UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

REPUBLIC SERVICES, INC.

and

Cases 25-CA-31683 Amended
25-CA-31708 Amended
25-CA-31709 Amended
25-CA-31813 Amended

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150, AFL-CIO, a/w INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

ACTING GENERAL COUNSEL'S MOTION TO REMAND CASES TO THE ADMINISTRATIVE LAW JUDGE

Comes now Counsel for the Acting General Counsel and respectfully submits to the Board this Motion to Remand Cases to the Administrative Law Judge. In support of this motion, Counsel for the Acting General Counsel offers the following:

On May 11, 2011 and consecutive days thereafter, an administrative hearing was held before Administrative Law Judge Arthur Amchan regarding the instant cases. On June 21, 2011, the Judge issued his decision regarding the instant cases pursuant to the filing of post-hearing briefs. On July 19, 2011, Counsel for the Acting General Counsel filed exceptions to the Judge's decision. On September 7, 2011, Republic Services, Inc., hereinafter referred to as the Respondent, filed cross-exceptions and an answering brief to the Judge's decision. On September 21, 2011, Counsel for the Acting General Counsel filed an answering brief to Respondent's cross-exceptions and a reply brief to Respondent's answering brief to the Judge's decision.

In his decision, the Judge made a conditional finding which states as follows:

> **I concluded that these cases [cited by the General Counsel] cannot be read for the proposition that an employer may not withdraw recognition or anticipatorily withdraw recognition because a sufficient number grievances regarding termination are pending. Of course, if the arbitration results in the reinstatement of the three employees, Respondent will be obligated to resume recognition of the Union and bargain with it upon request for a successor contract** (Decision, p. 8, l. 43-48).

Also, in denying the request for a bargaining order pursuant to the Board's decision in Burger Pitts, 273 NLRB 1001 (1984) enfd. 785 F. 2d 796 (9th Cir. 1986), the Judge stated, "However, should the arbitrator reinstate the 3 terminated employees, the General Counsel may wish to petition the Board to reopen the record in this matter" (Decision, p. 12, l. 24-30).

After the Judge issued his decision, arbitration decisions were issued regarding the grievances concerning the discharges of the three employees, Travis Pugh, Jason Weigand, and Mike Fairchild. Specifically, on July 21, 2011, an arbitration decision, attached hereto as Exhibit A, was issued regarding the discharge grievance concerning employee Pugh. On September 30, 2011, an arbitration decision, attached hereto as Exhibit B, was issued regarding the discharge grievance concerning employee Wiegand. On October 3, 2011, an arbitration decision, attached hereto as Exhibit C, was issued regarding the discharge grievance concerning employee Fairchild. In each of the decisions, the arbitrator found that the employee's discharge was not warranted and each of the discharged employees should be reinstated. It should be noted that, with respect to employee Weigand, the arbitrator found that he should be reinstated and his termination converted to a three-month suspension.

Based upon the attached arbitration decisions, the Judge's conditional finding as noted above has been satisfied. Thus, the Judge can and should make a finding based upon this new evidence. Therefore, Counsel for the Acting General Counsel respectfully requests that the

instant cases be remanded to the Judge with an instruction that the Judge now consider the impact of the arbitration decisions on his decision, consider whether a bargaining order is appropriate pursuant to his decision regarding this matter, and make appropriate supplemental findings of fact, conclusions of law and recommended remedy, order, and notice.

Respectfully submitted this 12th day of October, 2011.

Respectfully submitted,

Raifael Williams
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Region Twenty-Five
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of ACTING GENERAL COUNSEL'S MOTION TO REMAND CASES TO THE ADMINISTRATIVE LAW JUDGE has been E-filed on NLRB internet site (www.nlrb.gov) and served by Electronic Transmission on October 12, 2011 upon the following persons, addressed to them at the following addresses:

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BEFORE
JAMES R. COX
ARBITRATOR

IUOE, LOCAL 150 AFL-CIO

and

FMCS 110216-53450-3
THE TRAVIS PUGH TERMINATION

REPUBLIC SERVICS, INC.

DECISION AND AWARD

The Hearing in this matter was conducted by the Arbitrator in Rochester, Indiana May 5, 2011. Union Attorney Charles Kiser represented IUOE Local 150 and Attorney Dennis Devaney presented the Republic Services case. Following receipt of the Transcript, Post-Hearing Briefs were filed July 15, 2011.

THE ISSUE

The issue before the Arbitrator is whether Republic Services Inc. had *just cause* within the meaning of Section 2.03 of the Labor Agreement for the November 9, 2010 discharge of Travis Pugh and, if not, what should be the appropriate remedy? There are no questions of arbitrability. This matter has been properly placed before me for final and binding determination.

THE FACTS

Republic Services Inc. ("Republic") operates a number of landfills in Northern Indiana, including the County Line Landfill in Argos Indiana where the incident which led to the termination of Travis Pugh took place. This landfill had been run for some years prior to the advent of Republic by Allied Waste ("Allied"). It had been in December 2008, about two years before the Travis Pugh discharge, that Republic acquired Allied. Operations at the County Line Facility continued essentially without modification with Republic assumed the existing Collective Bargaining Agreement between Allied and IUOE Local 150. While there had been some layoffs after Republic took over, there had not been significant changes in either the

Exhibit A

workforce or day to day operations. It is noteworthy that Jamie Paschke, longtime Operations Manager at County Line, remained in charge after the acquisition. While it had been made clear to employees that Republic Work Rules had to be followed, there was no reported mention of punch in procedures with which, according to the evidence, employees had not been complying. There was no delineation of how or whether Republic Rules changed previous time keeping procedures. There was no evidence that Mr. Paschke or any other Republic Official had made any declaration of a change in punch in practices. It is unlikely that any Official other than the Site Manager would have knowledge of how employees swiped out and in at lunchtime.

Travis Pugh, hired by Allied June 13, 1999, is an experienced Heavy Equipment Operator who had worked in a variety of positions at the County Line Landfill until his November 9, 2010 discharge. Jamie Paschke remained the first line Supervisor at the site for Republic until Mike Beckley replaced him in August 2010, just about two months before the alleged October 29, 2010 misconduct which triggered Pugh's discharge.

There are essentially three structures at County Line Landfill, a *"house"* within which the Operations Manager's office is located, a Pole Building containing a break room/locker room and the Mechanical Shop. A Kronos time tracking machine located in the break rook is used to monitor employee time and attendance. System associated data collection soft wear facilitates employee time tracking and Republic's awareness of, among other matters, whether employees punch in or out in accordance with Company policies. Considering the relatively few employees at the landfill work site and the Supervisory ratio, monitoring their daily activities should not have been difficult. According to Grievant, there were only seven or eight employees on his shift.

Republic's lunch break policy allows for a thirty minute paid lunch. It was the swipe in policy for recording time off for lunch that Republic believed Travis Pugh manipulated Friday October 29, 2010. His Tuesday November 9th termination had been based upon, according to testimony of Operations Manager Mike Beckley, *stealing time as* a consequence of *"being clocked in by another employee or allowing it to happen"*.

Day shift employees take lunch in two groups - around either 11a.m. or noon. For a number of years they had been required to punch out and in at lunchtime. The Kronos time keeping system in effect at the time of Mr. Pugh's alleged misconduct required an employee to swipe a plastic card at the device to record the time he left for lunch and returned. Each employee had a specific card identified with his/her own name which was kept in an unlocked rack near the Kronos. It was understood that employees were to swipe their cards out at the start of their lunch breaks and in upon their return to work, whether they had left the premises or not. The Kronos system utilized by Republic after the ownership changeover in 2008 was substantially similar to the credit card-style swipe system used by Allied. There is no allegation that any Kronos system malfunction had been a factor in Grievants alleged misconduct.

Republic's policy clearly prescribes a thirty minute paid lunch break. Kronos system data was transmitted into Republic's Payroll Department at Regional Headquarters. Deductions from an employee's pay due to non-compliance are automatic. At Argos, the Operations Manager is responsible to review work time print outs for each employee. If employees had extended their paid lunch time in 2010, it is likely that Management would have been aware. However, Mr. Beckley testified that he had never disciplined an employee for extending his paid lunch. As far as the evidence shows, no employee had been disciplined for any time keeping violations prior until November 2010.

The Discharge

At the Arbitration Hearing, Mike Beckley testified that Travis Pugh had been terminated because another employee had punched his time card in violation of Company Rules, specifically Rules N and O set forth at Section B of the Northern Indiana District Work Rules. That provision sets forth offenses which *may* result in immediate discharge including:

n. Tampering with or permitting another person to punch your time card.

o. Tampering with or punching another employee's time card.

Prohibitions against not punching another's time card are also set forth in Rule 19 in the Republic Services Heavy Equipment Operator Manual and in their Brochure for Safe Actions.

The Operations Manager's Observation

Friday October 29, 2010, after punching out at an appropriate time, Travis Pugh drove to a nearby restaurant with employee Fairchild for lunch. During the time he was away from the premises, Operations Manager Mike Beckley and Operator Jason Wiegand happened to discuss a calendar with sexually explicit pictures Jason had found in his locker. After Mike went to the break room to look at the locker, he noticed that it was about 12:40. He remembered that Pugh and Fairchild had been reported in Kronos records he had been reviewing a few minutes before as having returned from lunch at 12:35. Not long after, Jason Wiegand saw Fairchild and Pugh in the parking lot and heard Mike Beckley tell Pugh that he was already punched in and needed to go back to work. The two men had not yet reached the break room. How did it happen that they were already punched in? Beckley saw them pulling into the parking lot. It was close to 12:45.

According to Jason, while he had been talking with Mike, he had noticed Fairchild's truck and, assuming that he had already returned from lunch, swiped the cards of both Fairchild and Pugh. Wiegand maintained that he did not have any prior arrangement with Pugh to swipe him back in if he were late. He testified that Pugh had not asked him to punch him in. There was no evidence of any such prearrangement.

Pugh recalled seeing Mike and Jason Wiegand talking as he and Fairchild returned from lunch and had entered the parking lot. Travis testified that Mike told them *"You guys are in. You*

need to return to work". On direct examination, the Operations Manager did not recall making such a statement – acknowledging, however, that he was aware the two had been punched in. However, on cross-examination, Mike remembered telling Fairchild that he was already punched in. He did not recall what he had told Pugh but acknowledged that he had not mentioned anything to him about his time card. He did not recall what he had said about the swipe card. At the time he was directed to return to work, Pugh was still in the parking lot and had not made any attempt to swipe himself back in. He had not reached the break room before having been given the message that he was already punched in and should return to work. There was neither recrimination toward either man nor mention of discipline until several days later. However, Mike asked Fairchild, who was the Union Steward, to come to his Office where he told him that swiping in of others cards should cease and not continue in the future.

The discussion within the Office opened with Mike relating the information about the calendar Wiegand had reported. He said that he then told Fairchild that Kronos records had shown him as being back on-site when in fact he had not yet returned from lunch. Beckley said Fairchild replied, "*That's been happening a lot*" and that he responded: "*I wasn't aware of it. You need to stop that now. It doesn't need to happen anymore*". Beckley testified that he had told Fairchild that clocking in another employee constituted a work rule violation. Without any mention of discipline, Beckley told him to go back to work. As Fairchild rode back up on the landfill with Pugh, according to his testimony, he related that he had told Travis that Mike Beckley had expressed concern about employees swiping each other's time cards. Pugh testified that Fairchild had made it clear that, "*We need to knock it* off".

Travis Pugh maintained that thereafter - through the date of his termination - he had not swiped any other employee's card nor allowed his card to be swiped by another.

Disciplinary Steps

After speaking with Fairchild, Beckley called Republic's Northern Indiana Regional Human Resources Manager, Mr. Rodney Atkinson, and Bob Walls, Republic's Regional Manager. That same afternoon, when Union Business Agent James Gardner phoned Beckley regarding an unrelated matter, he said Beckley advised him that some employees were punching each other out but that he not expect the matter to go any further .There was no further contact with the Union over the punching in matter until November 3rd when H. R. Manager Atkinson asked Gardner to attend a meeting the following day and told him the Company intended to interview Bargaining Unit employees about the previously mentioned punching in problem. Gardner testified that the meeting had been described as a *theft of time* investigation. He attended and represented his members It appears that Weingarten procedures had been followed.

The Investigation

November 4th Rodney Atkinson did come to the landfill site and interviewed Pugh, Fairchild and Jason Wiegand. He asked each for written answers to several prepared questions. Gardner advised them to answer honestly.

The first question read: "*On 10/29/10 did another employee clock you back in from lunch in the time clock while you were not physically at the facility*?" Pugh responded, "*I do not remember*", Fairchild answered "Yes" and Jason Wiegand admitted that it had been he who had clocked both Fairchild and Pugh in that day although they were not at the facility.

The written responses of each of these men to the remaining questions were substantially identical; each admitted having been clocked in by others in the past and conceded that they had clocked others in as well. In fact, Mr. Wiegand called it a "*common practice*" and Union Steward Fairchild said it "*happens all the time*". Travis acknowledged that both managers and other employees had clocked him in or out in the past. When asked why others would clock him back in when he was not physically present, he explained, "*If they did* (on other occasions he admitted they had punched him in), *it was to keep to the half hour lunch, not to get in trouble*".

Travis Pugh testified that he had been quizzed about each of his answers. Rodney Atkinson related that Pugh had told him he didn't remember being clocked back in but, if he were, it was to avoid getting in trouble for taking more than thirty minutes. Atkinson said that Travis acknowledged that, if someone punched him back in, it was probably wrong but had been common practice. Then when Pugh was asked to give specifics about Managers being aware of the asserted practice of employees punching others in, he pointed out that former Operations Manager Paschke himself had sometimes swiped cards for employees who were already inside the break room and in his presence.

Mike Beckley's testimony did not address several key points[1]. He could not recall asking Jason Wiegand whether Travis had asked to swipe him in. He had no information about Pugh making any attempt to have Jason swipe him in. Mike did not remember asking, prior to the termination, whether Pugh knew that Wiegand had swiped him in. He could not recall whether Republic had interviewed anyone other than three Operators in the course of the investigation. While it appears that someone from Republic had spoken with the former Operations Manager, Mr. Paschke did not testify in this proceeding[2].

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[1] The prepared questions had not addressed whether Pugh had asked another employee to swipe him in or if he had given anyone permission.

[2] Information provided in Dennis Jaeger's affidavit was, like Paschke verbal statement to management, inadmissible. Jaeger wrote that, after Republic took over, Mike Beckley had made it clear on several occasions that Republic would not tolerate employees punching each other in and out. Beckley came to the Operation in August 2010 and Jaeger's statement would seem inconsistent with his contention that he had been unaware of employees punching each other in and out until October 29th.

The Investigation concluded without any evidence that (1) Mr. Pugh had swiped any employee's card at lunch October 29th; (2) that he had arranged for any employee to swipe him back in that day or (3) that he had tampered in any way with his own card when he returned from lunch. Jason Wiegand was clear that that Jason Pugh had not asked to be punched back in, asserting, without prompting, that he had elected to do the swiping because he recognized that Pugh and Fairchild were late coming back to the facility from their luncheon. Union Representative Gardner told Republic officials that it was common knowledge that such a swiping practice had been going on without ever having been addressed by management.

A Determination to Discharge.

Beckley, Atkinson and Walls decided to discharge Travis Pugh. In their deliberations, while they reportedly considered Local 150's contention that there had been a long standing practice of employees swiping each other in and out, they discounted those assertions relying upon Mike Beckley's lack of knowledge that it had happened during the few months he had worked at the landfill and, what they stated they had learned from Mr. Paschke. Mr. Paschke's failure to testify was a serious setback for Republic's case. Mr. Gardner was advised to return to the facility November 9th. He was told that the decision had been made to terminate Pugh, Fairchild and Wiegand for *theft of time*. When Travis was called into the office that day, he was terminated by Mike Beckley "*...for being clocked in by another employee or allowing it to happen*".

Contrary to Republic Work Rule provisions, Travis Pugh had not been provided written notification identifying the Rule(s) violated or the penalty imposed. When Local 150 did request written notification, District Manager Robert Walls responded with a memo generally asserting, without specificity, that Company Policies had been violated.

A timely Grievance was filed.

The Practice

It was Grievant Pugh's testimony that employees had regularly swiped the cards of their co-workers throughout the term of his employment. Such an asserted regular procedure would be expected to have come to the attention of the Operations Manager –if someone swiped in another employee's card at lunchtime, that employee's card would be placed backwards in the open rack so that he would be aware he'd already been clocked in. Unlike a time clock punch, the cards would not show any time on their face.

Travis also claimed that it had been common for the person closest to the machine to swipe cards of others who were in the vicinity and that such a procedure had happened both in the morning at the beginning of the work day, going out or coming back from lunch and at

quitting time. He also claimed that employees would routinely clock in and then spend additional time socializing before getting back to work and that management was aware of this but made no effort to stop it. He testified that before October 29th, from time to time, he had been clocked back in from lunch even when he was not physically on-site without knowing who had swiped his card. He admitted having swiped others back in irrespective of whether they had already been off-site at lunch for thirty minutes. He testified that such conduct occurred while Allied owned the facility and continued after Republic took over.[3]

Travis Pugh's testimony that Jamie Paschke had been present over a period of years when employees had swiped cards of other employees was uncontested. He stated that, on some of those occasions, the employees whose cards had been swiped continued to eat or socialize, with Paschke present. No discipline was taken. As we have seen, there were no records of any employee having been disciplined for violation of the swipe rules. While the Rule was in effect, no notice had ever been posted at the machine that employees may not swipe any card but their own. Furthermore despite Paschke's apparent awareness – according to the witnesses to testify on this point – there is no evidence of any management notice or discussion addressing the swipe in procedure. In such a small unit such a practice would have been apparent to the Operations Manager.

Jason Wiegand, also terminated November 4th for violation of the same work rules, testified that there had been times during his years of employment when other employees would swipe him in and out for lunch. A candid witness, he would be aware when someone else had swiped his card because it would be returned to the rack rather than placed in backwards or on top of the machine where he'd have left it. According to his testimony, such swiping went on without his asking someone to do it. This continued to happen under Republic's watch, he said, about once a week. He testified that mornings Jamie Paschke would often be eating breakfast in the break room and was present when employees swiped others in. He did not recall similar situations involving Paschke at lunch. Jason acknowledged that often employees were in the vicinity when others swiped their cards, a different situation when he swiped Pugh's and Fairchild's cards on October 29th when they were not nearby and he did not know for sure that they were on-site. While he assumed that they had not been swiped in based upon the position of their cards, he would not know for sure.

In support of the Union's contention that the practice of employees swiping other employees' time cards had been long standing, other current and former employees were called to testify. Former employees Robin Day and Jimmy McGlothlin and current employee and brother of Grievant, Shannon Pugh, each testified that the practice had been widespread.

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[3] There had apparently not been any audit of such a procedure. It takes several minutes after swiping in to return to the location on the landfill where work in being carried out. It was not shown whether there were any time records of trucks coming in and out of the landfill. The crews coordinate at lunch time. It was not shown whether any effort had been made to correlate the times each had swiped in or relate the swipe in time to the time on the hill.

Commencing in 2000, Day had been employed longer than eight years at County Line Landfill; he was laid off some time after Republic took over. His experience was limited to the period that Jamie Paschke was Operations Manager. Day's testimony was consistent with that of other bargaining unit witnesses - that for many years employees had regularly swiped each other's cards. Whether under Allied or Republic, he said that sometimes one person would swipe cards of several employees standing in the area; there had been occasions someone swiped his card without his even knowing it. Day admitted that he himself swiped others in. Based upon the circumstances he concluded that the Operations Manager would have been aware of this behavior since he had sometimes brought pizza and ate with the crew. It was clear that the Operations Manager did not strictly enforce the punch in policy.

Mr. McGlothlin recalled he had started employment with Allied after 2005 but before Republic took over. While he worked for Allied, he too testified that employees swiping other employee's cards had been a common occurrence. He recalled that during this time, the Operations Manager organized lunchtime cookouts which lasted longer than thirty minutes. McGlothlin said Paschke was present as employees punched themselves and others back in after thirty minutes and then returned to the cookout.

Harold "Shannon" Pugh has been employed at the landfill since February 1997 and currently works in the maintenance shop. Shannon admitted that from the start of his employment he had been aware of company work rules prohibiting swiping other employee's time cards despite such conduct being an everyday occurrence under Allied and continuing even after Republic took over. He testified further that Paschke had been present during these apparent violations and would have been aware of such misconduct. Even on days when employees had left the site for lunch and had not yet returned, according to Shannon Pugh, they would be swiped back in by co-workers. It was his testimony that prior Managers, including Jamie Paschke, had specifically directed him to swipe others in who were off site at that time. This could be situations where management had been aware of the reason for the absence and approved of the swipe which would trigger payment. However, Shannon asserted that Paschke had been present at times when he had swiped himself back in at the end the thirty minute lunch time but continued to each lunch. Shannon Pugh acknowledged that he had never reported his or any other employees violations of the swipe card work rules to higher management because he was afraid he could get in trouble for it.

Work Rule Enforcement.

Travis Pugh testified that, shortly after Republic had finalized their acquisition of Allied, Mr. Bob Walls held an employee meeting at the Landfill. Paschke was still Manager at that time. Walls told the group that he was there to make sure everyone worked together efficiently to get the job done. Travis testified that, at no time prior to his termination, did Republic hold a meeting to discuss time card swiping or otherwise specifically address work rules relating to swipe cards. Mike Beckley testified that, *on several occasions* during the approximately two

month period he had been Operations Manager before the Pugh's misconduct, he had discussed the importance to Republic of employees complying with the work rules. There was no contention he had made specific mention of the swipe in procedure. Why he had spoken with them so often in such a short period was unexplained.

Republic District Manager Bob Walls testified that Republic is "*very good about following the rules, making sure they are enforced*" and that he had underscored this when he met with Pugh during the signing of the Last Chance Agreement less than two weeks before. Nothing was said about swiping time cards at that meeting. It was not then an issue.

Bob also testified he had emphasized Rule compliance when he spoke to the employees earlier, telling them, "*Gentlemen and ladies, these rules must be followed. We are a new company. This is Republic. This is not the old Allied site that was previously here.*" Walls stated that Union Business Agent Gardner had commented to the unit members at that same meeting, "*Hey guys, this is not Allied anymore. It is Republic.*".

Jason Wiegand testified that he had never heard either Bob Walls or Mike Beckley say anything about enforcing time card rules. However, Shannon Pugh testified that at the first employee meeting after the change in ownership, Mr. Walls had told workers that the regular rules apply and said something about getting the half hour paid lunch, swiping your card and then getting out of the way for others to do the same.

ANALYSIS

Mr. Beckley's reaction upon learning that Pugh and Fairchild had been swiped in before returning to the job site after lunch October 29th was consistent with his claim of not having had prior knowledge that employees were swiping each other's cards. He had immediately voiced his concern to Union Steward Fairchild and told him that such misconduct should stop and not take place in the future. It was remarkable that he never, that day or thereafter, made any effort to interview Pugh and get his explanation of how someone would have swiped his card. While his Union Steward was present; there was no effort to get Grievants position that day. Despite the contention of a past practice and the fact that this was a first instance as far as Beckley and top Republic Management knew, there was neither a posting that such conduct would not be tolerated in the future nor any letter to employees

The afternoon of October 29th, Mike reported the incident to both Rodney Adkinson at Area Human Resources and District General Manager Robert Walls. As mentioned, when Fairchild told him "*That's been happening a lot*", Mike had told him it had to stop. Yet there is no evidence that Republic then or thereafter checked to see whether there had been a past practice even though that past practice argument was raised during the investigation by Pugh, Wiegand and Fairchild. According to the Record there is no indication that they had interviewed other employees about that issue. They did contact Jamie Paschke.

Union witnesses identified a number of instances when the prior manager, Jamie Paschke, had by his inaction, condoned instances when employees had punched each other's cards in his presence. That testimony was not refuted. Paschke had been the only management representative on site during most of the time period that the asserted practice went on but was not present at the Hearing. While Republic said they had discussed the Union assertions with him during the course of their investigation, there is no probative evidence that Paschke had denied that there had been any such practice. We have only Mr. Beckley's testimony that Jamie Paschke told him that "*he was aware of no such thing. That it did not happen.*" There was no showing that Mr. Paschke had been unable to appear at the Arbitration Hearing or participate in a conference call. In view of the extensive testimony of Union Witnesses about a practice, such an unequivocal denial that swiping in other's cards did not happen at all was surprising.

I recognize that the evidence indicates that, in most cases, when employees swiped cards of others in the presence of Mr. Paschke, those whose cards had been swiped had been nearby. However, there were instances when Paschke himself specifically directed an employee to swipe the card of another who was not in the vicinity. The reason for such instruction was unknown. A far more troubling aspect of Paschke condoning the reported swipe failures was that, on several occasions, according to the testimony, he had purportedly permitted employees to swipe back in from lunch in his presence and then resume eating or socializing on paid time rather than returning to work! Such an attitude would send the wrong message and would degrade regard for the company's time card work rules. Under these facts, employees who did not return to work after swiping themselves back in or after having been swiped back in by others, were extending their paid lunch without management objection and were being paid although they were not engaged in bargaining unit work.

I recognize that, at the time of the Republic acquisition, there had not been any reason for Republic's new management to be aware of swipe card work rule violations. However, the local Manager remained in place and, according to the evidence before me, he would have been well aware of leniency in enforcing the scanning procedure. The new management was bound by his job performance and the record of time keeping laxity. According to the testimony, the practice of scanning time cards continued after the acquisition on his watch. Again, the evidence is that, despite the substantial evidence that time scanning contrary to the Rules continued and despite reported improprieties during Paschke's long term as Operations Manager, there had not been a single instance where employees who took an extended lunch hour were disciplined or even cautioned so far as the evidence shows.

There is no question that, not only were appropriate time card control rules in effect, but that employees were well aware of them. Grievant knew the Rules and that he was subject to discipline for time keeping violations. Shannon Pugh also admitted such knowledge and Grievant himself conceded such awareness in his written answer to the second question on Employer's Exhibit 5(a). There is clear evidence that the prohibitions against tampering with one's own time card, permitting another to swipe a time card and/or tampering with or punching

another's time card, had been widely promulgated in multiple documents for years, both before and after the acquisition of Allied by Republic. Grievant was aware of these rules and, by his own admission, had violated them from time to time in the past, sometimes with knowledge of the Operations Manager. There is contravening evidence, however, of a practice of the Operations Managers failures to enforce such rules and allowing such a practice to continue without objection.

This issue before me, however, is whether Travis Pugh violated the Rules October 29, 2010. There is insufficient evidence that he had engaged in any rule violation that day. He may have come back late from lunch, but there was no discipline for that tardiness despite the Operation Manager's awareness. He was fired by Mike Beckley for stealing time - "*...for being clocked in by another employee or allowing it to happen*".

Even setting aside past practice considerations for the purpose of determining the right to discipline here, there is insufficient evidence that Grievant Travis Pugh had violated the time keeping work rules October 29, 2010. He had returned late from lunch and was proceeding toward the break room when he was told by the Operations Manager that he had been punched in and should return to work. We will never know whether he would have gone to the rack and then swiped his card in accordance with prescribed procedures that afternoon[4]. We do know that there is no evidence that he had tampered with his own time card or had arranged for and/or permitted Jason Wiegand or any other employee to swipe his time card. There is no evidence that Travis had *"permitted"* or in any way authorized anyone to swipe his card October 29th. He was not responsible for the time card being swiped that day after the lunch period.

Jason Wiegand and Travis Pugh each credibly testified without contradiction that there had not been any prior arrangement for Wiegand to swipe Pugh's card October 29th. There was neither contention nor evidence that Mr. Pugh tampered with or punched another employee's time card that day. Regardless of the fact that Travis Pugh had then recently engaged in other misconduct which he had agreed to remedy with a Last Chance Agreement, there is absolutely no evidence that he had violated any Republic work rule October 29, 2010 other than being tardy returning from lunch[5]. There is no evidence that Travis Pugh had played any role in Jason Wiegand's swiping him in that afternoon. Moreover, this discipline is about his alleged misconduct October 29, 2010, not prior admitted improprieties. The issue of whether Travis Pugh should be disciplined for admitted prior improper timekeeping offenses is not before me.

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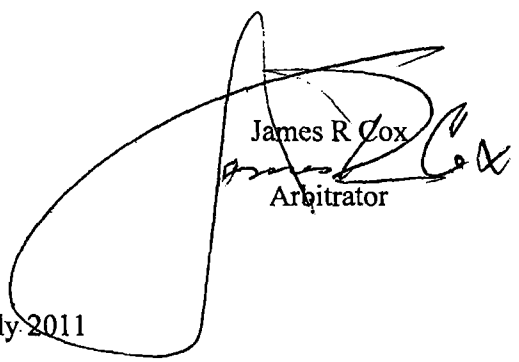
[4] The Employer notes that *"had Grievant been unaware that Wiegand clocked him in, he would have tried to clock in himself"*.

[5] As the Employer states, as prior discipline it may be taken into account with respect to Republic's demonstration of just cause.

THE AWARD

I find that Republic did not have just cause to terminate the employment of Travis Pugh based upon October 29th misconduct. Mr. Pugh is to be offered reinstatement with back pay less any outside earnings or unemployment compensation received.

The Grievance is granted. I shall retain jurisdiction for 90 days to resolve any dispute about the remedy.



James R Cox
Arbitrator

Issued this 21th day of July 2011

FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF THE
VOLUNTARY ARBITRATION
BETWEEN

REPUBLIC SERVICES, INC.

Employer,

-and-

Gr: Jason Wiegand/Termination
FMCS No: 110216-53452-3

IUOE LOCAL 150,

Union.

ARBITRATION OPINION AND AWARD

APPEARANCES

Dennis M. Devaney
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Troy, MI 48084

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Exhibit B

STIPULATED ISSUE

DID THE COMPANY HAVE JUST CAUSE,
TO DISCHARGE THE GRIEVANT, AND IF NOT,
WHAT SHOULD BE THE REMEDY?

On November 10, 2010, Bob Walls, the general manager, advised the Union that Jason Weigand, who has 16 1/2 years of seniority as a mechanic at the County Line Landfill, was being terminated for violating Company policies. A grievance requesting reinstatement and a make whole remedy was filed on November 10, 2010.

A transcribed arbitration hearing under the auspices of the Federal Mediation and Conciliation Service was held on June 17, 2011. Testifying for the Employer were: Rodney Adkinson, Human Resources Manager; William Meyer, President, Northern Indiana Area; Robert Walls, General Manager and Michael Beckley, Operations Manager, County Line Landfill. Testifying for the Union were: Jason Weigand, Grievant; Travis Pugh, Heavy Equipment Operator; James Gardner, Local 150 Business Agent and Harold Shannon Pugh, Mechanic. Comprehensive post-hearing briefs were submitted by the parties.

BACKGROUND

In December of 2008, Republic Services merged with Allied Waste, and took over Allied's County Line Landfill in northern Indiana. Jason Weigand was a mechanic at the landfill. The Company charges that on October 29, 2010, Mr. Weigand punched in two other employees before they actually returned from an off-site lunch. Theft of time is alleged.

After Republic took over the landfill in 2009, a former Allied employee named Jamie Paschke was the on-site manager from January of 2009 until mid-2010. He was replaced by Mr.

Beckley. Mr. Beckley testified that he spoke with employees when he started work, and told them that Republic was not Allied, and that he took the rules seriously.

Beckley said that on October 29, 2010, Weigand came to him about a "girlie" calendar that he found in his locker. Weigand was concerned that there had recently been a sexual harassment issue at the landfill. Beckley went with the Grievant to check his locker.

Thereafter, Beckley noticed, as he reviewed time card records, that Mike Fairchild and Travis Pugh were clocked in after lunch, even though he had not observed them in the break room.

Next, Beckley observed Pugh and Fairchild arrive in the parking lot in a green Oldsmobile. Fairchild had driven a truck to work.

Beckley asked Fairchild why he was punched in even though he had been off-site. He said that Fairchild told him that it was "past practice." Beckley testified that he was unaware of any such practice, and that he should punch in when he actually returned from lunch.

An investigation was undertaken, and Weigand admitted that he had punched in Fairchild and Pugh. Beckley concluded that there was a violation of work rules, which state:

> 1. Offenses which may result in immediate discharge.
>
> * * *
>
> o. Tampering with or punching another employee's time card.
>
> * * *

Mr. Beckley said that the Grievant was not notified in writing of the charges against him as required by the work rules.

On November 4, during an investigation, Mr. Weigand wrote the following answers to written questions:

> On 10/29/10, did you clock Mike Fairchild back in from lunch in the time clock while he was not physically at the facility?
>
> Yes
>
> On 10//29/10, did you clock Travis Pugh back in from lunch in the time clock while he was not physically at the facility?
>
> Yes
>
> If you clocked either of these employees back in from lunch on 10/29/10, why did you do this?
>
> Common Practice
>
> Have you ever clocked any other employees at County Line landfill "in" or "out" of the time clock before?
>
> Yes
>
> If yes, who and when?
>
> All
>
> Has anyone else ever clocked you "in" or "out" of the time clock before at County Line landfill?
>
> Yes
>
> If yes, who and when?
>
> All
>
> Signed Jason Weigand Date: 11/4/10

The general manager, Robert Walls, testified that he told employees at the landfill that Republic was a new company, and that Republic's rules had to be followed. He added that Jamie

Paschke, who had been with Allied, was let go after working for Republic for a period of time. However, it appears that as of the date of the hearing, Paschke was again working for Republic.

Walls stated that at a sexual harassment training prior to the events leading to the discharge, the Grievant and others were advised that they had to follow all of the rules.

Walls felt that discharge was appropriate, even though the employees were only 12 minutes late from lunch, because the Grievant was involved in the theft of time and there was liability, because the employees were on the clock at a time that they were driving off-site. Pugh and Fairchild were discharged along with the Grievant.

Walls said that this is first instance of time card theft at the Company. He adds that employees are not disciplined for returning late from lunch, but rather are not paid for their extra time away from work.

Rodney Adkinson, the Human Resources manager, testified that during his investigation, two other employees said:

> As I continued the investigation, you know, I determined that, okay, the other employees involved were saying it was a common practice as well which led me to believe there was type of mutual understanding that if they – certain employees had this agreement, that if they saw that someone was late back from lunch, if they had gone at the same time, then they just automatically knew to punch one another back in. (T. 24).

Mr. Adkinson said that the Company was unaware of a common practice at the landfill of employees punching in each other when they were late. Adkinson said that the Grievant told him that the two other employees were not at the landfill when he punched them in.

Mr. Adkinson said that prior to the Grievant's discharge, other employees received a Last Chance Agreement for sexual harassment. A Last Change Agreement was also permitted based upon a verbal disagreement at the landfill.

The president of the Northern Indiana Area, William Meyer, testified that the Grievant was terminated because he was stealing time from the Company.

Jason Weigand has been with the Company since 1994. He said that Jamie Paschke, an Allied manager, remained at the landfill for a year and one-half after Republic took over. Weigand said that Walls, when he took over, never mentioned the work rules.

The Grievant said that previously, employees would swipe in other employees when they were having coffee in the morning. He added that other employees swiped him out for lunch when Republic took over.

The Grievant said that as a matter of practice, he would not swipe in employees when he knew that they were late returning from lunch. However, he said that he did not know Pugh and Fairchild were late from lunch, because he saw a truck and assumed that they had just returned from lunch. The Grievant said at T. 126:

> Q. Then when if ever on this Friday, October 29th do you have occasion to swipe anybody else in?
>
> A. I sat down. I don't know if I went to the bathroom. I sat down at the table. I looked out the window. And Mike's truck was back.
>
> I thought, "Well, they are back from lunch." So I went over and swiped them back in, Mike and Travis, because they went to lunch together.
>
> Q. The truck belongs to Mike?
>
> A. Yes.
>
> Q. You see the truck back. Why did that seem to indicate to you that they were back?
>
> A. Well, if they drove it to lunch, they were back...

The Grievant denies that he was asked by Pugh and Fairchild to punch them in. The Grievant does say that he was asked on November 4 for the first time, if he had punched the other two employees in and that he admitted doing so.

The Grievant doesn't remember if he saw the truck when he returned from lunch himself.

Travis Pugh, who was discharged also, testified that he doesn't remember Republic discussing the work rules when it took over from Allied. Pugh said that he would swipe another employee's time card when that employee was following him to work, and he noticed him at the gas station in the morning. He further said that during Republic's presence at the landfill, this occurred and that Mr. Paschke was present.

On October 29, Pugh denies being aware that Weigand had signed him in before he returned from lunch. He also denies requesting the Grievant to swipe him in, or that he had an ongoing arrangement to be swiped in.

Shannon Pugh testified that it was common for people to swipe other employees' times cards after Republic took over.

PERTINENT CONTRACT PROVISIONS

2.02 COMPANY WORK RULES AND POLICIES

> The COMPANY shall have the right to make or change after proper publication thereof and to enforce any reasonable rules related to safety, discipline, production, efficiency or attendance. The question of reasonableness may be challenged by the UNION under the Grievance and Arbitration procedure described under Article IV hereof. Proper publication will be defined as follows: The Company will provide the Union a set of work rules or any changes to existing work rules at least fourteen (14) days prior to instituting said rules. The Union shall have thirty (30) days from the date any rules or changes to any rules are provided to the Union to file a grievance challenging the reasonableness of any rules, otherwise the rule(s) or changes shall be deemed reasonable.

2.03 DISCIPLINE AND DISCHARGE

The COMPANY shall have the right to discipline, suspend or discharge any member of the bargaining unit but only for just cause. When feasible, particularly preceding a holiday or weekend, the COMPANY shall notify the UNION of its decision to suspend or discharge an employee no later than the close of business on the day the action is taken, but in no case later than the close of business the workday following the day the action is taken.

4.06 ARBITRABILITY

The Arbitrator so selected shall hear all evidence he or she deems relevant and admissible and then render a decision based on the evidence and the Agreement. The Arbitrator shall be bound by the terms and provisions of the Agreement and shall have authority to consider only grievances presenting an arbitrable issue under this Agreement. The Arbitrator shall have no authority to add to, subtract from, modify. or amend any of the provisions of this Agreement. A decision of the Arbitrator on any grievance within the scope of this issue submitted shall be final and binding on the COMPANY, the UNION and the Employee or employees involved. Retroactivity for pay purposes will not exceed up to thirty (30) days prior to the filing of the grievance.

The neutral arbitrator's fee and expense shall be paid equally by the parties to the arbitration.

If there is an issue as to whether a particular grievance or issue is arbitrable, the arbitrator shall rule on the issue of arbitrability before taking evidence on the merits of the underlying grievance dispute.

POSITION OF THE EMPLOYER

It is asserted that the Grievant committed a theft of time by swiping the time card of two other employees while they were still at lunch. The Employer argues that the Grievant lacks credibility when he states that he did not know that the two employees were still at lunch when he swiped them in.

The Employer contends that there was an established arrangement for employees to punch each other in when they were late. Republic, it is argued, made it clear that it wanted its rules followed when it took over the landfill.

Arbitral precedent is said to support discharge for theft of time cases. The Employer notes that discharge is provided for a first offense of swiping someone else's time card.

The potential existence of a practice, it is argued, does not bind Republic, which told the Grievant and the other employees that it was enforcing the rules to the fullest.

POSITION OF THE UNION

The Union argues that the Company condoned the swiping of time cards by other employees for an extended period of time. The lax enforcement by the Employer is said to result in a just cause violation. It is emphasized that no one had previously been disciplined for a time card violation, and it is argued that the Employer was required to provide notice before it began enforcing the rule.

It is emphasized that the Employer failed to call its on-site manager, Jamie Paschke, to rebut the allegations of a practice. The Union argues that the rule does not distinguish between employees who are at the facility or off-site, when a card is swiped by another. The Union argues that Paschke never disciplined employees for violating the rule.

The Union contends that the rule at issue does not require termination. Also, it is argued that Republic violated its own rules by failing to provide written notice of the charges. The Union also maintains that the Grievant lacked the intent to steal time.

The penalty of discharge is argued to be too severe, in light of the practice of employees swiping other employees' time cards. Also, it is emphasized that Mr. Weigand is a long-term employee.

DISCUSSION

I have carefully considered the evidence and the well-reasoned arguments of the attorneys; however, I will focus only on those areas that are relevant to my decision.

Pugh, Fairchild and the Grievant were terminated. Previously, on July 21, 2011 Arbitrator James R. Cox reinstated Travis Pugh with back pay. He concluded that there was no evidence that, "Pugh had played any role in Jason Weigand's swiping him in that afternoon." (Cox Award, p. 11).

Additionally, Arbitrator Cox found that Paschke, the previous on-site manager for Republic, condoned card swiping by others. The arbitrator wrote at p. 10:

> I recognize that the evidence indicates that, in most cases, when employees swiped cards, of others in the presence of Mr. Paschke, those whose cards had been swiped had been nearby. However, there were instances when Paschke himself specifically directed an employee to swipe the card of another who was not in the vicinity. The reason for such instruction was unknown. A far more troubling aspect of Paschke condoning the reported swipe failures was that, on several occasions, according to the testimony, he had purportedly permitted employees to swipe back in from lunch in his presence and then resume eating or socializing on paid time rather than returning to work! Such an attitude would send the wrong message and would degrade regard for the company's time card work rules. Under these facts, employees who did not return to work after swiping themselves back in or after having been swiped back in by others, were extending their paid lunch without management objection and were being paid although they were not engaged in bargaining unit work.
>
> I recognize that, at the time of the Republic acquisition, there had not been any reason for Republic's new management to be aware of swipe card work rule violations. However, the local Manager remained in place and, according to the evidence before me, he would have been well, aware of leniency in enforcing the scanning procedure. The new management was bound by his job performance and the record of time keeping laxity. According to the testimony, the practice of scanning time cards continued after the acquisition on his watch. Again, the evidence is that, despite the substantial evidence that time scanning contrary to the Rules continued and

> despite reported improprieties during Paschke's long term as Operations Manager, there had not been a single instance where employees who took an extended lunch hour were disciplined or even cautioned so far as the evidence shows.

Prior in-house awards on similar issues should be followed in subsequent arbitrations, in order to provide stability and consistency in labor relations. Moreover, I concur with Arbitrator Cox that there was evidence that Paschke, the previous Republic manager, allowed employees to swipe in for each other. Importantly Paschke who is a current Republic manager, did not testify to refute the allegations of lax enforcement.

There is no evidence that the on-site manager who replaced Paschke was aware of the practice of employees swiping in for each other. Moreover, the Company did testify that it told employees that it was going to enforce the rules. However, there was no showing that the new management directly addressed the issue of employees punching in for each other, and that it intended to strictly enforce the rule with a discharge penalty. The actions of Paschke, who represented Republic for a year and one-half, created the conditions for lax enforcement of the rule against swiping in for another employee.

Arbitrators have recognized that lax enforcement can require a reduction of the penalty. Elkouri and Elkouri, in *How Arbitration Works* (BNA 6th Ed., p. 994) state:

> Arbitrators have not hesitated to disturb penalties where the Employer over a period of time has condoned the violation of the rule in the past. Lax enforcement of rules may lead employees reasonably to believe that the conduct in question is tolerated by management. Even where the employee has engaged in conduct that is obviously improper, such as threatening a supervisor, the fact that management has failed to impose discipline in the past can be a signal that unacceptable behavior will not be penalized.

The authors further state at p. 366 of their 2010 Supplement:

> Arbitrators continue to find that employers lack just cause to discharge employees for violating a work rule that has not been generally enforced in the past, unless notice has been given that in the future the rule will be strictly enforced.

The Grievant lacked notice that the card swiping rule could lead to his discharge, based upon the prior lax enforcement during the Paschke regime. However, the Grievant did understand that it was improper to swipe a card if the employees were away from the facility at a restaurant.

Mr. Weigand said that he believed that Pugh and Fairchild had returned to the facility, because he saw a truck belonging to one of them in the parking lot, and that he failed to notice it when he returned to work himself.

However, the Kronos card reader system results in a punch in followed by a punch out. The Grievant, if he only observed a truck, but not Pugh and Fairchild, would not know if they already had punched in, and that as a result, he might be punching them out when he swiped their cards. This suggests that the Grievant would not have punched in Pugh and Fairchild unless he knew that they were not back at the facility. The evidence was that the practice involved situations where the other employees were either at the facility or were about to arrive. There is insufficient proof to conclude that the Grievant knew that Pugh and Fairchild met that criteria. Therefore, the Grievant's action was outside of the practice.

Nevertheless, because of the prior lax enforcement under Paschke, the Grievant lacked notice that his action would result in his discharge. Therefore, discharge would be inappropriate under the just cause standard, both because of lax enforcement and lack of notice of the potential penalty of discharge.

Moreover, just cause requires consistency relative to the punishment meted out to employees. Arbitrator Cox declined to find a conspiracy among the three employees to allow Weigand to swipe the cards. He reinstated Pugh with back pay.

The Cox rationale is not directly applicable to Weigand, because Weigand was admittedly involved in swiping the card. However, Cox offers lax enforcement as a relevant consideration. Certainly, Cox's mention of lax enforcement was not gratuitous, and should therefore be followed in this proceeding.

Accordingly, due to lax enforcement, lack of notice of a potential discharge penalty, and the Cox award, discharge for Mr. Weigand is contrary to just cause. He should be reinstated with seniority.

However, there should not be full back pay, and instead the Grievant should receive a three month suspension. That is required because the Grievant should have understood that he faced some degree of a serious penalty for swiping in employees who were not at the facility, a situation which was outside the practice of the parties. The Cox award requires back pay for the relevant period, less outside earnings or unemployment. The Cox award said:

> I find that Republic did not have just cause to terminate the employment of Travis Pugh based upon October 29th misconduct. Mr. Pugh is to be offered reinstatement with back pay less any outside earning or unemployment compensation received.

Therefore, the Grievant should be reinstated with seniority and back pay, less a three month suspension, outside earnings and unemployment compensation.

AWARD

For the foregoing reasons, the Grievant shall be reinstated with seniority. His discharge will be converted to a three month suspension. He shall receive back pay for the period outside of the three month suspension, less any outside earnings or unemployment compensation received. I will retain jurisdiction for 90 days for problems, if any, pertaining to the remedy. However, the arbitrator's fees are due immediately.

Mark J. Glazer
Arbitrator

September 30, 2011

IN THE MATTER OF ARBITRATION BETWEEN

International Union of Operating Engineers
Local150, AFL-CIO :
Union,
: **FMCS No. 110216-53449-3**

Republic Services, Inc. :

:
Employer. :
:

BEFORE: Floyd D. Weatherspoon, Arbitrator. Selected in accordance with the Federal Mediation and Conciliation procedures

APPEARANCES:

For the Union: Charles R. Kiser
Dale D. Pierson
Local 150 Legal Department
6140 Joliet Road
Countryside, IL 60525

For the Employer: Dennis M. Devaney, Esq.
Devaney Jacob Wilson, PLLC
3001 W. Big Beaver Road, Suite 624
Troy, MI 48084

DATE OF HEARING: May 27, 2011

BRIEFS RECEIVED: July 25, 2011

DATE OF AWARD: October 3, 2011

AWARD:

The grievance is sustained.

Floyd Weatherspoon, Arbitrator

Exhibit C

I. STATEMENT OF FACTS

The facts indicate that the International Union of Operating Engineers, Local 150, AFL-CIO, hereinafter (Union) and Republic Services, Inc, hereinafter (Company or Republic) are parties to a collective bargaining agreement, dated 2008-2010, hereinafter (CBA or Agreement).

The facts indicate that Michael Fairchild (Grievant), began working at the Countyline Landfill in 1994. (Tr. 100). At that time, Allied Waste, Inc. owned the Landfill. The Grievant was also a union steward. In January 2009, Allied Waste was acquired by Republic Services Inc. (Tr. 22). The facts further indicate that Republic Services, Inc. provides commercial and residential solid waste management services. During Allied Waste management, Jamie Pachke was the Site Manager at Countyline. Mike Beckley became the Countyline Site Manager in August 2010. Up to that point, Jamie Pachke remained the Site Manager after the acquisition. Bob Walls is the General Manager for Republic Services whose territory covers the Landfill.

The facts indicate that on October 29, 2010, the Grievant and Travis Pugh went to lunch offsite. The Grievant and Mr. Pugh returned from lunch late. However, another employee, Jason Wiegand clocked the Grievant and Mr. Pugh's time card, thereby clocking them into work, when they had not yet returned from lunch. Mr. Beckley was aware that the Grievant and Mr. Pugh was clocked in, but did not see them in the break room. Mr. Beckley observed the Grievant and Mr. Pugh return from lunch. Mr. Beckley informed the HR Manager, Rodney Adkinson, of the incident. After an investigation, the Grievant was terminated on November 9, 2010 for permitting another employee to clock him in while he was not on the premises and theft of time.

A grievance was filed challenging the Grievant's termination. The grievance went through the various stages of the grievance procedure. The grievance was denied. Arbitration

was requested pursuant to Article 4 of the CBA. (Joint Exh 1).

II. ISSUE

The parties stipulated that the issue before the Arbitrator is did the Company have just cause to terminate the Grievant, If not, what is the appropriate remedy?

III. RELEVANT CONTRACT PROVISIONS AND WORK RULES

Article 2 Management Rights and Prerogatives

2.03 The COMPANY shall have the right to discipline, suspend or discharge any member of the bargaining unit but only for just cause. ***

NORTHERN INDIANA DISTRICT LANDFILL WORK RULES

A. Introduction

The following rules are designed to promote, encourage: and insure that the Company operates in an efficient and safe manner. They will be uniformly and strictly enforced. They will also be enforced fairly. Employees who violate these rules will be notified in writing of the rule violated and the penalty imposed. For the purpose of the progressive discipline, penalties, other than discharge, will accumulate for a period not to exceed (1) year from the date an employee is first notified of a violation.

Offenses which may result in immediate discharge:

a. Theft:
   1. From the Company

***

n. Tampering with or permitting another person to punch your time card.

o. Tampering with or punching another's time card.

IV. POSITION OF THE PARTIES

A. Union's Position

It is the position of the Union that the Company did not have just cause to terminate the Grievant. The Union contends that the Company did not meet its burden to demonstrate that the Grievant engaged in wrongdoing. The Union maintains that the Grievant did not "permit" another employee to clock him in. The Union contends that a common practice existed where employees swiped each other's time cards, with the knowledge of management. The Union further contends that if the Arbitrator finds that the Grievant engaged in misconduct, termination is too harsh a penalty under the circumstances.

B. Company's Position

It is the Company's position that it had just cause to terminate the Grievant for permitting another employee to clock him in while he was not at the workplace. The Company maintains that the Grievant was given notice that Republic expected employees to follow all policies and work rules. The Company contends that the Grievant and his co-workers engaged in time card falsification and theft of time. The Company contends that the Grievant and his co-workers had a mutual agreement to engage in time falsification.

V. DISCUSSION AND ANALYSIS

In discharge grievances, typically, the Employer has the burden of demonstrating that the employee was terminated for just cause. See, generally, Elkouri & Elkouri, How Arbitration Works, 6th Ed. pg. 949. Under this just cause standard the employer cannot act arbitrarily, capriciously, discriminatorily, or make a decision not based on fact. Therefore in this grievance, Republic Services has to prove the Grievant was terminated with just cause pursuant to Article 2.

In determining whether an employee was terminated for just cause, the employer must first prove the employee engaged in wrongdoing, once this is established, the Arbitrator must review the reasonableness of the penalty imposed by management. (Elkouri How Arbitration Works, 6th Ed. pg. 948).

The elements of the just cause analysis are further developed by Arbitrator Carroll Daugherty in the seminal cases, *Grief Bros. Cooperage Corp,* 42 LA 555, 557-559 (Daugherty, 1964); *Enterprise Wire Co.*, 46 LA 359, 363-365 (Daugherty, 1966). The elements considered under the just cause analysis are: the employee must have been given advance warning of the possible disciplinary consequences of his/her conduct, the rule or order the employee violated must be reasonably related to the efficient and safe operation of the business or agency, the employer investigated before discharge, the investigation was fair, there is substantial evidence that supports the charge against the employee, there was no discrimination, and the degree of discipline was reasonably related to the nature of the offense and the employee's past record. See, Norman Brand, ed. Discipline and Discharge in Arbitration, pp. 31-33 (BNA Books, 1998; Also see, Koven, Smith and Farwell, "Just Cause: The Seven Tests", eds., pp. 21-23 (BNA Books, 1992); Dunsford, "Arbitral Discretion: The Tests of Just Cause," Proceeding of the 42nd Annual Meeting of NAA, 23, 35-37 (BNA Books, 1990).

The Company maintains that it had just cause to discharge the Grievant for permitting another person to clock him in while he was not at the workplace (Company Brief, pg. 8) and theft of time. Specifically, the Company maintains that the Grievant permitted another employee to clock him into work when he was not physically on the premises, thereby getting paid for time that the Grievant was not working. The basis of the Company's contention

surrounds an incident that occurred on October 29, 2010.

After reviewing all the evidence on the record, the Arbitrator finds that the following facts summarize the incident. On October 29, 2010, the Grievant and Travis Pugh went to lunch away from the work site. Mr. Pugh drove his vehicle. The Grievant and Mr. Pugh were late returning to lunch. However, another employee, Jason Wiegand, saw the Grievant's vehicle in the parking lot and assumed that the Grievant and Mr. Pugh had returned from lunch and swiped and/or clocked the Grievant and Mr. Pugh in. The Grievant and Mr. Pugh were not yet back from lunch when Mr. Wiegand swiped them into work.

The facts further indicate that Jason Wiegand found an inappropriate calendar in his locker and gave it to Mike Beckley, the site manager. Mr. Beckley, also approved employees time. Mr. Beckley went to the break room to speak to Mr. Wiegand about the calendar and returned back to his office. Mr. Beckley was in the process of approving time and noticed that the Grievant was already clocked in, even though Mr. Beckley didn't see him in the break room. Mr. Beckley went back to the break room and was talking to Mr. Wiegand when the Grievant and Mr. Pugh pulled into the parking lot.

The Grievant testified, when he and Mr. Pugh returned from lunch, they saw that Mike Beckley and Jason Wiegand were having a conversation outside of the break room door. The Grievant testified that he and Mr. Pugh headed to the break room to clock in and Mr. Beckley told Mr. Pugh he was already clocked in and he asked the Grievant to come to the office with him, presumably, because the Grievant was a union steward. The Grievant admits that he was late coming back from lunch. Once in the office, Mr. Beckley informs the Grievant about the calendar, but then turned the computer screen towards the Grievant to show him that he was

already clocked in. He asked the Grievant if he knew that he was already clocked in. The Grievant replied that he did not. The Grievant explained that it was common practice that employees swiped each other in. Mr. Beckley told the Grievant that the employees could no longer swipe each other's time cards. The Grievant said he would make sure that it got changed. (Tr. 118-121). Mr. Beckley reported the incident to Rodney Adkinson, HR Manager. Mr. Adkinson came to the landfill the following week to conduct an investigation. After the investigation, the Company terminated the Grievant.[1]

The Company maintains that it had just cause to terminate the Grievant because he falsified company time records. The evidence demonstrates that the Northern Indiana District Landfill Work Rules, hereinafter, Work Rules were incorporated into the parties CBA. The Company maintains that the Grievant's actions violate the work rules. The Work Rules, provide in relevant part,

> The following rules are designed to promote, encourage: and insure that the Company operates in an efficient and safe manner. They will be uniformly and strictly enforced. They will also be enforced fairly. Employees who violate these rules will be notified in writing of the rule violated and the penalty imposed. For the purpose of the progressive discipline, penalties, other than discharge, will accumulate for a period not to exceed (1) year from the date an employee is first notified of a violation.
>
> Offenses which may result in immediate discharge:
>
> a. Theft:
> 1. From the Company
>
> ***
>
> n. Tampering with or permitting another person to punch your time card.

1 The evidence on the record indicates that Travis Pugh and Jason Wiegand were also terminated due to the incident.

o. Tampering with or punching another's time card.

As a foundation, the Arbitrator notes that the Union provided evidence that a common practice existed where employees swiped/clocked another employee's time card.

Common Practice

The evidence establishes and the parties stipulated that "during Allied Waste's management of the site the practice of swiping in and out other people happened." (Tr. 138-139). Indeed, the Union provided compelling evidence that employees swiped each other in and out on a continuous basis. For example, the Grievant described a scenario where he might swipe someone in, if he was pulling in the parking lot and seen a fellow worker, and he knew that he was behind him, he would punch both of them in and tell the employee he was already in. (Tr. 110-111). Jason Wiegand further testified that punching each other's time card in was common practice. (Tr. 149). Travis Pugh testified that the practice of swiping each other's card is something that was always done. (Tr. 166). Therefore, the evidence establishes that there was a common practice. Moreover, the evidence demonstrates that Management employees of Allied Waste were aware of the practice. The Grievant testified that Jamie Paschke observed employees swiping other employees time cards. (Tr. 114). Jason Wiegand also testified to instances when Mr. Paschke would have observed employees swiping other employees time cards. (Tr. 151). Travis Pugh also described situations where Mr. Paschke observed employees swiping each other in. The Arbitrator notes that the evidence suggests that the instances where Mr. Paschke observed the employees swiping each other, are instances where all the employees were in the same vicinity. For example, the employees were in the lunchroom and one employee swiped several of the other employees in that were present in the lunchroom. Now the Arbitrator will

determine whether the Grievant's conduct violated the work rules.

Did the Grievant "permit" Jason Wiegand to clock him into work

The Grievant was terminated for permitting another person to clock him in while he was not at the workplace. (Company Brief, pg. 8). The Grievant was also told that he was terminated for theft of time. (Tr. 133-134). The Union contends that the Company did not have just cause to terminate the Grievant. The Union maintains that the Company did not prove that the Grievant engaged in misconduct because the Grievant did not "permit" anyone to clock him in. Specifically, the Union contends that the Grievant did not ask anyone to clock him in, nor did the Grievant know that he was already clocked in, until he was notified by Mr. Beckley.

The evidence establishes that the Grievant did not punch his own time card or anyone else's time card, therefore, the Company has to demonstrate that the Grievant "permitted" Mr. Wiegand to punch his time card. In order to meet this element the Company contends that the employees had a standing arrangement amongst them. Specifically, the Company states that "these employees had an established arrangement among themselves to clock each other in to be paid for times when they were not working and not even back to the site." (Company's Brief, pg. 10). The Company relies on the testimony of Mr. Adkinson in support of its position that the employees had an established arrangement. Mr. Adkinson testified,

> "[t]he fact that it was indicated to me that it [employees clocking each other in] was common practice also indicated to me that there was some type of mutual agreement between [the Grievant] and some of the other employees that they did this. Whether they just knew when somebody was not back, they didn't have to tell them on a particular day, they looked to see if they were back and then clock one another back and forth." (Tr. 55-56).

The Company maintains that the established agreement between the employees meets the permission requirement. Therefore, the Company contends that the Grievant's conduct meets the

"permit" requirement of the work rule.

The Union maintains that the Company failed to demonstrate that the Grievant engaged in misconduct or that he violated any company rule. Specifically, the Union contends that the evidence establishes that the Grievant did not "permit" Mr. Wiegand to swipe his time card on October 29, 2010. Additionally, the Union argues that the Grievant did not steal time from the Company. It is the Union's contention that the Grievant was not even aware that Mr. Wiegand swiped him in, until Mr. Beckley informed him.

In support of its position, the Union states that permit means to "consent to expressly or formally" or "to give leave: authorize". The Arbitrator agrees that permit involves that act of consent or permission. Indeed, dictionary.com defines "permit" as, to grant permission; to allow to do something. It suggests formal consent or authorization. Thus, in order to permit another person to punch his time card, the Grievant would have to know that it was going to be done and to grant his permission or consent.

The Arbitrator notes that in standard discipline and discharge cases the preponderance of the evidence standard would typically apply. However, "in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher burden of proof, typically a 'clear and convincing evidence' standard, with some arbitrators imposing the 'beyond a reasonable doubt' standard." Elkouri, pg. 950-951. A "discharge for theft has such catastrophic economic and social consequences to the accused that it should not be sustained unless supported by the overwhelming weight of evidence". Elkouri, pg. 951, citing Armour-Dial, 76 Lab. Arb. Rep. (BNA) 96 , 99 (Aaron, 1980). [2] This Arbitrator agrees that cases involving an allegation of theft,

[2] For a recent list of arbitrators who apply the clear and convincing standard in cases involving serious criminal mis-conduct, see Elkouri & Elkouri, How Arbitration Works, 6th ed., 2010 Cumulative Supplement,pp.348-349

a higher standard should be applied. Therefore, the clear and convincing standard will apply to this case.

Black's Law Dictionary defines "Clear and Convincing proof as: "more than a preponderance but less than is required in a criminal case. Proof which should leave no reasonable doubt in the mind concerning the truth of the matters in issue." Henry Campbell Black, Black's Law Dictionary, 5th Ed. pg. 130.

The Company has not provided clear and convincing evidence that the Grievant permitted another person to punch in his time card on October 29, 2010. The Company contends that because the Grievant states that it was a common practice of employees clocking one another in, that indicated that there was some type of mutual agreement between the Grievant and some of the other employees. The Company's contention is not persuasive. The evidence does suggest there was a common practice. However, the mutual agreement suggested by the Company connotes specific people with specific terms and conditions that are not present here. For example the evidence illustrates that the card swiping practice involved no specific terms and no specific people, rather it was a sporadic occurrence with no specificity. For instance, the examples given include situations where one employee can see another walking behind him and swipe him in, or one employee can see someone pulling into the parking lot and swipe them in. The practice has no definite bounds or obligations and the evidence indicates that the employee might not even be aware that he/she was already clocked in. Indeed, the Arbitrator believes that in order to meet the "permission" requirement of the rule; the Company has to demonstrate that the Grievant gave his prior authorization or express consent. The Company has failed to establish such evidence. Mr. Wiegand testified that on October 29, 2010, he looked out the window and

the Grievant's truck was in the parking lot, so he clocked the Grievant back in. He testified that he thought they were back from lunch because the Grievant's truck was in the parking lot. Mr. Wiegand assumed they were walking back in, and swiped them in. (Tr. 149). He said that was a common practice. He testified that the Grievant did not ask him to swipe him back in from lunch. (Tr. 149-150). Therefore, the Company has not presented clear and convincing evidence that the Grievant "permitted" Mr. Wiegand to swipe him in from lunch.

The Company next argues that on November 4, 2010, when interviewed by Mr. Adkinson, the Grievant confirmed that he knew Mr. Wiegand had clocked him back in from lunch on October 29. While the evidence establishes that by November 4, the Grievant knew that Mr. Wiegand swiped him in on October 29, the evidence also indicates that the Grievant found this out after the fact. (Tr. 122). The evidence suggests that the Grievant was not aware that he was already on the clock until Mr. Beckley intercepted him on the way to the break room and informed him that he was already clocked in. The evidence further indicates the Grievant was not aware that Mr. Wiegand swiped him in until later that day. In other words, the evidence suggests to the Arbitrator that the Grievant did not have previous knowledge on October 29, 2010 that he was already clocked in upon his return from lunch; additionally, the Grievant was not aware that Mr. Wiegand swiped him in, until after-the fact. Therefore, the Company has not demonstrated that the Grievant "permitted" Mr. Wiegand to clock him in.

Lax Enforcement

The Union has provided sufficient evidence that management under Allied was aware of this common practice. The Arbitrator notes that the evidence suggests that the instances where Mr. Paschke observed the employees swiping each other, are instances where all the employees

where in the same vicinity. For example, the employees were in the lunchroom and one employee swiped several of the other employees in that were present in the lunchroom. The Company distinguishes the common practice of swiping other employees while on the premises, with the situation at hand, because the Grievant was off the premises. The Arbitrator recognizes the distinction made by the Company. In terms of the imposition of a penalty, the distinction, may make a difference. However, in terms of showing a violation of the rule, it is a distinction without a difference. The Union provided compelling evidence that a common practice of employees swiping each other's time cards in existed with the knowledge of management under Allied. Lax enforcement of rules leads employees reasonably to believe that the conduct in question is tolerated by management. Arbitrators have not hesitated to disturb penalties where the employer has allowed the violation of the rule in the past. Even though an employer is lax in its enforcement, that employer can turn to strict enforcement after giving clear notice of the intent to do so. *Elkouri* pg. 994. However, employees are entitled to clear notice that rules will be enforced. The question here, is whether the employees had clear notice that the time card rule would now be strictly enforced by Republic.

Notice

The Company maintains that it gave sufficient notice that it intended to strictly enforce all the rules. First, the Company states that General Manager for Republic met with the employees at County Line, shortly after the merger to discuss company policies and expectations. The Company maintains that Mr. Walls met with the employees and "stressed the importance of all the rules." (Company Brief, pg. 1). The Company contends that the work rules were likewise reiterated in the parties' Heavy Equipment Operator's Manual (Co. Exh. 2) and the

Safe Actions for Excellence Handbook. (Co. Exh 1).[3] Additionally, the Company maintains that the Grievant was placed on specific notice that he was expected to follow *all* work rules.[4] Lastly, the Company states that the testimony of Dennis Jaeger confirms its contention that the employees were given sufficient notice that Republic intended enforcement all work rules.

As stated earlier, in order for Republic to strictly enforce the card swiping rule, it must have given clear and specific notice that it intended to enforce the work rule. See, *Lockheed Corp.*, 75 Lab. Arb. Rep. (BNA) 1085 (1980).

A general statement that it is expected that employees will follow all work rules is not adequate notice that a rule that once had lax enforcement, will now be strictly enforced. Employees must be given clear notice of both what the employer expects and the penalties that might be imposed for failure to meet those expectations. *Elkouri*, pg 991. Thus, the Arbitrator is looking for evidence that the employees were given clear notice that they could be disciplined including terminated for violating the work rules about time cards.

In *City Of Hialeah Gardens [Fla.] And Fraternal Order Of Police, Florida State Lodge* AAA Case No. 32-390-00161-10, Arbitrator Wolfson summaries the notice requirement that arbitrators generally insist upon:

> There was an absence of actual communication of penalties or that dismissal was possible for any of Grievant's behavior, or violation of any Rule. The Employer did not proceed in a manner so as to overcome its prior lax enforcement. See Grief Bros. Cooperage Corp., 42 Lab. Arb. Rep. (BNA) 555 (1964), for the importance and necessity of explicit warnings. Just as management chose not forewarn the Grievant that his behavior was a violation worthy of termination, he came to expect that he

3 The Arbitrator notes that both of these handbooks, articulate the principle that employees should not punch another's time card or falsify time records.

4 The evidence indicates that the Grievant was given a Last Chance Agreement (LCA) on October 18, 2010. The Company maintains that as part of this LCA, the Grievant was specifically informed that he was expected to comply with all work rules.

> was not committing a violation of any rules and regulations that would result in termination; or that a violation of a Rule would result in termination. In Stevens Shipping & Terminal Co., 70 Lab. Arb. Rep. (BNA) 1066 (1978), Arbitrator Malcom J. Hall stated . . . it might be somewhat unfair to now "get tough" on this Grievant without some forewarning.

In this grievance, the evidence indicates that Mr. Walls did have a meeting with the employees after the merger, in the form of a pizza party. (Tr. 104, 145, 163). However, the evidence on the record does not sufficiently establish that Republic gave clear notice that it was going to strictly enforce the card swiping rule and that it would terminate employees for the violation on the first offense. The evidence indicates that Mr. Walls purchased pizza for the employees and introduced himself and invited the employees to ask questions. The Grievant testified that Mr. Walls didn't say anything about the work rules. (Tr. 104). Mr. Wiegand testified that he didn't remember Mr. Walls saying anything about the work rules. Mr. Wiegand recalls Mr. Walls stating that he wasn't going to make any changes regarding union or nonunion. (Tr. 146). Additionally, Mr. Wiegand testified prior to November 4, 2010, the issue of swiping time cards was never brought up by Republic management. (Tr. 150). Travis Pugh testified that Mr. Walls asked about the employee concerns and that he felt it was like a pep-rally. (Tr. 161-162). Mr. Pugh also didn't recall Mr. Walls saying anything about work rules. (Tr. 162). Mr. Pugh states that the conversation went on, and that Mr. Walls was excited to be the general manager to take care of the employees, etc. (Tr. 162).[5]

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5 While the Arbitrator recognizes that all three employees have reason to have interest in the outcome of arbitration, directly or indirectly, the Arbitrator finds the employees' testimony credible. The employees, especially, Mr. Pugh were precise, detailed and consistent. Significantly, the three employee's recollection of the event corroborates each other. Specifically, each employee recalled that Shannon Pugh asked a question regarding the unionization of the landfill. The Arbitrator also finds the employees testimony to be logical and reasonable. It is reasonable to expect that a new general manager would come in and ask the employees about their concerns, answer their questions, and give a general overview of the new general manager's expectations It is not expected that a meeting of this nature would contain detailed specifics.

Mr. Walls testified that when Republic took over Allied, he made an appearance at the site in January 2009, to talk to the employees about policies, procedures, expectations, etc. (Tr. 22). Mr. Walls further added that at the meeting, they stressed the importance of the rules and regulations and what they expected from the employees. (Tr. 22). Mr. Walls was asked if the meeting was a lunch time meeting and he responded, "no, this would have been a meeting we called everybody together for." (Tr. 33).

Additionally, in support of the Company's position, Dennis Jaeger testified. Dennis Jaeger, runs the trash dozer at County Line. He has been employed at County Line for 8 years. He testified that under Allied, in his experience employees occasionally clocked each other in. (Tr. 90-91). Mr. Jaeger testified that when Mr. Beckley became the site manager he stated to the employees that "things would be different with Republic. That tardiness, absenteeism and punching one another in on the time clock would not be tolerated." (Tr. 93).

The Arbitrator finds that the meeting with the employees did not sufficiently place the employees on notice that Republic would begin strict enforcement of the time card policy. Mr. Walls' testimony does not sufficiently demonstrate that he gave notice that the rules would be strictly enforced. Indeed, He didn't testify that he talked about any specific rule, rather his testimony implies that he gave a general overview of expectations. However, as stated, clear and specific are required, not general expectations.[6]

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6 The Arbitrator notes that Dennis Jaegar's testimony supports the Company's contention. However, the Arbitrator gives more weight to the three employees testimony. The evidence indicates that the employees go to lunch in two or three shifts. The three employees appear to go to lunch during the same time period, which is why they were all at the same lunch meeting with Mr. Walls. It doesn't appear from the evidence on the record that Mr. Jaegar was present during the same meeting as the employees. Therefore, it is possible that Mr. Walls disseminated different information during the separate meetings. In any event, the evidence on the record does not sufficiently establish that the employees were placed on clear notice that time card rule would be strictly enforced in the future.

Moreover, Republic's reliance on the handbook and the work rules as notice is not sufficient. It is undisputed that the work rules are published in the handbook. Indeed, the rules existed and were attached to the CBA under Allied's management, however, the evidence further establishes that despite the written work rule, it was not strictly enforced. Thus, the mere presence of the published written work rule does not provide notice that the employees will be disciplined for a violation of the rule.

Additionally, the Arbitrator finds that the Last Chance Agreement and the meeting with management surrounding the Agreement were also not sufficient to place the Grievant on clear notice that the time card rules would be strictly enforced.

Rodney Adkinson, HR Director, testified that the Last Chance Agreement was drafted as the result of his investigation into an incident involving the Grievant. The Agreement was entered into as a method for the Grievant to avoid termination. Mr. Adkinson testified that it was communicated to the Grievant that one of the requirements of the LCA going forward was that the Grievant was "expected to follow all policies that the Company has in effect, any Company work rules." (Tr. 42). Mr. Adkinson further added, "[i]n the course of our conversation we also reminded him that not only this policy but all policies are expected to be followed from this point forward." (Tr. 43).

The Arbitrator appreciates that this Agreement places the Grievant on notice that he is expected to follow rules and policies that the Company has always enforced. However, this Agreement does not place the Grievant on clear notice that behavior that has been accepted in the past, will *now*, no longer be accepted in the future. If the Company had already demonstrated strict enforcement of the time card policy, then the Company's argument would be more

persuasive. For the reasons listed above, the Arbitrator concludes that Republic did not give the employees clear and sufficient notice that it would strictly enforce the time card policy in the future, where such enforcement was not strictly enforced previously. In facts, similar to this grievance, Arbitrator Neigh also held that:

> [The Union] argues persuasively that the Company has failed to enforce them and so has lulled the Grievant into expecting that there would be no disciplinary consequences for violating them. Under these circumstances it was an unfair denial of due process to discipline the Grievant. If the Company intends to enforce these policies, it must give clear notice to the employees in advance of commencing enforcement measures. In re Interstate Brands Corporation [Jefferson City, Mo.] And Teamsters Union, Local 833, 128 Lab. Arb. Rep. (BNA) 338 (2010)

The Arbitrator further notes that the Company also contends that the Grievant's actions constitute theft of time. The Company maintains that the Grievant was paid for time that he was not working. The Company states the Grievant, "could have reported to management at any time that he was clocked in for time that he was not working, but never did." (Company's Brief, pg 5). This argument is not persuasive. The evidence clearly establishes that Mr. Beckley informed the Grievant that he was clocked in, while he was off the premises. Therefore, the evidence certainly establishes that there was no need for the Grievant to inform Management of this fact, when Mr. Beckley (who also approved the time) was already aware that the Grievant was clocked in and not on the premises.

The Arbitrator sympathizes with Republic's situation. The Arbitrator recognizes that the Grievant was paid for time that he didn't work. However, Management was clearly aware of this practice. Management cannot have knowledge of an error or wrongdoing, do nothing about it, and then expect the employee to shoulder the blame alone. The evidence on the record also suggests to the Arbitrator that the employees were not swiping time cards with an intent to

defraud the Company. The employees were attempting to avoid being disciplined for being late, even though, as the Company points out, there is no evidence that an employee has been disciplined for returning late from lunch.

The Arbitrator's decision is not meant to excuse any employee's failure to follow rules. The work rules clearly provide that the employees are not to swipe another employee's time card or permit another employee to swipe his/her time card. However, it is also clear that this practice was allowed to go on under Allied Management, despite the written work rule. While the Arbitrator does not condone the failure to follow rules, the Arbitrator cannot ignore the Company's failure to enforce the rules and in order to began strict enforcement of the rules, the Company has to provide clear notice.

The Arbitrator finds that the Company failed to demonstrate that it had just cause to terminate the Grievant. First, the Company did not establish that the Grievant engaged in wrongdoing because the Company did not demonstrate that the Grievant's actions met the "permit" requirement in the work rule. Second, the Company failed to put the employees on clear notice that the time card work rule would be strictly enforced in the future. Because the Company failed to demonstrate that the Grievant engaged in wrongdoing, the Arbitrator doesn't need to decide whether the penalty was too harsh.[7] Since the Company didn't establish wrongdoing, it didn't have just cause issue any discipline to the Grievant.

The Arbitrator further notes that the Union maintains the Company failed to follow the rules when it terminated the Grievant. Specifically, the Union maintains that the rules provide that employees must be provided with written notification of the termination, the rule violated

[7] Even though the Arbitrator did not reach the penalty element of just cause, it should be pointed out that the Grievant had approximately 16 years of employment with the company, and fired based on the enforcement of a policy that was rarely enforced. These factors would have supported the modification of the penalty.

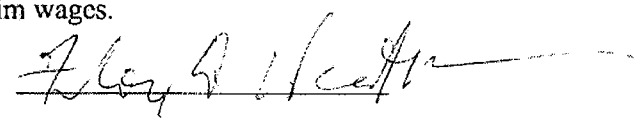
and the penalty imposed. The Union contends that the Company did not do this. The Arbitrator notes that it is not clear on the record whether the Union raised this argument previously in the grievance process. However, the Arbitrator also finds that he doesn't have to address the argument because the Arbitrator already determined that the Company failed to meet its burden to demonstrate that it had just cause to terminate the Grievant.

VI. CONCLUSION

The Company has failed to meet the elements of the just cause standard. The Company did not demonstrate that the Grievant's conduct violated the rule. Additionally, the Company failed to establish that it gave clear and sufficient notice that it intended to strictly enforce the time card policy.

VII. AWARD

The grievance is sustained. The Grievant shall be reinstated with full back pay and benefits, less unemployment benefits and any interim wages.



Floyd D. Weatherspoon

10/3/2011

Date