

THE ARBITRATION OF TARDINESS CASES

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ABSTRACT

This article surveyed forty-five published arbitration awards concerning the issue of discipline and discharge for tardiness. While not a new problem, the author contends that it is a continuing one judging from the number of cases which deal with this issue. Three problems complicate tardiness cases: an effective definition of what it means to be tardy; the number of occasions that an employee may be late over a given period of time; and the appropriate severity of the penalty imposed.

“Tardiness is usually a pattern of behavior which, at least in the eyes of offenders, is beyond their control” [1, at 785].

While every employer may have a legitimate expectation of regular and punctual employee attendance at work, it is not always clear when an employee is tardy or when discipline may be properly imposed. The ultimate outcome of tardiness arbitration cases largely revolves around three issues: 1) the establishment of a definition of what constitutes being late for work; 2) the number of tardies over a period of time that may lead to discipline/discharge; and 3) the appropriateness of the penalty, given all of the circumstances.

This article explores all tardiness cases that have been published in the Bureau of National Affairs' *Labor Arbitration Reports* and the Commerce Clearing House's *Labor Arbitration Awards*, over the period 1984 to 1996. A total of forty-five awards were used in this study.

DEFINITION OF TARDINESS

On the surface, defining a “chargeable tardy” would appear to be a simple matter. However, a number of issues must be considered that remove the definitional problem from the “child’s play” category. Arbitrator Grabuskie noted:

. . . technically, if an employee is to start at 8:00 a.m. and punches in at 8:01 a.m. that employee is one minute tardy. Surely such occurrence would not normally result in adversely affecting store operations. But frequency as well as duration is a function of tardiness [2, at 7270].

Thus, one minute late can result in an incident of tardiness or a grace period may be extended to employees such that one is tardy only if more than a certain number of minutes have elapsed after the starting time, such as five, eight, or ten minutes [3].

Practices in certain industries may also affect the definition of tardiness. For example, in the coal mining industry employees are expected to be “completely dressed and ready to work at starting time” [4, at 660].

Another definition of tardy is a so-called “departmental tardy.” This type of tardy occurs when an employee must be at his/her work station at the scheduled starting time. Arriving at work and clocking in on time is not sufficient to insulate an employee from discipline under such a system [5]. However, in one case, an employer had a rule that an employee must be at his/her place of work when the starting signal sounded [6]. Nevertheless, the practice was that salaried employees were considered late only when they arrived at the guardhouse after the designated starting time, and no rule required salaried employees to be at their desk at starting time [6, 7, 8].¹

Some tardiness rules also distinguish between “excused” and “unexcused” lateness. Of course, further definition is required, as it is necessary to differentiate the two terms. Sometimes, employers simply consider the employee’s failure to call in to report his/her tardiness to render the tardy as an “unexcused” one. Other employers mandate that the reason proffered must be acceptable to excuse the lateness.

In the absence of a specific definition of tardiness, the parties’ practices and/or the “normal meaning” of tardiness will prevail. Arbitrator Seidman noted:

Further the parties in the contract placed no limitation on what tardy was so that it had its normal meaning of reporting after the fixed starting time for the beginning of a shift or for the return to a shift after a lunch period, regardless of how much after [9, at 1059].²

¹The time clock in each department governed employees in that particular department [7]. The practice was that employees who were not at their workstations on time were disciplined [8].

²The parties’ practice was that an employee was tardy whenever s/he was one minute or more late [9].

NUMBER AND DURATION OF TARDIES

As previously noted, a definition of tardiness should be accompanied by the number of tardies in a given period that will trigger discipline. Normally, to have discharge upheld for “excessive” tardiness, the tardies must have been accumulated over some specified time period, such as one year [10].³ For example, in *Worcester Quality Foods, Inc.*, the employer used the following progressive disciplinary format:

- First late in a calendar month—verbal warning;
- Second late in a calendar month—written warning;
- Third late in a calendar month—one week’s suspension; and
- Sixth late in a calendar year—termination [11, at 5187-88].

Any unexcused lateness more than fifteen minutes after the scheduled starting time was counted. In another case, discharge was upheld for tardiness when the employee had amassed ten or more instances of tardiness in excess of one hour, with some as much as three hours, within eleven months [12].

No matter what the numbers of tardies that are established, there should be a period certain in which to accumulate them, otherwise “the Sword of Damocles” hangs over the head of an employee indefinitely. For example, in one case, there was no just cause to discharge an employee for tardiness even though she had received successive written warnings and two suspensions [10]. Then she went almost ten months without being tardy. Arbitrator Kaufman noted the company had established no policy or program whereby an employee could cleanse his/her record after a period of time had elapsed without further violations. In reducing the discharge to a thirty-day suspension, Kaufman explained:

On this record, then, the Arbitrator concludes that even without an attendance policy or program, it did not square with the standard of just cause for the Grievant, notwithstanding her record of discipline for tardiness, to remain subject to immediate discharge for excessive tardiness irrespective of the passage of time since her last unexcused tardiness [10, at 917].

Yet, the passage of time since an employee received his/her last discipline is not, by itself, the determining factor. When tardiness must be accumulated within a calendar year, the passage of four and one-half months between suspension and termination was not sufficient to thwart discharge [12]. Arbitrator McKay likened the situation to that of a traffic offender who needs one more ticket before losing his/her license [12, at 4235].

³ Arbitrator Kaufman noted: “However, as with absenteeism, it is often difficult to determine the point at which tardiness, which is a form of absenteeism, becomes excessive” [10, at 916].

ARE TARDINESS RULES REQUIRED?

Normally, employers are obligated to develop and promulgate to employees its rules of conduct. However, when certain behaviors are so obviously wrong, there is a diminished need for certain rules. Arbitrator McKay noted:

Furthermore, the rule with respect to tardiness is such a basic and fundamental obligation on the part of every employee that whether or not the rule was published, any employee should reasonably be expected to understand that by accepting a job with an employer, they are obligated to report to work at the times set out for them by the employer. Coming to work on time is not such a foreign or unusual concept that employees must be told by the employer that they are expected to come to work on time [12, at 4233; 13].⁴

While it may be common knowledge to employees that they are expected to attend work regularly and be on time, an employer should, however, fix the definition of tardiness and the penalties for violations, if it expects to have its discipline upheld in arbitration. For example, when a policy governing absenteeism and tardiness was not well understood by employees, discharge was found to be too severe for an employee who was late for work, despite his otherwise unsatisfactory work record [14]. The arbitrator noted that the grievant would not have been discharged had he not come to work and he would not have come to work had he understood the tardiness policy. Moreover, in one case tardiness was not allowed to be used as a disciplinary factor until the company and union had amended their attendance program to include excused and unexcused tardies [15].

Employers can unilaterally adopt rules regarding tardiness. They are subject only to a test of their reasonableness [16]. Rules are reasonable when they are related to a legitimate business objective of management [16, at 991]. However, if an employer unilaterally promulgates a tardiness policy or rule, the union cannot attack it successfully after it has been in use and enforced over a period of time [17]. Moreover, a company may have different tardiness policies at each of its plants, provided the parties' collective agreement does not state that policy must be uniform at all facilities covered by the agreement [17].

LOAFING OR TARDINESS

Loafing and tardiness represent two distinct disciplinary issues. Yet, sometimes they are confused in application in actual practice. For example, when a truck driver was delayed at a stop, he took longer than two hours for his lunch [18]. Company policy required the driver to call in, but he failed to do so. He was given a

⁴Arbitrator Cole noted that the absence of written rules is not uncommon, or that written rules exist only for certain types of misconduct and not others [13, at 4251].

five-day suspension for loafing, but the arbitrator reduced it to a written warning, while explaining:

First, loafing is often referred to as “loafing on the job,” yet the grievant was not “on the job” if he was on his lunch or afternoon break. Second, loafing implies the possibility of a threat to safety, as with one who is not paying adequate attention and should be punished more severely. Third, tardiness provides a longer period of notice and greater opportunity to correct by scheduling two written warnings rather than one [in the case of loafing] for termination [18, at 4200].

THE APPROPRIATENESS OF DISCIPLINARY PENALTIES IN TARDINESS CASES

Tardiness is generally considered to be a “minor” offense, in the sense that one occurrence is not sufficient to merit discharge. A pattern of tardiness must be established over a period of time before discharge may be properly invoked [19]. Arbitrator Talarico noted:

In most disciplinary cases involving tardiness the focus of the grievance is generally on the appropriateness of the penalty because proof of wrongdoing is easily established by time cards, sign-in sheets, etc. [6, at 4656].

There is a divergence of opinion among arbitrators whether progressive discipline is required when it has not been negotiated and/or adopted by the employer [20]. Progressive discipline is absolutely not required in situations involving last-chance agreements. In such situations, the union and employer negotiate to eliminate the just-cause obligation to settle a grievance when the union is willing to sacrifice just-cause entitlements to preserve the job of an employee [21]. Indeed, the employee need not be discharged for the same offense as was involved with the last-chance agreement. In one case, an employee who was dismissed for insubordination and was reinstated pursuant to a last-chance agreement, was twenty minutes late because he overslept [21, at 445]. The employee was told that if it happened again, he would be discharged. Subsequently, he came to work twenty-five minutes late and was dismissed [22, 23].⁵

Regardless of whether an employer has established parameters for excessive tardiness, just cause will exist when the employee’s service becomes “of little or no value” [24, at 745]. As arbitrator Heekin observed:

First, it is well established that an employer has a right to terminate an employee whose rate of absenteeism/tardiness is such that no longer can it reasonably be expected that he/she will regularly appear for work at

⁵The arbitrator found no requirement to apply progressive discipline for an employee on a last-chance agreement who was late for work three times in violation of the last-chance agreement [22].

the designated starting time, regardless of the excusability of the absences involved . . . [24, at 745].

The grievant's absenteeism/tardiness rate was approximately 26 percent over a fourteen-month period.

An interesting, but ineffective defense was raised by a union in the *City of Euclid* [Ohio] case [25]. The union claimed that tardiness, standing alone, could not justify an employee's dismissal. However, arbitrator Paolucci disagreed, stating: ". . . any misconduct, no matter how insignificant, which continues after progressive discipline has been properly applied, can lead to discharge" [25, at 3363].

Another questionable union defense was raised in the *Cone Mills Corporation* case [26]. In that case, there was just cause to terminate an employee for her fourth incidence of failing to notify management of a tardy within a six-month period. The rules stated that any employee arriving at the job more than fifteen minutes late, without prior arrangements ["except in very unusual circumstances which are acceptable to the supervisor"] was to be sent home and issued an attendance policy violation [26, at 5942]. Nevertheless, it was claimed by the union that the tardiness policy requires proof of "willfulness" before imposing discipline. The arbitrator noted, however, that the policy was aimed at discouraging tardiness and encouraging advance notice. Her fifteen years of service did not mitigate the penalty [26].

Another union defense to discipline for tardiness was that the time clock was faulty in some way [7]. The accuracy of the time clock was checked over time, and the arbitrator could not find a pattern of tardiness during the days in question. The grievant was late four times, two others in the department were tardy one time each. In another case, a grievant's failure to complain regarding the accuracy of the time that the tardies occurred was presumptive proof that the employee did not believe that the time clock was inaccurate [9]. However, when numbers on a time card are unclear, and union witnesses will testify on behalf of the grievant, discipline may be reduced [27].

It hardly needs to be said that employers are obliged to act consistently while attempting to enforce otherwise valid tardiness rules or policies. For example, in one case, an employee was discharged for accumulating twelve points under a no-fault absenteeism/tardiness program, after he was charged one-half point for missing a safety meeting, held one hour prior to the onset of his shift [28]. Several months earlier he had arrived late, or failed to attend a safety meeting, and was not disciplined at all. He was reinstated with back pay by the arbitrator. In another case, an employee had been counseled regarding excessive tardiness and told that a further incident of tardiness would lead to a formal letter of warning [29]. When the employee was again late, he was given a two-day suspension. Obviously, the company could not impose a harsher discipline than the one previously promised.

Nevertheless, when an employer acts consistently, even for trivial tardiness, discharge may be upheld. For example, in one case a truck driver was found to be

properly discharged after the fourth instance of tardiness [30]. The employer had regularly recorded tardiness of any length and disciplined violators, although no driver had ever been discharged for tardiness. The driver claimed he was being singled out for discharge because of his activities with the union.⁶ However, the arbitrator noted that the grievant knew, or should have known, that his activities would not result in lax enforcement of the rules. The arbitrator stated it was important that the infractions had been recorded against drivers, regardless of the minutes late involved in each case [30].

DISCUSSION

It is a fundamental right of management to expect employees to arrive at work on time. Even in the absence of a rule prohibiting tardiness, employees should be aware they must maintain regular and reliable punctuality. However, the sample cases demonstrate that an employer is on firmer disciplinary grounds when it carefully defines tardiness, e.g., how late is chargeable tardiness, whether an employee must be punctual by just entering the facility or be at his/her workstation, and whether the definition distinguishes between excused and unexcused tardies. If no definition exists in the contract or rules, the normal meaning of reporting after the fixed starting time will prevail.

Tardiness should be defined so as to indicate accumulations over a fixed period of time. Normally, after such period of time has elapsed without further discipline, there is a means for an employee's tardiness record to be reduced or expunged.

Finally, progressive discipline is the rule in tardiness cases. Such discipline may be ignored if an employee is working pursuant to a last-chance agreement. Then, just-cause parameters are no longer in effect.

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⁶The driver had been involved in a court case and was critical of two company managers during a television interview [30].

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