

Arbitration Session: Framing Opening and Closing Arguments
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2019 Atlantic Coast Labor Management Conference

INSTRUCTIONS

Read the cases below and use it to make open and closing arguments within your group. You should ensure your arguments mention key facts for the union if you are in the union group and for management if you are representing management. (For example: who/what/when/where).

THE NO CALL / NO SHOW BANQUET EMPLOYEE

The grievant Mr. I.M. Late, works for a hotel as a banquet/restaurant server and had 17 years of service at the time of his termination on August 26, 2017. The issue is whether the incident of Aug. 26, 2017 was just cause for discharge? Did it constitute a no call no show?

The agreement provides that employees who are absent should provide an excuse for their absence. Failure to provide a valid excuse results in a unexcused absence. Each unexcused absence is worth 1.0 point. Additionally, the Agreement establishes no call / no show policy requiring employees to notify the Employer within a 2 hour window of their shift starting, either side of reporting time. Each instance of a no call / no show is worth 2.0 points. Accumulating 6.0 total points within the same calendar year results in termination. Even if the employee does not reach the 6.0 point threshold, if he or she has two no call / no shows in the same year it will also carry a discharge penalty. Restaurant and banquet employees are advised to call the Head Waiter's Office in the event of an absence. However, according to testimony from management witnesses employees are permitted to call many other related offices, like the Banquet Office or the Head Dining Coordinator. The grievant claims he usually tried to give notice to his direct supervisors instead of the Head Waiter's Office, a practice he was never advised to change.

The Employer claims the grievant was a no call /no show on August 26, 2017 and was appropriately classified as such. Prior to this absence, the grievant had accumulated a total of 1 no call no / shows and 5.5 total absence points. The total of number of absences the grievant had accrued was 7.5 if the disputed no call no show were added in (which counts as 2.0) That would be above the permissible no. of 6 and would be a dischargeable offense.

August 26 was a Saturday, and thus notification would be through phone messages. The grievant's August 26 shift was scheduled to start at 4:45PM. The grievant states that he called in (via a friend's phone) and left a message at 4:52 pm. He did not call in from his own phone. He was at his friend's garage when he started feeling ill, and called from his friend's phone. His own phone was out of data.. The grievant did not report to work at all on August 26, 2017.

At the hearing a fellow employee testified that the grievant was present with the friend in question between 3:00PM and 4:00PM on August 26. The Employer did not find any message.

There is no definite policy about deleting messages or moreover, retention of messages. The first supervisor to arrive on Monday morning, Ms. Strict, checked with all relevant departments for recorded messages. Additionally, the Employer's IT department says that there were no phone calls logged at any relevant extension. None were found.

Phone records from the friend's phone show a call placed on August 26 at 4:52PM to the Employer's main switchboard with a 1 minute 4 second duration. After calling the main

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switchboard, the grievant testified he asked the operator transfer him to the Banquet Office. The Banquet office could not locate a recorded message the following Monday. The grievant has provided a doctor's note indicating that he was ill on the day of the absence.

After noticing the grievant's August 26, 2017 absence, the Employer suspended him pending an investigation. After the investigation, the Employer classified it as a No call no show and terminated him.

Absenteeism Policy Excerpts

Policy is Per Calendar Cycle

Employee will have a clean slate on January 1 of each year. Occurrences equate into points. Five (5) points are allowed each calendar year. Six (6) points will result in termination.

Point System: Each Unexcused Absence Shall Equate to the Following Point Scale –

Excused Absence = 0 Point;

Unexcused Absence = 1 Point

No Call / No Show = 2 Points

Definitions (excerpted.)

No Call / No Show – Employees who are absent and who do not call and/or notify his/her supervisor within two (2) hours of the start or end of the scheduled shift, unless unable to call because of extreme emergency or emergent conditions beyond the employee's immediate control are considered no call no show.

The Employee and Union will be given notice of each point as it is recorded on his/her absentee record. At any given time, should an employee's absentee record reflect the following levels, discipline will be administered as follows:

1st No Call / No Show = Final Written Warning

Five (5) Points = Final Written Warning

2nd No Call / No Show = Termination

Six (6) Points = Termination

YELLING AND ALLEGED THREATENING BEHAVIOR

At the time of termination, the grievant Mr. Reuther had 17 years of seniority with the Employer and had previously acted as a union officer. The grievant worked as an Equipment Operator in a facility which manufactures specialty extrusion products (a continuous process manufacturing facility.) The manufacturing process involves about 65 employees across 3 shifts.

The parties' current collective bargaining agreement has a provision requiring employees to assign overtime that they do not want to another employee, rather than have management assign it. This was a recent change to the agreement. In the previous agreement, bargaining unit members could only redistribute *mandatory overtime* to other employees. In the prior agreement, employees deciding they did not want to work voluntary overtime could not choose to whom those hours would be reassigned. The old agreement required voluntary overtime reassignments to be based on seniority. The overtime hours at issue in the instant case were voluntary, and thus under the old agreement employees would not have been able to reassign them to someone else.

On July 20, 2018, another employee with the same job classification as the grievant was offered voluntary overtime. The overtime would have been worked on the grievant's machine, and would involve training another employee that the grievant was currently training. The other employee Ms. Vacillate, accepted the overtime, and later talked to the grievant about her plans to work the overtime shift. A few hours later she decided not to work the shift because it was becoming very hot in the facility, and assigned it to another employee (not the grievant). The grievant testified that he had been under the impression that he would likely be the recipient of this unwanted overtime. After learning that the overtime was assigned to someone else, the grievant became very angry. The grievant, Mr. Active, discussed the issue with a current Union official and a facility production manager. The grievant testified he wanted to know if this recent reassignment of overtime by Ms. Vacillate, was consistent with the bargaining agreement. In those conversations, the grievant thought the decision to reassign the overtime to someone else in this instance was unfair to him. Throughout the grievance process the grievant said he had been treated unfairly.

Toward the end of his shift, the grievant confronted Ms. Vacillate. Ms. Vacillate perceived these confrontations as threats. Ms. Vacillate, would later describe the confrontation as involving yelling and said it made her feel like she had to fight or flee (that is leave her work station.). The grievant used phrases like "you are taking overtime from a family man." Ms. Vacillate, claims she put up her hand to tell the grievant to stop and felt threatened and scared by the incident. Video surveillance establishes that the allegedly threatened employee did leave her workstation after the grievant approached her and flailed his arms. (Due to machine noise no sounds can be heard on the video above the sounds of the machines so the tape could not establish whether there was yelling.) However, from the grievant's perspective, the confrontation was not a threat and not intended to be a threat. The grievant says he was simply attempting to understand why – given earlier conversations – the overtime was not being worked as planned.

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In the week following the incident, both the allegedly threatened employee and the grievant returned to work at their normal stations. Both parties work close to each other on the production floor. A few days after the confrontation, the grievant approached Ms. Vacillate, again. This time she was in her car at the facility's parking lot during a break. The grievant yelled out her name but turned back away from her after she said "stay away from me." Again, in the second incident, the grievant says he was attempting to apologize and Ms. Vacillate said she felt threatened.

After receiving the report of the initial confrontation on July 20, the Employer conducted an investigation. The investigation included a review of video footage, which captured the confrontation (although the video did not capture what the grievant said due to noise levels). The grievant was suspended during the investigation, although the suspension was not immediate and he continued to work for a few days after the incident. Upon concluding the investigation, the company determined that the grievant was found guilty of threatening another employee. The Employer considered this a violation of the guidelines on personal conduct, and the grievant was thus discharged.

Policies and Contract Language

Management Functions and Rights

The Union recognizes the Company's exclusive rights in the management of work forces; and the plant; direction of the working forces, including the right to hire, suspend or discharge for proper cause. The Union further recognizes that the right to relieve employees from duty because of lack of work is vested exclusively with the Company....

Guidelines for Personal Conduct

I. Purpose: Guidelines for the acceptable conduct of employees are necessary for the orderly operation of the facility and for the benefit and protection of the rights and safety of all employees.

II. Responsibility: It is the responsibility of each employee, their Manager and Human Resources to ensure compliance with this policy.

III. Deliverables: ...Notwithstanding the forgoing, the following misconduct may result in immediate termination of employment:

- Threatening, intimidating, or coercing fellow employees on the premises at any time for any purpose.