation (although on this record it appeared that she did) but is given misleading or intentionally inaccurate information, the Employer cannot later be heard to say that the employee did not clearly ask for a Union steward.

On this record it was abundantly clear that a Weingarten violation occurred during this investigatory meeting. The next question is what to do about that. The Union asserts that the entire discipline must then be thrown out due to this significant procedural error by the Employer. As the Employer asserts however, the greater weight of case law does not require this. If there is sufficient evidence to support the discipline without any of the statements made during the investigatory meeting in light of the Weingarten violation, the matter can still proceed. What does occur is that any statements allegedly made during the meeting cannot be used to support the Employer’s claims. Here two things conspire to defeat the claim that there was an admission made at the investigatory meeting.
First, there is the Weingarten violation noted above. Even if a confession was made it now cannot be used. More importantly, on this record there was insufficient proof of an admission made in any event. Even a cursory review of the notes of the meeting and reading them in the light most favorable to the Employer shows that no admission of guilt was ever made. The notes reflect that the grievant asked what would happen if she were found guilty of punching her children in. Further she apparently asked if she was going to lose her job as the result of these allegations. There was some allusion to statements about the death of her other child and a divorce. These obtuse references do not even contain anything remotely resembling an admission of guilt here. Accordingly, there was insufficient proof of an admission of guilt and even if any such admission was made, it cannot be used.

Moreover, the grievant vehemently denied making any admission of guilt in this matter at the investigatory meeting. The notes of that meeting were not apparently done at the meeting as a verbatim record of what was said and involved just the two people. Moreover there was no tape recording of this or other record that would elucidate this dispute. Based on this record, even if one could consider the statements made there would be insufficient evidence to say definitively that an admission was made at that meeting anyway.

The next issue raised by the Union that needs to be determined before a review of the actual evidence is whether the grievant should be reinstated even if there is a finding that she punched her children in. The short answer is that the rule against this is not only well published but also well known in the American workplace setting. Punching someone else’s time cards especially in light of the fact that this would result in clear fraud is more than sufficient to support a termination. If she did this the termination will absolutely be sustained. If not then the grievant must be reinstated with full back pay and benefits. It is thus against this backdrop that the factual and evidentiary determinations can proceed. On this record that proved a tempestuous journey.
The University’s case was largely circumstantial. There was no direct evidence that she punched her children’s time cards. There was no evidence to suggest that someone saw her actually punching a card that was not hers. Likewise, there was no any direct evidence that she was seen punching a time card and then another time card on the heels of the first one. Indeed, the only direct evidence presented that the grievant actually did this was the allegation that she admitted doing so in the investigatory meeting and later at the Step 3 grievance meeting. Weingarten, as discussed above, prevents consideration of the statements made at the investigatory meeting.

There was further an allegation that the grievant made an admission at the Step 3 grievance meeting. This allegation was also hotly denied by the grievant and frankly there was little if any direct evidence of this adduced at the hearing. On this record it was clear that there was no direct evidence tying the grievant to the allegations here nor was there sufficient competent evidence that she made an admission to this effect.

Having said that though, circumstantial evidence can be quite probative and convincing under the right circumstances. If there is but one reasonable conclusion to be reached from the circumstantial evidence then such evidence can be enough to carry the burden of proof. If on the other hand, equally plausible conclusions can be reached from the same evidence this will be problematic and even fatal to the Employer’s case since the Employer in a discharge case carries the burden of proof. It is incumbent upon the party defending a circumstantial case to provide an alternative and plausible conclusion to be reached from the same evidence. It is not enough to simply say that there could be something else that could have happened; it is critical that the party opposing the conclusions to be reached from circumstantial evidence be able to show that there was indeed another equally plausible scenario that could have or even did occur based on the same set of known facts.
Here the Union did just that. Obviously, the most striking piece of evidence that came out of this hearing was the last minute confession of young Robert O’Brien who for the first time at the hearing, admitted that he and his sister Brittney colluded to falsify their time cards unbeknownst to their mother, the grievant. Robert apparently lied to investigators at first when asked if he or anyone else falsified his time cards and punched him in when he was not there. He continued this lie at the hearing before the UST Student Judicial hearing and told various other lies and fabrications throughout the course of this proceeding.

There were also many times when he was punched in at UST and scheduled to be in class. He claimed and the evidence supported, that he was not in class very often during these times. Obviously, on those dates where there was a conflict between his class and work schedule, he could certainly have cut class and been at work. In the alternative he could have been at class and cut out of work. As noted herein, there was little direct supervision of the student workers and they came and went without oversight. On this record there was no way to tell if on the dates he was punched in and scheduled for class whether he was work or not. Certainly, if that was the only piece of evidence on this record the case would be far easier to decide. Further, there is no question that he was not at work at UST at all times when he claimed. One need only take a cursory review of the evidence in this matter to see that there were multiple times when he was punched in at UST and at Wells Fargo at the same time. He could not have been in both places at the same time and the evidence showed that he was likely to have been at work at Wells Fargo rather than at UST at the times when his records shows him punched in at both places. These instances and times will be discussed in some detail below.

Turning now to Brittney for a moment, there were also many times she was punched in and scheduled for class. She too could have either cut class and been at work or she could simply have punched in and gone to class without punching out. Certainly this would have been a serious violation of policy and could certainly have gotten the two children into trouble. That piece alone however does nothing to support the claim that the grievant punched them in or out.
There was considerable evidence that both Brittney and Robert were less than religious about classroom attendance. No one takes attendance at these classes and there was no direct evidence of how many times they actually were in class or not. It was clear that their grades may well have suffered as the result of poor attendance but again, this evidence did little to establish by even a preponderance of evidence that the grievant was punching them in when they were in class.

The evidence showed that the process by which student workers are scheduled is a loose one indeed. There is little direct supervision, no set schedule and very little if any oversight of the times they actually do work. Students work when they have time and perform the tasks they are assigned, mostly cleaning and light maintenance work, in the dorms and classroom buildings around the campus. No one really watches them all that closely.

However, there were also many times when Robert O’Brien was supposedly working at UST when he was scheduled to be working at his other job at Wells Fargo. There was direct evidence showing clearly that Robert was not at work at UST when he was punched in. A review of the time cards and the calendars provided by the University shows clearly that there were many times when he was punched in at both places. That however is not the issue, the issue is whether the grievant punched his cards to allow that to happen.

As noted herein, most of the Employer’s case was based on the claim that there were too many times when the grievant and one of her children punched in or out at the same time or within a few minutes. The Employer alleged that this is too suspicious and that the grievant must therefore have been doing that. A close review of this evidence reveals that the opposite is true and that the more likely scenario posited by the Union is at least as likely, even though that scenario involves the most nefarious and fraudulent behavior by Brittney and Robert O’Brien.

Robert and Brittney contended that Brittney would frequently punch her older brother in or out even though he was not working. Certainly if this is true, there would be nothing to incriminate the grievant. The time records of both children were reviewed extensively to determine what happened.
Brittney’s time records show that she frequently was punched in when she was scheduled to be in class. The instances relied upon by the University are not convincing to show that the grievant punched her in however. There was one instance in January of 2007 when she was scheduled for class from 9:55 a.m. to 11:35 a.m. She was punched in from 7:52 a.m. to 11:44 a.m. The grievant punched in at 7:09 a.m. that day. These facts effectively show only that Brittney might well have either cut class or could have gone to class without punching out but were insufficient to prove that the grievant punched anyone else’s time card. Significantly, the grievant began work usually at approximately 7:00 to 7:30 a.m. Brittney never punched in anywhere near that early and most of the time did not punch in until well after 9:00 a.m. Frankly, there was nothing to suggest or even imply that the grievant was punching her daughter in on any of these days.

The same general pattern was shown for Brittney’s punch out times as well. On February 2, 2007, Brittney punched out at 11:15 a.m. while the grievant punched out at 5:20 p.m. February 5th Brittney punched out at 4:24 p.m. while the grievant punched out at 4:46 p.m. February 7th Brittney punched out at 4:30 p.m. and the grievant punched out 3:00 p.m. February 8th: Brittney punched out at 11:46 a.m. and the grievant punched out at 5:12 p.m.

Even on the dates specifically referenced as the dates the grievant was actually alleged to have punched one of her children in or out, these almost always in reference to Robert. On January 31st, one of the dates where two or more family members were punched in at approximately the same time, Brittney was not punched in at all. February 1st, Brittney punched out at 3:16 p.m. and the grievant punched out at 4:32 p.m. February 14th, Brittney punched in at 9:45 a.m. and out at 4:43 p.m. On that same day the grievant punched in at 7:15 a.m. and out at 5:17 p.m. February 21st: Brittney punched out at 4:38 p.m. and the grievant punched out at 5:02 p.m. February 22nd: Brittney punched out at 4:53 p.m. while the grievant punched out at 5:00 p.m. (Robert punched in 11:11 a.m. and out at 4:59 p.m. This is a date that will be discussed further as it relates to Robert.
It was clear from these facts that it was possible that Brittney punched Robert out on that date given that the times are within 6 minutes of each other). February 26th: Brittney punched out at 4:21 p.m. and the grievant punched out at 5:15 p.m. February 27th: Brittney did not work at all. March 9th: Brittney punched out at 4:51 p.m. and the grievant punched out at 5:15 p.m. March 14th: Brittney punched out at 3:45 p.m. and the grievant punched out at 4:31 p.m. On none of these dates was there any evidence, direct or circumstantial to suggest that the grievant punched her daughter in or out.

Only on March 16th did Brittney and the grievant both punch out at 4:32 p.m. A review of Robert’s time clock shows that he punched out at 4:32 p.m. on March 16th. Obviously, this could be one of those dates that the grievant could have punched the children out if one believes that was the case. However, it could just as easily be one of the dates that the grievant and her children testified that they all left work together. Without any direct evidence it was simply not possible to make a definitive statement that the grievant was guilty of punching her children’s cards that day.

The simple fact that the times are close does not provide enough proof of complicity in a scheme to punch each other in or out. This is clearly one of these instances where equally plausible scenarios are possible based on the same facts.

On balance there was insufficient evidence to suggest that the grievant was punching her daughter in or out. The times in the vast bulk of the cases are not even close and it strains credibility beyond that which is reasonable to conclude that the grievant would punch in early in the morning and come back later on and punch in again. It is simply not credible that the grievant would be doing this day after day and that no one would notice her doing that. The same is true for the punch out times as well. It strains credibility that the grievant would come into the office, punch her daughter out in the middle of the day and then punch herself out hours later.
There is still the question of whether the circumstantial evidence shows that the grievant was punching her son in or out and whether that evidence is enough to override the direct testimony of both Robert and Brittney here. A review of the calendars and the time cards reveals again that there was insufficient support for the Employer’s claim.

The Employer focused on those times when it was clear that Robert was not at UST since he was at work at Wells Fargo. There were of course many times when Robert was punched in at UST but was scheduled to be in class. He testified that he frequently cut class and the same sort of analysis applied here as with Brittney. He also could easily have either cut class or gone to class but failed to punch out until later. In either case it was clear that there were inconsistencies between his time cards and his class schedule but these facts did not provide sufficient support for the claim that the grievant had punched him in or out.

A review of the calendars and the time cards provided as definitive evidence by the Employer proved very instructive. On January 30th the grievant punched out at 1:00 p.m. Brittney and Robert both punched out on that day at 11:44 a.m. Robert was not at Wells Fargo until 12:10 p.m., some 20 to 25 minutes later, which he could easily have accomplished given the location of the Wells Fargo bank at which he worked near Ford Parkway. Robert was scheduled to be in class until 11:35 a.m. As noted above he could have cut class or simply punched in and gone to class.

Brittney was also scheduled to be in class until 11:35 a.m. allowing ample time for her to punch Robert in or even for Robert to punch himself in and then leave to go to Wells Fargo. Also, none of the punch in times on January 30th are close. The grievant punched in at 6:50 a.m., Brittney at 7:52 a.m. and Robert at 8:01 a.m. This is one of the dates specifically highlighted by the Employer as a date it claimed showed definitively that the grievant must have punched her children out. In fact the actual evidence provided much more support for the scenario provided by Brittney and Robert, i.e. that Brittney punched Robert out. There was absolutely no evidence circumstantial or otherwise that supported the Employer’s claim on this date.
Likewise on January 31\textsuperscript{st} the grievant punched in at 7:09 a.m. and out at 4:32 p.m. Brittney punched in at 11:17 a.m. and out at 3:45 p.m. There was no evidence regarding what her class schedule was that day. Robert punched in at 11:18 a.m. and out at 4:32 p.m. Certainly the grievant and Robert punched out at the same time. However, Robert was not at Wells Fargo that day and he could simply have punched out that day. Both he and the grievant testified that he and his mother would occasionally leave together. This is a classic case involving equally plausible scenarios from the same set of known facts. The simple fact that the grievant and her son punched out at the same time does not prove that she fraudulently punched him out. There must be something more than this.

A review of the dates where Robert was punched in at UST and was apparently also at Wells Fargo again shows a mixed bag of possible scenarios. On February 1\textsuperscript{st} Robert punched out at 4:59 p.m. but was at Wells Fargo until 6:20 p.m. The grievant punched out at 5:02 p.m. and Brittney punched out at 3:16 p.m. This was troublesome. Still though, Brittney testified that she frequently punched herself out and then went back to punch Robert in or out as the case may be. There was time lag of approximately one hour and 45 minutes between the time Brittney punched herself out and when Robert was punched out. Clearly if the Wells Fargo records are accurate, and there was no evidence to suggest they were not, Robert was not at UST that day. There was 3-minute difference between when the grievant punched out and when Robert’s time records show he was punched out. Significantly, there was no evidence as to where Brittney was on this date. It was evident that she was around the campus and could well have done just what she said she did and punched her brother’s time card.

The next date highlighted by the Employer as a date it contended showed definitively that the grievant punched her children in or out was February 14\textsuperscript{th}. The grievant punched out at 5:17 p.m. and Robert punched out at 5:16 p.m. Brittney punched out at 4:43 p.m., approximately half an hour prior to her mother and brother. This was also not a date on which Robert was at work at Wells Fargo though and this could again have simply been a situation where he and his mother punched out at similar times.
The next date was February 21st. The grievant punched in at 7:28 a.m. and out at 5:02 p.m. Robert punched in at 11:02 p.m. as well and out also at 5:02 p.m. Brittney punched in at 1:55 p.m. and out at 4:38 p.m. Robert was not at work at Wells Fargo that day and again this could well have simply been a similar situation to the one discussed above, i.e. that they simply punched out together. The fact that Brittney and her mother punched in within 7 minutes does not prove that the grievant defrauded the University by punching her in. Brittney was scheduled to be in class at about that time but as discussed at great length above, the evidence showed that she frequently did not go to class.

The next date was February 22nd. The grievant punched in at 7:15 a.m. and out at 5:00 p.m. Robert punched in at 11:11 a.m. and out at 4:59 p.m. Brittney punched in at 11:18 a.m. and out at 4:53 p.m. Robert was at Wells Fargo from 1:00 to 6:15 p.m. These facts actually provide as much support for the Union’s scenario as the one posited by the University. Robert could have punched himself in or had his sister do it since the times were 7 minutes or so apart. The punch out times are suspect. Robert was not there and could not have done it himself. So, what could have happened here?

Certainly the grievant could well have punched all three of them out at the same time. That is one conclusion that could be reached from these facts. The University argued that this is the only reasonable possibility to be deduced from these facts. It is not however.

It is equally likely that Brittney punched herself out at 4:53 p.m. and then punched her brother out a few minutes later without her mother even knowing which card she was punching. It was not clear how many people are milling around the time clock at the physical plant office at 5:00 p.m. but it is unlikely that the grievant would have easily gotten away with punching three cards within 7 or 8 minutes of one another if anyone had been around. Obviously there is not much supervision of the time clock since somebody somewhere was somehow punching in or out multiple time cards sometimes at or very near the same time. How literally nobody could have ever seen that was not made clear at the hearing but apparently that is what occurred. There is no video or other camera to record who punches in or out and at what times.
The difficulty here is that both scenarios are plausible but in a case that rises and falls on circumstantial evidence, the party with the burden of proof must establish that there is only one reasonable conclusion to be reached from the known facts. Here that simply was not the case. Arbitration is much like any other adversarial proceeding; it is not what you know it’s what you prove that carries the day.

The next such date was February 23\textsuperscript{rd}. The grievant punched in at 7:14 a.m. and out at 4:33 p.m. Robert punched in at 10:02 a.m. and out at 4:22 p.m. while Brittney punched in at 9:50 a.m. and out at 4:21 p.m. Robert was again at Wells Fargo from 1:30 p.m. to 6:30 p.m. that day and could not have been there to punch himself out. This is again a scenario highlighted by the Employer as one that supports the case for discharge. However the facts here show that it is at least as likely that Brittney punched her brother out at the same time as it shows that the grievant did it 11 minutes later. Brittney’s classes ended at 2:40 p.m. and she could easily have punched herself and her brother out at 4:21/4:22 p.m. and left without her mother ever knowing that happened.

The next such date was February 26\textsuperscript{th}. The grievant punched in at 7:32 a.m. and out at 5:15 p.m. Robert punched in at 10:04 a.m. and out at 5:10 p.m. while Brittney punched in at 10:30 a.m. and out at 4:21 p.m. Robert was not at Wells Fargo that day however. This is again a similar scenario that those described above that do not definitively establish guilt by the grievant.

The next date was February 27\textsuperscript{th}. The grievant punched in at 7:09 a.m. and out at 4:46 p.m. Robert punched in at 10:00 a.m. and out at 4:32 p.m. while Brittney apparently did not work at all. Including this again supported the Union’s claim as much as anything. There was a 12-minute difference between the two punch-out times and nothing to suggest that the grievant punched Robert out even though it was clear someone did since he was at Wells Fargo that day. This again shows that it is at least as likely that Brittney did exactly as she testified to punch her brother’s time card.
The next date was March 2\textsuperscript{nd}. The grievant punched in at 7:59 a.m. and out at 5:35 p.m. Robert punched in at 10:33 a.m. and out at 5:14 p.m. while Brittney punched in at 10:27 a.m. and out at 5:14 p.m. Robert was at Wells Fargo from 2:45 to 6:30 p.m. and clearly could not have punched himself out that day. This again is a scenario that the Employer highlighted yet shows almost clearly that Brittney punched Robert out that day. They punched out at the same time while the grievant punched out some 21 minutes later. On these facts the more reasonable conclusion to be reached is precisely what the Union alleged.

The next date was March 5\textsuperscript{th}. The grievant punched out 7:10 a.m. and out at 5:14 p.m. Robert punched in at 10:31 a.m. and out at 5:07 p.m. while Brittney punched in at 9:57 a.m. and out at 5:04 p.m. Robert was not at Wells Fargo that day. At the risk of sounding repetitive, this again shows only that Brittney could have punched Robert out or that he did and the trio all left together that day. Without more there was insufficient evidence to establish guilt on the facts shown on this day.

The next date was March 7\textsuperscript{th}. The grievant punched in at 7:14 a.m. and out at 5:29 p.m. Robert punched in at 9:47 a.m. and out at 4:35 p.m. while Brittney punched in at 10:02 a.m. and out at 4:37 p.m. Robert was not at Wells Fargo that day and this was a curious date to select as a date that allegedly showed the grievant’s guilt. What it shows is that it was more than likely that Brittney punched her brother out that day or that he may well have punched his own card. Robert and Brittney punched out within 2 minutes of one another while their mother punched out almost an hour later.

The next date was March 9\textsuperscript{th}. The grievant punched in at 7:14 a.m. and out at 5:15 p.m. Robert punched in at 9:58 a.m. and out at 5:14 p.m. while Brittney punched in at 9:58 a.m. and out at 4:51 p.m. A review of the Wells Fargo records at Employer Exhibit 8 shows that Robert did not work at Wells Fargo that day. It was possible that the two children punched in together or that Brittney punched in for Robert. It was possible that the grievant could have punched both children in at the same time at 9:58 a.m. but since she had already been at work for well over 2 hours that is less likely.
There is also some possibility that the grievant could have punched out for Robert at 5:14 p.m. and herself out one minute later. It is also possible that Brittney could have punched herself out and returned at the same time her mother did and punched Robert out too in the hopes that no one would notice. Alternatively, it is just as likely that Robert accompanied his mother and punched out at about the same time she did. Keep in mind that the question here is whether the grievant was guilty of punching her children in or out of work and whether the evidence in this matter makes it more likely than not that she did so. As is becoming abundantly clear, it is equally likely that she did not.

The next date referred to by the Employer was March 14th. The grievant punched in at 7:12 a.m. and out at 4:31 p.m. Robert punched in at 9:51 a.m. and out at 4:31 p.m. while Brittney punched in at 9:46 a.m. and out at 3:45 p.m. Robert was again not at Wells Fargo that day. Clearly the grievant and her son punched out at the same time but without something to suggest she did it for him it cannot be said definitively that the grievant was guilty of terminable misconduct.

The next such date was March 15th. The grievant punched in at 7:10 a.m. and out at 5:15 p.m. Robert punched in at 9:59 a.m. and out at 5:06 p.m. while Brittney punched in at 9:49 a.m. and out at 4:20 p.m. This is another of the dates on which Robert was at work at Wells Fargo from 1:00 to 5:15 p.m. Robert was thus not there that day to punch himself out. This is again a troublesome date as the one noted above but there is again a 9 minute delay between the punch out times for the grievant and Robert. Brittney punched out some 55 minutes before the grievant and Robert and could have punched him out as they alleged. Had there been some evidence that Brittney was not there or that she could not have been there to punch Robert out that day the result would perhaps be different. However, taking the evidence in its totality, it is again as likely that what Brittney and Robert testified too about their complicity in the scheme to punch Robert’s time clock as the Employer’s scenario implicating the grievant.
The next such date was March 16th. The grievant punched in at 7:12 a.m. and out at 4:32 p.m. Robert punched in at 9:57 a.m. and out at 4:30 p.m. while Brittney punched in at 9:56 a.m. and out at 4:32 p.m. The Wells Fargo records show that Robert did not work there that day and this again shows only that the three could simply have left at about the same time. It is suspicious indeed that both Robert and Brittney punch in within a few minutes of each other but this makes it far more likely that Brittney punched Robert in that day along with herself. There is nothing to suggest that the grievant did it since she was again punched in well over 2 hours before and there was no evidence to suggest that she went back to the physical plant to punch both of the children in at about the same time.

The next date was March 27th. The records from Employer Exhibit 7 show that the grievant punched in at 6:57 a.m. and out at 4:47 p.m. Robert punched in at 9:28 a.m. and out at 4:47 p.m. while Brittney punched in at 9:28 a.m. and out at 4:35 p.m. The evidence showed that Robert did not work at Wells Fargo that day and the analysis here follows closely if not identically with that from the preceding paragraph.

Even though the punch in times for Robert and Brittney are the same that could easily mean that they either punched together or, more likely, that Brittney punched him in. The fact that the punch out times for Robert and the grievant are the same with Brittney’s 12 minutes before can just as easily mean that they were there together or that Brittney punched herself out and returned a few minutes later to punch Robert out.

The next date was March 29th. The grievant punched in at 7:12 a.m. and out at 4:31 p.m. Robert punched in at 9:55 a.m. and out at 4:14 p.m. while Brittney punched in at 9:45 a.m. and out at 4:14 p.m. Robert was at Wells Fargo that day from 1:00 to 6:15 p.m. and could not have punched himself out that day.
The last date highlighted by the Employer was March 30th. The grievant punched in at 6:56 a.m. and out at 3:30 p.m. Robert punched in at 9:53 a.m. and out at 3:16 p.m. while Brittney punched in at 9:45 a.m. and out at 3:15 p.m. Robert was working at Wells Fargo that day from noon until 6:15 and could not have punched himself out. The evidence from both of the above dates this again shows that it was far more likely that Brittney punched Robert out at the same time she punched out and that her mother, who punched out 15 or 16 minutes later, did not.

There were more than just these dates that the Employer relied upon to support its case. These were all reviewed but resulted in a similar set of conclusions. Obviously, in any case involving circumstantial evidence the question becomes what conclusion are possible from the facts that are known either because they are unrefuted or are shown by a preponderance of the evidence. In every case when Robert was clearly not at work and where the grievant was also punched in or out at a similar time Brittney was also shown to be there as well. While there were two instances from the multitude of instances cited by the Employer as hard evidence of the grievant’s guilt, in fact in even those Brittney was around and could have punched the time clock for her brother.

To borrow an analogy from the criminal law, while there was certainly enough “probable cause” here for the Employer to conduct the investigation and to look very hard at whether the grievant was in fact guilty of punching in or out for her children there was not sufficient evidence to establish guilt even by a preponderance of the evidence let alone by some other more stringent evidentiary standard. There were no instances were the grievant and Robert were punched out and where Robert could not have been at UST and where Brittney was not also at or near the time clock. Certainly, this could have shown that the grievant punched Robert out. Equally possible is the scenario, as posited by the testimony of Brittney and Robert that in fact Brittney punched Robert’s time card.
The Employer argued that Brittney could not have punched her brother in the fall of 2006 since she was not working. This also was unconvincing. UST’s St. Paul campus is relatively small and Brittney testified that she frequently did go to the Physical Plant office and punch her brother in. This was certainly possible and would not have created a huge inconvenience for her.

Equally as obvious in this case was the fact that there was no direct evidence of the grievant punching someone else’s time card. There as however direct evidence adduced by the Union that Brittney did in fact punch her brother in and that the grievant never knew about nor condoned it. Could Brittney and Robert have been lying about all of this to protect their mother? Certainly they could have. Could this whole scenario been concocted at the last minute in response to the overwhelming evidence that showed that at many times Brittney and Robert were not at work when they said they were and that they at least had been clearly caught doing something they should not have? Certainly, and that distinct possibility, especially when the confession comes at the 11th hour as it did here did not escape the arbitrator’s attention.

Arbitrations are not about mere or abstract possibilities however. They are about what reasonable conclusions can be reached based on the known facts. They are not even about what someone “knows” but rather what one proves. Here the Employer had the burden of proving that the grievant punched her children’s time cards and the evidence adduced at this hearing simply did not adequately support that conclusion.

There was of course the evidence from Shylite Arias. She testified that she became suspicious of Robert’s ability to work at both UST and Wells Fargo and testified that he told her that he was not in fact working when his time cards indicated he was. She also testified that he admitted that his mother, the grievant, was helping him in his regard, a fact wholly denied by Robert. Her testimony was in stark contrast to that of Brittney and Robert’s testimony and bears some comment. It cannot simply be said that the testimony must be discounted completely because she was the jilted lover.
Clearly she had significant inconsistencies in her testimony and was shown to be somewhat less than stable psychologically and that this may well have been the reason she and Robert broke up. That however does not make her a liar nor is it particularly relevant in this matter. Certainly it was somewhat suspicious that her email to the University came on the heels of that break-up but overall, it was clear that a great deal of the story was shown to be true. Robert really was defrauding UST. The question is whether there was clear evidence that the grievant was helping him do it. At best Ms. Arias indicated, “she heard [the grievant] make comments about his [Robert’s] clocking a couple of hours here and there.” At worst her statement introduced at Employer Exhibit 4 is logically rambling and very difficult to follow. There frankly was no direct evidence of even a hearsay statement in this exhibit that implicated the grievant’s mother. Robert flatly denied saying to Ms. Arias that his mother had been clocking him in or out. Her testimony was similar in nature. There were some unsubstantiated hearsay statements about the grievant’s complicity in this scheme but little else. Her testimony made it clear that she discovered that Robert was not working when he claimed at UST but did little to support the ultimate claim that the grievant was the person clocking him in or out.

There is also the allegation by the Employer that Robert admitted that his mother would punch him in during the interview with Ms. Ireland. There is a statement contained in the report she prepared to the effect that on occasion the grievant would punch him in while he was on the way to work. Both Robert and the grievant indicated that he did in fact ask her to do this on several occasions but that she refused. She essentially told him to park the car and come in and punch himself in. This makes some sense given the clear fact that there is no set schedule for the student workers and no reason to punch in at a particular time. Moreover, given the problems with these statements and the fact that they are neither recorded nor was there even another person there to verify the statements made they can hardly be said to be definitive proof of nor an admission of anything.
Both Robert and Brittney denied punching each other in, a fact later shown to be false. They also denied that their mother knew anything about it. As noted above, it is certainly possible that they could be covering for their mother now that they know the possible consequences of this matter.

Cases like this must be determined based on a review of all the evidence, the good the bad and the ugly, and making the most reasonable conclusions based on the evidence. They cannot be decided based on hunches or feelings or guesswork. Here the evidence was reviewed very thoroughly with all of its inconsistencies and the allegations by both sides that the other was lying. Based on that evidence and the competing conclusions to be reached from that evidence the discipline cannot be sustained.

It should be noted however that the Employer’s actions here were understandable given what they knew at the time of the termination. The University had clear evidence in the nature of a tip from Ms. Arias that they were being defrauded for time not worked by certain people. They conducted an investigation that clearly and absolutely showed that Robert at least was not at work at UST when he claimed he was. They obviously did not have the benefit of the 11th hour confession of young Robert O’Brien and could not have known that. Moreover, part of what they thought they knew was improperly obtained and could not be considered.

There was certainly also evidence to suggest that Brittney was also not at work when she claimed she was. There were several witnesses who claimed that they worked in the same building but rarely if ever saw her. This evidence was helpful in showing that she was not at work when she claimed but again did nothing to establish the grievant’s guilt here.

In any event, it was not until the hearing that the confession by Robert and Brittney became known. There was no way UST could possibly have known this was coming. Some consideration was given to a remedy that was less than full back pay and benefits. In most cases where there is an absence of adequate proof of guilt of the offense charged, the employee is generally reinstated with such back pay. Here it is clear that both parties were harmed by the conduct of Robert and Brittney O’Brien.
The question then is who should bear the brunt of the cost of that. On balance even though the University was victimized by the actions of the two younger O’Briens there is no reason to penalize the grievant by reducing her remedy here.

Accordingly, the grievant is to be reinstated within 5 business days of this Award and shall be made whole for all lost back pay, less any unemployment or other government compensation, wages earned or other salary or compensation for working she may have received in the interim, along with full contractually accrued benefits including but not limited to any seniority benefits.

**AWARD**

The grievance is SUSTAINED. The grievant shall be reinstated with full back pay, subject to mitigation of back pay as set forth above, and with full accrued contractual benefits as set forth above.

Dated: January 21, 2008

Jeffrey W. Jacobs, arbitrator