IN THE MATTER OF THE GRIEVANCE ARBITRATION BETWEEN

Teamsters Local 471,            FMCS Case No. 160328-53829-8
                                    Union,
-and-                                    DECISION AND AWARD

Dairy Farmers of America,
                                    Employer.

Name of Arbitrator: George Latimer

Date and Place of Hearing: October 18, 2016
                                    Minneapolis, Minnesota

Briefs Received: November 18, 2016

Date of Award: December 15, 2016

APPEARANCES:

For the Employer: Tori Johnson, Human Resource Generalist
                                    Roxanne Theobald, Human Resource Manager
                                    John Toner, Attorney

For the Union: Andrew Olson, Grievant
                                    John Kobler, Business Representative
                                    Richard Kaspari, Attorney
PRELIMINARY STATEMENT

This is a grievance arbitration between Teamsters Local No. 471 (“Union”) and Dairy Farmers of America (“DFA” or “Employer”). The parties are signatories to a collective bargaining agreement, effective September 15, 2014 through September 14, 2019 (“CBA”). The arbitration hearing was held on October 18, 2016 at the offices of the Federal Bureau of Mediation Services. The parties agreed the matter was properly before the Arbitrator and there were no jurisdictional disputes. Both parties had full opportunity to submit evidence and examine witnesses. Post-hearing briefs were received by the Arbitrator on November 18, 2016, and the record was closed.

STATEMENT OF THE ISSUE

Did the Employer have just cause to discharge Andrew Olson, and, if not, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

2. Management’s Rights. Except as specifically limited by an expressed provision of this Agreement, all of the rights, prerogatives and authority which the Employer had prior to the execution of this Agreement are retained and remain solely and exclusively with the rights of management. By way of example only and not in limitation thereof, these rights include the management, operation and maintenance of facilities; the right
to select, hire and terminate employment, establish and enforce reasonable rules of conduct; direct the work force, schedule work, determine what work is to be done and by whom; what is to be produced and delivered and by what methods and means; to determine the size of the work force; to locate or remove any portion of the facilities and to abandon any operation at any time it deems appropriate to do so, to discipline, suspend, and discharge employees for just cause.

4. **Termination of Employment.**

4.B. **Discipline and Discharge:** The Employer shall not discharge or discipline employees without just cause. For less serious work rule and policy violations, the Employer will follow a progressive disciplinary procedure in effort to correct the employee’s performance. The Employer may, however, implement discipline outside the progression if the circumstances warrant. Warning notices will remain in effect for one year from the date of issuance. No warning notice need be given prior to discharge for dishonesty, the possession of intoxicants or illegal drugs during working hours, the consumption of intoxicants or illegal drugs during working hours, being under the influence of intoxicants or illegal drugs during working hours, conviction of a felony, flagrant violation of Company rules, or insubordination. The Employer shall send to the Union within twenty-four hours after the discharge of any employee, a copy of the discharge notice to the employee stating the reason for the discharge. The employee or the Union may protest the discharge by filing written notice within five days thereafter with the Employer, and the matter shall be referred for settlement between the Employer and the Union. Any reprimand will be given within fourteen (14) calendar days from the knowledge of the facts involved in the occurrence.

10. **Seniority**

10.H. **Leave of Absence: Sickness or Injury:** An employee shall be granted a leave of absence from the department in which the employee is working if such leave of absence is required because of non-work related sickness or injury up to and including eight (8) months, without losing seniority rights, and shall not be allowed to take other employment or enter a business during such leave. An
employee on such leave of absence shall not be paid holiday pay for any holiday falling during the period of absence, nor shall there be accumulation of earned vacation for an absence extending beyond sixty (60) days.

21. Grievances and Arbitration
21.A. Arbitration: A grievance is defined as any dispute or difference concerning the application or interpretation of the express provisions of this Agreement. Grievances shall be handled according to the following procedure: . . .

Step. 4: The parties shall first attempt to agree upon an impartial arbitrator. If they cannot agree, the parties shall jointly request the Federal Mediation and Conciliation Service to submit a list of five possible arbitrators. First the Union, then the Company shall strike two names from the list; the remaining person shall act as the arbitrator. Such arbitrator shall have no authority to alter, in any way, the terms and conditions of the Agreement and shall confine the decision to a determination of the facts and an interpretation and application of the Agreement. The decision of the arbitrator shall be final and binding. In no event shall the arbitrator’s award be retroactive to more than thirty (30) days prior to filing of the grievance. The parties agree to share the cost of the arbitrator’s fees and expenses.

BACKGROUND AND FACTS

The bargaining unit is comprised of 67 drivers and 114 milk plant employees. Andrew Olson, the Grievant, was employed for 20 years at the Employer’s Kemp Milk Plant before being terminated on March 8, 2016, for violating the Employer’s attendance policy. At the time of termination, the Grievant worked four 10 hour shifts per week as a line dragger. He worked
primarily in the cooler, pulling stacks of milk from the line and dragging them to another area. The Grievant obtained Family Medical Leave Act (“FMLA”) certification in 2010. Under the FMLA, Grievant was allowed 480 hours of intermittent leave in a 12 month period.

**The Attendance Policy, implemented in May 2011**

The Employer’s no-fault attendance policy is a progressive discipline policy based upon a point system, and was implemented on or about May 1, 2011. The policy states a uniform attendance monitoring system as one of its goals. (Co. Ex. 1; Un. Ex. 1). Attendance points are tabulated as follows: (a) One-half point (.5) point for a Tardy/Leave Early less than one-half a shift; (b) 1 point for an entire shift absence; a tardy more than one-half a shift; or leaving early before half of shift; (c) 3 points for a “no call-no show” and for calling in, reporting a tardy, then failing to show up. Points are “rolled off” after a 12 month time period.

The progression of disciplinary action starts at 6 points (verbal warning); 7 points (written warning); 8 points (final written warning); 9 points (termination). (Co. Ex. 1; Un. Ex. 1). The allowable amount of leave under the FMLA is not used in the point system. (Co. Ex. 3, p. 2).

The Attendance Policy (dated May 1, 2011) that the Union submitted at hearing includes a page 3 which is in the same format as pages 1 and 2
of the Attendance Policy. (Co. Ex. 1; Un. Ex. 1). This page 3 indicates some flexibility and options to employees with attendance issues. It advises employees to utilize its work/life wellness employee assistance program if there are any personal issues which have affected attendance. It also states that time off allowed under Federal or Minnesota law is not assessed for points and that a supervisor can excuse time off.

The Grievant acknowledged reviewing and understanding the attendance policy and its point system. (Co. Ex. 2).

The Attendance Policy, revised June 2015

The Attendance Policy was revised on June 7, 2015. (Co. Ex. 3) without page 3 of Union Exhibit 1. The point system remained much the same as it was implemented in May 2011, with the exception of an additional category for taking time off before or after a vacation by applying 6 points for no-call, no-show absences and for reporting a tardy then not reporting for work.

Although the 2015 policy includes language that FMLA leave is not counted in the point system similar to page 3 of Union Exhibit 1, it omits any reference to supervisory discretion in excusing absences. It also omits the goals of the policy and any reference directing employees with attendance issues to an employee assistance program.
Roxanne Theobald, the Human Resources manager, emailed Union Business Representatives on April 22, 2015. In that email she mentioned the revised attendance policy indicating that the point system remained the same and inviting comments prior to its implementation. Local 471 Business Representative John Kobler did not offer any comments or request a copy of the revised policy. (Tr. pp. 83, 82, 86, 89). Employees were mandated to obtain training on the Revised Attendance Policy through its online learning management system. (Co. Ex. 3; Tr. pp. 21-22).

* * *

In late November 2015, the Employer discovered a timekeeping error regarding the Grievant’s FMLA time. By the end of November 2015, the Grievant had been absent from work in excess of 200 plus hours beyond the 480 allowable FMLA hours. The Employer asked the Grievant whether he would have taken the time off had he known he was out of FMLA. He responded affirmatively. Because of Grievant’s affirmative response and because it was the Company’s error, Tori Johnson informed the Grievant on November 24, 2015, that they would allow him to add FMLA hours from FMLA time taken the previous year using a rolling calendar method of
calculation.\(^1\) (Co. Ex. 11). Although Ms. Johnson gave Grievant a spreadsheet showing the dates he was absent the prior year so that he could tell the exact date he would accumulate additional FMLA time, she did not question him any further regarding his medical condition which resulted in the 200+ hours in overage or direct him to any employee assistance program. (Co. Exs. 4-6; Co. Ex. 11; Tr. p. 24).

In Ms. Johnson’s November 24\(^\text{th}\) letter to Grievant, she informed him that he had accrued 5 attendance points and that if he took a FMLA day but didn’t have FMLA time in his “bucket”, he would receive an attendance point. (Co. Ex. 5, Tr. 23-24). On December 29, 2015, Grievant received a verbal warning for being tardy on December 21, 2015. The written notice warned that 9 points means termination. (Co. Ex. 7). Grievant next received a written warning and his 7\(^\text{th}\) point for being tardy on January 25, 2016. Again the written notice warned that 9 points is termination. This notice on January 25\(^\text{th}\) informed him that he did not have any FMLA time to use. (Co. Ex. 8). On February 29, 2016, Grievant was tardy and received his 8\(^\text{th}\) point. On March 1st, Grievant was absent and received his 9\(^\text{th}\) point.

\(^1\) Using this method, 170 hours of FMLA leave were added to Grievant’s “bucket” of available FMLA time from December 1, 2015-February 24, 2016.
On March 8, 2016, the Employer terminated the Grievant for his March 1 “no call-no show.” (Co. Exh. 9-10).

During a grievance meeting between the parties on March 14, 2016, the Union submitted Grievant’s treating psychiatrist’s letter, dated March 8, 2016. In that letter, Dr. Bruce Meyer stated Grievant’s diagnoses as Major Depression, Anxiety and Episodic Insomnia with medication and informed the Employer of the reasons for Grievant’s attendance problem and that with an adjustment and change in medications, Grievant would be able to return to work on March 28, 2016 (Co. Exs. 14, 15; Tr. p. 53). The Employer denied the grievance on the basis of its strict liability attendance policy. (Tr. pp. 41, 53, 54, 55, 56)

EMPLOYER ARGUMENTS

- The Union has not presented any argument or evidence challenging the validity of the attendance policy.
- The Union never argued that the attendance policy has led to arbitrary results. The policy is a fair one.
- The Employer has not shown disparate treatment in applying its attendance policy. All bargaining unit members who have acquired 9
attendance points have been terminated. The Union did not grieve their terminations.

- Arbitrators have recognized that no-fault policies promote equal treatment in addressing attendance issues.

- The Union did not provide evidence that its version of the 2011 attendance policy (Un. Ex. 1) had been negotiated and was the controlling policy.

- The Union acquiesced to the 2015 attendance policy under which Grievant was terminated. This policy was drafted solely by the Company.
  - The Employer emailed notice of the 2015 revised attendance policy to the Union’s Business Representatives on April 22, 2015, and invited comments prior to implementation informing them that the point system remained the same. Local 471 did not offer any comments.
  - During recent contract negotiations, the Union did not seek any change or “softening” of the no-fault policy with a change in number of points or the method of determining points.
  - The Union never grieved the Employer’s right to enforce the no-fault attendance policy.
• The Union failed to show that supervisory discretion in excusing absences would have changed the outcome of Grievant’s termination of employment.

• The Employer’s no-fault attendance policy is a fair one designed to provide employees with flexibility in addressing attendance issues and giving them advance notice of the consequences if the policy is not followed.

• Grievant was terminated with just cause on the basis that its no-fault attendance policy contains progressive discipline.
  o Grievant received training on the attendance policies and was given multiple forewarnings that he would be terminated upon accruing 9 attendance points.

• The Union never argued that the Employer’s decision to terminate the Grievant was discriminatory or arbitrary.

• The Employer’s consistent adherence to its strict no-fault attendance policy in the last five years constitutes a binding past practice within the meaning of the standards of labor relations.

• The Employer has established by a preponderance of the evidence that the Grievant committed the misconduct and was rightfully discharged and the Union must prove any mitigating circumstances.
• The Union did not encourage the Grievant to seek medical attention until after the termination and did not establish that Grievant’s medical condition was the reason for his failure to work as scheduled.

**UNION ARGUMENT**

• The operative attendance policy was adopted in 2011 (Un. Ex. 1) and contains a third page (not part of Co. Ex. 1) which explains that (a) attendance points will not be taken for leaves such as those under the FMLA; (b) gives discretion to a supervisor whether to give attendance points for an absence; and (c) requires the Employer to provide a report to the Employee at the end of a month if any attendance points were accrued that month. Human Resource Manager Theobald did not dispute the accuracy in the provisions contained in p. 3 of Un. Ex. 1. (Tr. pp. 87-88).

• The CBA ensures that bargaining unit employee cannot be discharged without just cause. This standard under Section 4.B of the CBA was not met because the Employer did not consider the circumstances of Grievant’s absences from work. Where as here, the Grievant’s absences are the result of inadequate treatment of a serious mental illness, a reasonable Employer should give the
employee a reasonable opportunity to rehabilitate. In this case, by seeking adequate treatment for his mental illness.

- Grievant informed the managers at the March 8th termination meeting that he might have a problem with his prescription drugs. They responded that he had reached 9 points and must be terminated. (Tr. pp. 32, 36; Co. Ex. 12).

- Grievant also asked the management team at the termination meeting to consider his long seniority and if there was anything that could be done for him. (Tr. pp. 54-55). He was given the same response that the only thing that mattered was that he had incurred 9 points.

- During the grievance process, Grievant’s treating psychiatrist informed the Employer of Grievant’s worsening anxiety disorder, depression and medication side effects which significantly caused his attendance problems and recommend a two-week leave. (Co. Ex. 15). The Employer denied Grievant a two week leave standing by its decision to terminate.

- The Employer unjustly applied its attendance policy without informing its supervisors that the policy allowed them to make exceptions.
• Progressive discipline is ineffective for absenteeism caused by severe depression, anxiety and insomnia. Rather, it is intervention that is more effective. The nature of Grievant’s illness and the medication he was on did not allow him to improve his absences for, among other reasons, he thought he would be institutionalized if he told his doctor, and, therefore, would lose his job. It took the loss of his job for Grievant to get proper treatment for his mental illness.

• The Employer should have offered the Grievant encouragement and the opportunity for rehabilitation. The CBA itself addresses such a circumstance by allowing employees up to 8 weeks of medical leave without loss of seniority for medical problems.

• The Employer certified Grievant’s eligibility for intermittent FMLA leave in 2010, therefore, it knew that Grievant’s absences were primarily from a serious mental illness.

• In November 2015, the Employer knew that Grievant’s excessive absences were the result of his mental illness because when they asked, he informed them that even had he known he had gone over 200 hours of the allotted 480 hours of FMLA leave, he still would have been absent (Er. Ex. 4). At this point, the Employer could have suggested that he take a medical leave under Section 10.H of the
CBA. Rather than termination, the Employer could also have suggested that Grievant take a Section 10.H medical leave when he informed management at his termination meeting that he might have a problem with his medication.

- Once Grievant got the proper medicine, he was able to cope effectively with daily life, and would have been able to return to work as his psychiatrist recommended on March 28, 2016.

**ANALYSIS**

As noted above, under the CBA binding the parties, the Employer retains the managerial prerogative of directing and deploying the workforce, including the right to establish and enforce reasonable rules of conduct and to discipline, suspend and terminate employees for just cause. Among the rules established by this employer is an attendance policy with a precise system of points assigned for absences.

Under that policy, absences covered by the Federal Medical Leave Act (“FMLA”) are excluded. The Grievant was permitted 480 hours annually under that Act. The attendance policy has been labeled a “no-fault” attendance policy, meaning that no medical or other proof justifying an absence was necessary. The Employer’s decision to terminate,
however, must pass the just cause test and that test is not determined by a simple application of its attendance policy but must be determined by all of the facts of this case. The Employer has the burden of proving with clear and convincing evidence that the determination was for just cause.

The seven tests for just cause first established by Arbitrator Carroll Daugherty are a good guide. Those seven tests are whether (1) the rule in question is reasonable; (2) whether proper notice or warning was given to the employee of the consequences of the violation of that rule, (3) whether there was a full investigation prior to the termination, (4) whether that investigation was fair, (5) whether there was substantial proof and evidence that the employee indeed violated the rule; (6) whether the rule was applied evenhandedly to all employees and that there was no disparate treatment in that regard, (7) whether the degree of discipline or the penalty, in this case termination, was reasonably related either to the seriousness of the employee’s offense or to the record of past service.

The Union has not challenged either in this case or in its bargaining history the reasonableness of the attendance policy. Likewise, the notice to the Grievant and to the Union has been ample in this case. As to disparate treatment, the evidence is clear that the Employer has been consistent in the application of its policy.
The strongest arguments by the Union and its counsel have been directed at the fairness of the investigation and the penalty assessed. Counsel for the Union argues that the Employer’s single-minded focus on the Grievant’s accrual of 9 attendance points shows that the Employer failed to conduct a fair and full investigation of the mitigating circumstances which caused the Employee’s absences. The Union argues that because the Employer had knowledge of Grievant’s mental condition that caused him to take intermittent FMLA leave, one would expect a fair and complete investigation of the reasons for Grievant’s excessive absences. However, given the facts in this case as stated above, including the totality of Grievant’s absences beyond the 480 FMLA hours, it is difficult to see how the Employer’s actions could be viewed as unfair or unreasonable.

By adopting a no-fault attendance policy\(^2\), the employer is obligated to permit absences without questioning the cause or mitigating circumstances. The unbroken past practice has demonstrated that the Employer adhered to the no-fault policy without regard to the cause of absence. To do otherwise would be a departure from past practice and

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\(^2\) The operative Attendance Policy under which the Grievant was terminated is the Policy revised on June 7, 2015. (Co. Ex. 3). Based upon the evidence, the arbitrator finds that page 3 of Union Exhibit 1 was never agreed to by the parties and is not part of the CBA.
although permitted as part of the management’s prerogative, it is not mandated. The Employer’s choice not to make an exception in this case is an exercise of managerial discretion well within the Management’s Rights clause of the contract.

By accepting the Union’s arguments, this arbitrator would be replacing the Employer’s decision to terminate the Grievant. On the facts of this case, the arbitrator is bound by the contract and the principles of just cause for discharge. As noted above, the past practice by the parties in support of the attendance policy, including the exception for up to 480 hours of FMLA leave is undisputed. Also undisputed is the fact that the Employer communicated clearly and repeatedly to the Grievant of the application of the attendance policy. To reverse the Employer’s decision to terminate the Grievant on the basis of the medical report received after the notice of termination would be unfair and unjustified in this case.

AWARD

The grievance is denied.

/s/George Latimer                     Dated: December 15, 2016
George Latimer, Arbitrator