

Labor Arbitration Decision, Firestone Building Prods. Co., 2023 BL 184342, 2023 BNA LA 118

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BNA Headnotes

LABOR ARBITRATION

SUMMARY

[1] Discharge – Absenteeism – Failure to report – Attendance program ► [118.6362](#) ► [118.25](#) ► [118.305](#) [[Show Topic Path](#)]

Arbitrator Bradley A. Areheart held that Firestone Building Products had just cause to discharge the grievant under its attendance program providing progressive discipline tied to an employee's unexcused absences, even though it appears that there were some errors made in calculating such absences and applying the attendance policy. He found that any errors were harmless, because the grievant had many more documented unexcused absences than required to reach step four termination under the attendance program. Unexcused absences were important enough to management that, under its attendance program, an employee could potentially be discharged for missing eight days within a two-and-a-half-year period, and the grievant didn't dispute any of the 27 documented unexcused absences he incurred during this period.

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Pagination

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118 p

**FEDERAL MEDIATION & CONCILIATION SERVICE
VOLUNTARY LABOR ARBITRATION TRIBUNAL**

**In the Matter of Arbitration
Between**

UNITED STEELWORKERS,

Union

-and-

FIRESTONE BUILDING PRODS CO.,

Company

FMCS Case No. 220906-09005

Grievant: A__

Issue: Termination

OPINION AND AWARD

April 18, 2023

Arbitrator: Bradley A. Areheart

Date of Award: April 18, 2023

Appearances for the Parties:

For the College:

Chad Vincent

United Steelworkers

For the Company:

Jerry D. Garner, Attorney

Barber Law Firm

I. PROCEDURAL HISTORY

This matter arises under a labor agreement entered into between Firestone Building Products Company ("the Company")¹ and United Steel, Paper and Forestry, Rubber, Manufacturing, Entergy, Allied Industrial and Service Workers, International Union ("the Union"), AFL-CIO, CLC, on behalf of Local Union 970) covering the period December 12, 2019 through May 31, 2024 ("the CBA" or "labor agreement"). Jt. Exh. 2. Grievance No. FSBP-2021-0019 was submitted to the Company in writing on August 23, 2021 and thereafter processed in accordance with Article 6 of the labor agreement. Following unsuccessful attempts at resolving the grievance it was referred to arbitration. Using the services of the Federal Mediation and Conciliation Service, Bradley A. Areheart was appointed as Arbitrator.

An in-person evidentiary hearing was held in Hope, Arkansas on February 7, 2023, at which time the parties had full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. A recording of the hearing was made for the Arbitrator's sole use. The parties both filed briefs by March 8, 2023, at which time the record closed.

II. RELEVANT CONTRACT AND POLICY PROVISIONS

Section 6.01 of CBA

Normally, an employee's individual problem shall be referred initially to supervision in his department by the employee concerned. However, if the problem affects other employees, it may be so referred by the Union representative. If the problem is not settled and is to be processed through the grievance procedure, then the first step shall be:

Step 1. The Union committeeman with or without the complainant, shall discuss the matter with the Shift Supervisor. If no satisfactory settlement is reached then: The Union committeeman or the Division Chairman or both, and the complainant, when necessary, shall submit a written complaint signed by the Union Committeeman and the complainant to the Department Manager and discuss the matter with him/her. The Department Manager shall give his/her written answer within three days after receipt of the written grievance. If no satisfactory settlement is reached, the matter may be carried within ten days after receipt of written answer to Step 1 to the next step of the grievance procedure.

...

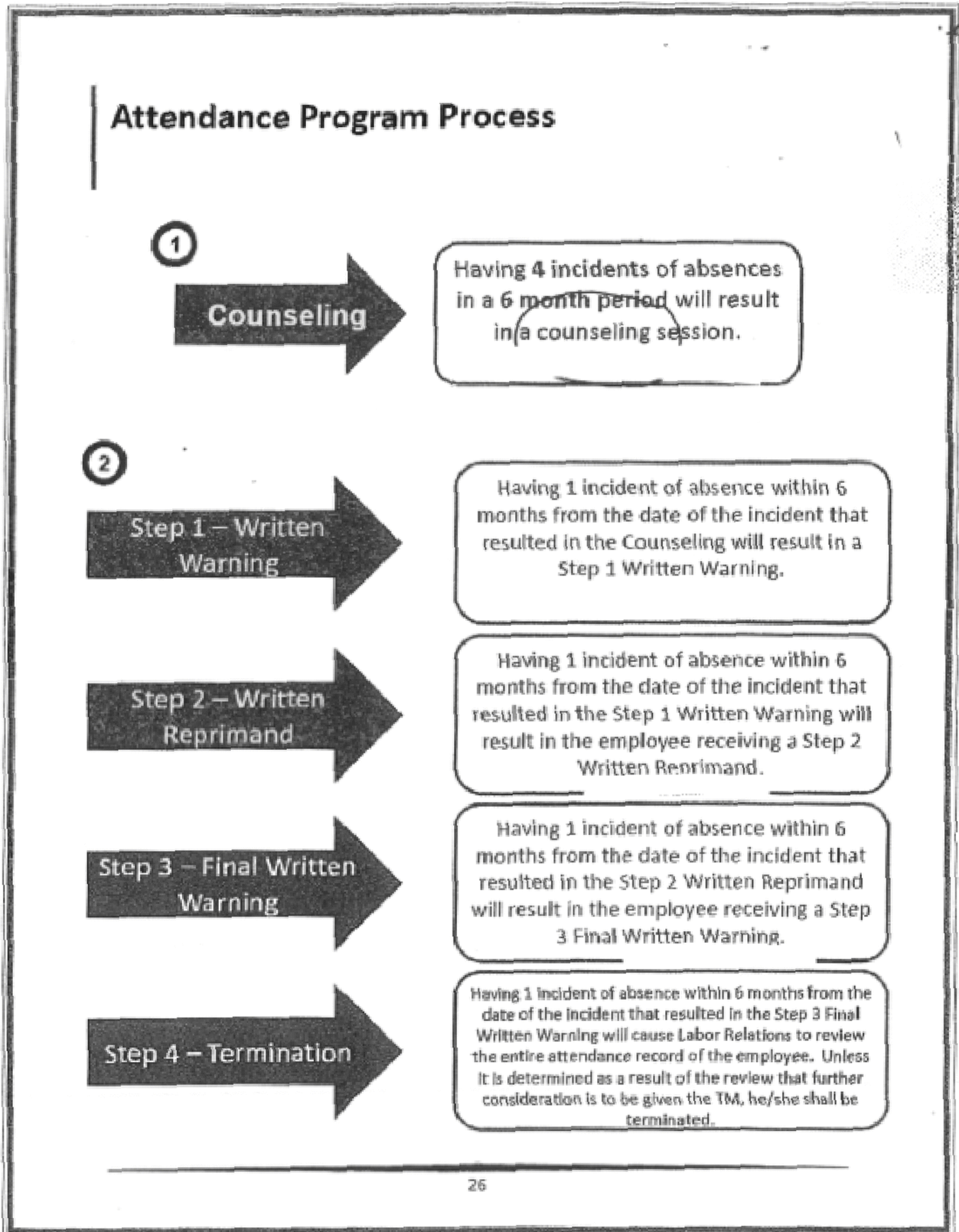
Jt. Exh. 2, p. 10.

Section 6.10 of CBA

In the event an employee is found to be unjustly discharged or suspended, he shall be reinstated without a loss in seniority or wages. A meeting will be scheduled within seven (7) scheduled working days after the Company receives the grievance at which time an attempt will be made to settle the grievance.

Jt. Exh. 2, p. 12.

Attendance Program Process



Jt. Exh. 4, p. 26.

Attendance Program

Incident Definition & Summary[*2]

Leaving Work early or being tardy is considered a half-incident of absence. However, if the TM does not work half of his/her scheduled shift, it will be counted as a full incident.

If a TM has six months of no incidents from the latest incident that resulted in a step of discipline, the TM will be removed from the Attendance Program. Time off the active payroll will not count towards the six months.

If a TM is subject to the Attendance Program for a second (or subsequent) time within 12 months of exiting the Attendance Program, the TM will immediately be moved to Step 2 of the Attendance Program.

Jt. Exh. 4, p. 25.

III. ISSUE

Did Firestone have just cause to terminate Grievant A___ on August 18, 2022? If not, what is the appropriate remedy?

IV. SUMMARY OF THE EVIDENCE

A___ ("Grievant") went to work for Firestone Building Products in 2015. He worked there until he was terminated on August 13, 2021. There are some disagreements between the parties over whether and when certain things happened. For the sake of clarity, I have broken up the facts below both by years and certain salient topics.

The Attendance Program

The Company has an attendance policy, which is in essence a progressive disciplinary policy tied to an employee's unexcused absences from work (or "incidents"). The policy can be seen as having two stages, which are helpfully illustrated by a flowchart contained in the policy.² In the first stage, an employee enters the attendance program if they have four incidents within a six-month period. Entering the program means that the worker has a "counseling session." Counseling is not defined by the policy but suggests to the Arbitrator that someone speaks with, or provides written documentation to, the employee about this initial accumulation of incidents.³ The idea of this step is that an employee receives notice of the Company's records and is given the opportunity to remedy their attendance shortcomings.

There are two possibilities following counseling. One is that the employee has no incidents during the next six months; if that is achieved, the worker is removed from the program. The other possibility is that the employee has one or more incidents in the six months following the counseling; in such a case, there is a second stage of employee discipline, which is comprised of four disciplinary steps. An employee moves to "Step 1 — Written Warning" if they have one unexcused absence within six months from the date of the incident that resulted in the counseling. Next, an employee moves to "Step 2 — Written Reprimand" if they have one unexcused absence within six months from the date of the incident that resulted in the Step 1 discipline. An employee moves to "Step 3 — Final Written Warning" if they have one unexcused absence within six months from the date of the incident that resulted in the Step[***3**] 2 discipline. Finally, an employee moves to "Step 4 — Termination" if they have one unexcused absence within six months from the date of the incident that resulted in the Step 3 discipline.

At any point in the disciplinary process, if a worker has no unexcused absences over a six-month period, they are removed from the attendance program. However, if an employee accrues four incidents in a six-month period that is within twelve months of exiting the Program, the employee automatically re-enters the Attendance Program at Step 2. The employee would then potentially progress through the Attendance Program from that Step 2 starting position.⁴

2019

Sometime in or around January of 2019, Grievant missed enough work to be counseled for four unexcused absences. Union Exh. 1. We are not told which dates he missed, but according to an "employee interview report" dated January 11, 2019 Grievant had a violation of "4 undocumented absences" and received "counseling/attendance policy review." There is a written report on the counseling, which is signed by both a company supervisor (Naaman Moss) and the grievant.

Later in 2019, Grievant had at least 4 more undocumented absences. Comp. Exh. 1. The four absences that the Company has highlighted occurred on the following dates: 8/3/2019; 11/20/2019; 11/21/2019; and 12/19/2019. According to the Company, these four absences led to an entry into the attendance program and counseling. Here, there is a factual disagreement between the Company and the Union about whether counseling actually occurred in December of 2019. Although there is no documentary evidence of counseling, HR Manager Chris Wilkerson testified Department Manager Bill Deckard told him that it happened. For his part, Grievant testified he does not recall any such counseling. The Union introduced a more recent counseling reprimand (from November of 2022)—ostensibly to show the importance of documenting counseling. Union Exh. 3.

Fredrick Muldrew, President of the Union, testified that counseling is the most important step in the attendance program because it allows Grievant to review the record for accuracy. The Company claimed that Grievant's own behavior between December of 2019 and June of 2020 is itself evidence that counseling took place since he had no incidents of absence during that timeframe. The company further suggests the goal of counseling was achieved because Grievant went from having many incidents of absence prior to December of 2019 to having none within a six-month timeframe.

2020

Sometime in 2020, Grievant exited the attendance program. As indicated above, an employee may exit the attendance program if the employee achieves six months with no incidents of absence. According to the Company's position statement and Step 1 answer to the grievance, Grievant exited the program on February 23, 2020. Jt. Exh. 3. At the hearing, company counsel noted this[*4] date was a typographical error and should be June of 2020. In the Company's Step 2 reprimand, the details provided that Grievant exited the program on July 11, 2020. Comp. Exh. 2. Ultimately, it seems that Grievant exited the attendance program sometime in 2020 and had not yet progressed beyond counseling to further stages of discipline.

2021

In 2021, Grievant reentered the attendance program due to four more incidents of absence. The Step 2 reprimand notes the date of re-entry as May 17, 2021. Comp. Exh. 2. (The Step 3 reprimand recounts this date as May 18, 2021. Comp. Exh. 3.) At this point, Grievant reentered the program at Step 2 since, if the June 2020 date of exiting the attendance program is correct, he would have been subject to the attendance program within 12 months of exiting. Union Exh. 2. This understanding is confirmed by an email dated May 26, 2021 from Bill Deckard to Mr. Muldrew, in which Mr. Deckard explained how Grievant re-entered the attendance program at Step 2. Union Exh. 2.

A few days later, on May 22, 2021, Grievant had another unexcused absence which brought him to step 3 in the disciplinary process. Comp. Exh. 3. On August 13, 2021, Grievant had a final unexcused absence which brought him to Step 4. Comp. Exh. 4. The Step 4 Reprimand noted: "Teammate has had another incident within 6 months from the date of the attendance discipline step 3 event which has resulted in this Step 4 attendance event in accordance with the Attendance [Policy] which is termination." Id. The Company terminated Grievant by a letter dated August 18, 2021, which memorialized a conversation between Grievant and Mr. Wilkerson. Jt. Exh. 5.

On both the Step 2 and Step 3 reprimands, it is recorded that Grievant "refused to sign." Comp. Exh. 2 & 3. When asked at the hearing why he refused to sign, Grievant could not recall his reasoning. He simply and flatly noted he did not agree with the punishment. Grievant acknowledged, however, that he did not grieve either step and that he did ultimately sign the Step 4 document. Comp. Exh. 4.

Absences

A critical part of the factual development in this dispute relates to the undocumented absences that Grievant had between February of 2019 and August of 2021. The Company has identified several groupings of absences that support certain disciplinary steps. For example, the Company has highlighted 4 days (8/3/2019; 11/20/2019; 11/21/2019; and 12/19/2019) as supporting counseling in December of 2019 for the Grievant. Comp. Exh. 1. It also highlighted 4.5 more days as supporting step 2 discipline (5/6/21; 5/7/21; 5/13/21; 5/14/21; and 5/17/21). Comp. Exh. 2.

However, as far as the Arbitrator can tell there are many more days of undocumented absences which could have supported earlier discipline. For example, it appears that after being counseled on January 11, 2019, Grievant had undocumented absences on 4/5/19, 4/27/19, and 6/14/19—each of which were dates[*5] within 6 months of the prior discipline (and thus could have supported progression to Step 3 in the Attendance Program Process). All of these incidents (the 4+ that supported the January 2019

counseling plus the 3 dates noted just above) are prior to the grouping the Company says supports its December 2019 counseling and Grievant's entry into the attendance program. Company counsel also claims there were approximately 15 unexcused absences between June 18, 2020 and May 17, 2021 (the date on which Grievant re-entered the attendance program at Step 2). Comp. Exh. 2. By this Arbitrator's count, that number appears to be 13 (in light of half-days and certain absences I understood to be excused),⁵ though this discrepancy is not of consequence.

The Grievance and Answer

The Union filed a grievance on behalf of Grievant on August 23, 2021. Jt. Exh. 1. The nature is described as follows: "Grievant A___ was wrongly terminated [and] the company has not followed the attendance policy." The relief sought is as follows: "Reinstate Grievant job and pay all monies owed and grievant be made whole." The Grievant did not sign.

In the Company Position Statement and Step 1 Answer, the Company found that Grievant incurred enough absences to warrant his termination under the attendance policy. Jt. Exh. 3. The Company also argued the grievance was improper since it did not bear the Grievant's signature.

V. POSITIONS OF THE PARTIES

The Union's Position.

The Union contends that Grievant was unjustly terminated by the Company. They contend that Mr. Wilkerson was not involved in the bargaining process and thus did not fully understand the attendance policy. Un. Brief at 2, 4. In particular, the Union argues that the Company did not correctly and consistently apply the policy. As just one example, the Union points to the Company's position statement, in which it said that Grievant exited the program on February 23, 2020 and re-entered the program at Step 2 on or about March 21, 2021. Id. at 3. Under the attendance policy, Grievant would not have moved to Step 2 if those dates were correct since there is more than 12 months separating the Grievant's exit and re-entry.

The Union also critiques the Company's apparent failure to document its December 2019 counseling of Grievant. They note: "[t]he company randomly decided to use the May 17, 2021 date to put [Grievant] into Step 2 of the program without having a previously documented counselling [sic] session." Un. Brief at 4.

The Company's Position.

The Company contends that Grievant failed to properly file the grievance and that it had just cause to terminate Grievant. First, it argues the Arbitrator should reject the grievance outright because it lacks Grievant's signature. Second, the Company argues that Grievant was properly terminated pursuant to the Company's attendance program.[*6] Grievant was absent from work more than enough to warrant his termination under the steps of the program. It also contends that various errors in certain company documents do not make its decision to terminate Grievant "unjust."

VI. ANALYSIS

The parties have asked the Arbitrator to determine whether the Company had just cause to terminate Grievant. The CBA does not include standards for when the Company may discipline or discharge workers. Instead, in the grievance procedure section of the CBA, there is a single reference to potential remedies in the event "an employee is found to be unjustly discharged or suspended[.]" CBA Section 6.10. Even so, the Company does not argue something less than just cause is required. Further, it is well-settled that a Company ought to have just cause for terminating workers under a CBA.⁶ This is a rare discharge case where the parties agree on largely everything that occurred. What they disagree on is whether Grievant's actions justified his termination.

A determination of whether just cause exists for discipline is a two-step process.⁷ First, it must be determined whether the Grievant is guilty of the misconduct charged and second, it must be determined whether the penalty assessed is appropriate under all of the circumstances. One of the principles inherent in the appropriateness of a penalty is due process. Due process requires that employees are treated fairly during the disciplinary process, including having notice of the charges against them and the opportunity to present their side before discharge.⁸ The primary justification for associating due process rights with just cause is to prevent discipline where there is little evidence on which to base a just-cause discharge.⁹ The Company bears the burden of proving just cause.

The Union's primary line of argument is that the Company was inconsistent and inaccurate in its enforcement of the Attendance policy. For example, the Union argues there is no documentation of the Company counseling Grievant in December of 2019. They also claim there are discrepancies concerning when exactly Grievant exited the attendance program and reentered at Step 2. Certainly, inconsistencies in dates are important. After all—and as illustrated by the Attendance Program Process above—discipline under the attendance policy turns on the reliability of earlier dates and incidents. Where the record-keeping is unreliable, an arbitrator could worry that the discipline administered is not fair or reasonable.

Here, the Arbitrator is convinced that the discipline was both fair and reasonable. While it is challenging to perfectly calculate Grievant's absences,¹⁰ to the best of the Arbitrator's ability it appears that Grievant had 27 "incidents of absence" in less than 3 years (i.e., between July of 2018 and August of 2021).¹¹ This is not the full number of Grievant's absences. By the Arbitrator's count there were at least 58 absences that are documented[*7] in the business records provided, about half of which were excused or documented and thus did not count as incidents under the attendance policy.¹² The 27 incidents refer only to absences that were both unexcused and undocumented. Moreover, the Union acknowledged in its post-hearing brief that it does not dispute Grievant's attendance record. Nor did Grievant himself dispute any absences.

Such "incidents of absence" were important enough to management that, under its attendance policy, a worker could potentially be terminated for missing only 8 days within a two and a half-year period of time.¹³ It thus appears that any errors made in calculating and applying the attendance policy served to help Grievant and thus were harmless.¹⁴

VII. AWARD

The Company had just cause to terminate the Grievant. The grievance is denied.

The undersigned will retain jurisdiction of this matter for a period of sixty (60) days to address any issues regarding implementation of this Award.

Date: April 18, 2023

Bradley A. Areheart, Arbitrator
Knoxville, TN

[fn](#)

1 While most of the documents in this matter refer to Firestone, some refer to Lafarg-Holcim—which is the company that acquired Firestone Building Products after the grievance was filed.

[fn](#)

2 Attendance Program Process, *supra*.

[fn](#)

3 For all other stages of discipline under the attendance program, it is expressly noted that the communication with the employee will be in writing.

[fn](#)

4 Based on the Arbitrator's reading, if an employee were to exit the attendance program and later accrue four incidents that were *more than 12 months removed from when the worker exited the program* the employee would be back at stage one counseling.

[fn](#)

5 This number is based on the instruction the Arbitrator received from the parties regarding which codes count as excused versus unexcused absences and which absences were only half-days. The dates I counted for my 13-day calculation are as follows: 6/18/20, 7/2/20, 7/30/20, 8/7/20 (1/2 day), 12/17/20 (1/2 day), 1/6/21, 2/3/21, 4/3/21, 4/8/21 (1/2 day), 4/10/21, 5/6/21, 5/7/21, 5/13/21 (1/2 day), 5/14/21, and 5/17/21. The discrepancy between my count and the Company's appears to involve three dates: 8/3/20 (which I did not count, because it appears COVID-excused), 12/17/20 (which the Company did not count in its Brief), and 3/25/21 (which I did not count, because it appears FMLA-excused).

[fn](#)

6 Many arbitrators have been willing to imply a just cause limitation in collective bargaining agreements. Elkouri & Elkouri, *How Arbitration Works*, Section 15.2.B.i (2021). The reasoning is that "[i]f management can terminate at any time for any reason, such as one finds in the 'employment-at-will' situation, then the seniority provision and all other 'work protection' clauses of the labor agreement are meaningless." *Herlitz, Inc.*, 89 LA 436, 441 (Allen, Jr., 1987).

[fn](#)

7 See, e.g., *Atlantic Automotive Components*, [122 LA 630, 638](#) (Brodsky, 2006).

[fn](#)

8 Elkouri & Elkouri, *How Arbitration Works*, Section 15.3.F.ii, Due Process and Procedural

Requirements (2021).

[fn](#)

9 Id. (citing *Lincoln Lutheran of Racine, Wis.*, [113 BNA LA 72](#) (Kessler, 1999)).

[fn](#)

10 Analyzing Grievant's attendance record was challenging[*8] since there were so many absences, some of which were excused or unexcused (based on the underlying notes) and some of which required documentation. The Arbitrator has sought to piece together Grievant's attendance record based on a combination of attendance spreadsheets (Company Exhibits 1-4), the attendance program policy (Joint Exhibit 4), and questions asked and answered during the evidentiary hearing.

[fn](#)

11 Here is my math: 4+ incidents (dates unknown) between July of 2018 and January of 2019 to support the January 2019 counseling; 3 incidents (4/5/19, 4/27/19, 6/14/19) between January 2019 and the December 2019 counseling; 4 incidents (8/3/19, 11/20/19, 11/21/19, 12/19/19) to support the December 2019 counseling; the approximately 13 dates of incident noted in footnote 2; and 3 more incidents (5/18/21, 5/22/21, 8/13/21), which support both the Step 3 reprimand and Step 4 termination.

[fn](#)

12 There are 19 total absences notated in Company Exhibit 1; then 38 more in Company Exhibit 3; finally, one more in Company Exhibit 4, for a total of 58 absences.

[fn](#)

13 This possible scenario is pieced together by adding 4 incidents within 6 months (stage 1 counseling) to 4 separate incidents (stage 2, steps 1-4), each within 6 months of the prior discipline-inducing incident.

[fn](#)

14 One could argue they were not harmless because they suggest waiver (and estoppel) regarding such rights. However, this is not an argument advanced by the Union and I will not construct an argument the parties themselves did not make.

General Information

Case Name	Firestone Building Prods. Co.
Date Filed	Tue Apr 18 00:00:00 EDT 2023
Judge(s)	Bradley A. Areheart
Citation	2023 BL 184342; 2023 BNA LA 118; 220906-09005