VII. AWARD

For the reasons set forth above the instant grievance is sustained. The grievance filed by the Association on September 23, 1991, was timely. The District failed to timely respond, in writing, to the Level III grievance pursuant to the express terms of the parties' Agreement. The parties' Agreement mandates that default be taken against the District. The monetary remedy noted above shall be implemented with reasonable speed, and the undersigned retains jurisdiction over this case for a period of sixty (60) days, commencing on the execution date of the instant award, to oversee its proper implementation and administration. The undersigned expresses no opinion whether the District's underlying decision to assign teachers to a sixth (6th) class period abridged the terms of the parties' Agreement.

NORTHERN INDIANA PUBLIC SERVICE CO. —

Decision of Arbitrator

In re NORTHERN INDIANA PUBLIC SERVICE CO.—CONSTRUCTION DEPARTMENT and UNITED STEELWORKERS OF AMERICA, LOCAL 12775, Grievance No. 6768, June 28, 1993

Arbitrator: Lamont E. Stallworth

ABSENTEEISM

— Discharge — Notice of attendance policy ▸24.111 ▸118.6361 ▸118.305 ▸118.306

Employer did not have just cause to discharge employee for excessive absences due to personal business, even though she had been warned about attendance problems, where employee did not receive proper notice of attendance program or her rights under collective-bargaining contract until 15 months after she was hired, at which time she had already accumulated 15 of her 20 attendance points, she was not officially informed of revisions to attendance policy, once employee received copy of contract and attendance program booklet, which described how she could erase negative points, her attendance record improved considerably until she was transferred, and company did not fully consider employee's post-transfer two hour commute to work when examining her final driving-related absences.

REMEDY

— Back pay — Conditions to reinstatement — Remand ▸94.609 ▸118.806

Employee whose discharge for absenteeism is overturned because she did not receive proper and timely notice of attendance policy is not entitled to full back pay, and issue of terms and conditions of reinstatement is remanded to parties for negotiation, where grievant is ultimately responsible for seeing that she gets to work on time regularly, and she continued to experience attendance problems after she received notice of terms of attendance policy.

Appearances: For the employer — Douglas A. Bobillo, labor relations; Fred Fesko, labor relations specialist; B. J. Pingleton, custodial supervisor; Ronald Swart, assistant personnel and safety supervisor; and Kristen Emaus, labor relations specialist. For the union — Michael Sandy and Richard Essig, grievance committeemen.

NOTICE OF POLICY

ISSUES:

STALLWORTH, Arbitrator: — [The Issues are: —]

1. Did the Employer have just cause to discharge the Grievant?
2. If not, what shall the remedy be?

Relevant Contract Provisions

ARTICLE III
MANAGEMENT

1. It is understood and agreed between the parties that, subject to the conditions contained in this Agreement, the Company has and shall continue to have vested in it the exclusive right to exercise the duties of management, to plan, direct and control the working operations and force, including the right to hire, suspend, demote, promote, discharge for just cause, determine the adequacy of supervision, relieve employees from their duties because of lack of work or materials and for other legitimate reasons, and designate the hours of employment.

Background

The instant case involves the Company's first discharge of an employee under the "personal business" aspect of its attendance program. The Company unilaterally initiated the attendance program in 1986. The Union challenged it, and the basic program was upheld in arbitration.

The Company revised the program in 1991, after a joint labor- management committee thoroughly reviewed problems with the program. Meetings were held throughout the Company in order to acquaint employees with the new program.

Under the attendance program, personal business absences include occurrences such as transportation difficulties, illness of family members, tardiness, etc. Under the new program an employee accumulates negative points for chargeable personal business absences, depending upon the length of the absence. Absences of four (4) hours or less count for -1 point, absences greater than four (4) hours accumulate -2 points etc. An employee may counteract the negative points by accumulating positive points earned by a combination of going a certain period without a chargeable personal absence in combination with a limited amount of sick time.

The new attendance program sets forth corrective measures to be taken when personal absences exceed a certain level. When an employee's negative point level reaches -10 to -14 he or she receives a warning letter and counseling session. Discipline proceeds progressively to Step 4, which is a formal review of an employee's record and possible discharge.

The attendance program also describes how extenuating circumstances may be taken into account. The employee may file a request for special review, under the program. The attendance program booklet also states that,

> A Local Union Official, at the level of Grievant Committee Person or higher, will attend all Formal Reviews of the Attendance Review Committee that involves employees whose attendance records and related performance matters are subject to review and disposition. The role of this official will not only be to provide the usual representation to the employee, but also to provide advice and counsel to the employee on a more personal level at this critical point of the employee's career with the Company.

The Grievant, B—, was hired by the Company on September 10, 1990 as a custodian in the Fort Wayne area. She testified, and the documentary evidence supports the fact that she did not receive a copy of the attendance program booklet, or the collective bargaining agreement from the Company at the time she was hired.

The evidence indicates that the Grievant accumulated -10 points by May 24, 1991 and therefore reached Level No. 1. She was counseled at this time. There is no record of any witness being present at this session. By December 30, 1991 the Grievant had reached Level No. 2, which provided for a three-day suspension. She had 15 points at the time. She contends that it was at this point that she received the attendance booklet.

The Grievant's record improved over the next five months, so that she was able to reduce her overall point total to -8. In June, 1992, the Grievant was bumped out of her job in Fort Wayne and accepted a job at the Shahfer Generating Station, which is about 120 miles from her home.

The Grievant had some instances of tardiness etc. after this move which precipitated additional counseling and brought her point total to -20 by November 5, 1992, at which time she was disciplined at Level No. 3 with a ten-day suspension. The last incident which triggered the discipline involved the Grievant being stopped for speeding in Warsaw, Indiana on her way to work. She was detained at a police station because she was not carrying her driver's license, and the police could not locate a record indicating that she had a valid driver's license. The Grievant called the Company, and did not come into work that day. She was picked up by a friend who drove her back to Fort Wayne, where she obtained a valid driver's license that day.

The Grievant filed a request for special review, based on the fact that the police could not find a record of her driver's license. The circumstances of her not having a driver's license are under dispute. The request was denied.

The Grievant was given a ten-day suspension. While she and management personnel were discussing her situation she was given directions to the Training Center in LaPorte, where she was to report the day after her suspension ended in order to be tested for a meter reader position. The Grievant testified that she got lost on the way to the Training Center and showed up about one hour late. The Grievant was issued one negative point, which brought her above the 20 point level and triggered a formal review of her attendance record.

The Grievant apparently hired an attorney who wrote to the Company asking that additional time be afforded the Grievant to provide information regarding any excuses for her absences. The attorney was given until January 11, 1993 to provide this additional information. On January 12, 1993, he provided a list of accidents on Highway 30.

The review of the Grievant's attendance record was scheduled and the Union was notified that it would occur. When the management represen-

tative arrived for the review, the Union committeeman was not available, and the Union office did not know where he was. The meeting proceeded with an assistant griever. The Grievant was discharged.

The Union filed a grievance over the discharge. The Parties were unable to resolve the issue and the matter was submitted to arbitration.

The Company's Position

The Company asserts that the discharge was warranted and should be upheld. In support of its position, the Company notes that the Grievant only worked for the Company for about two and one quarter years, and during that time she accumulated personal absences and progressively more serious forms of discipline, which led to her discharge.

The Company takes issue with the Grievant's credibility in regards to her testimony that she did not understand the significance of her absences for personal business. The Company notes that terminology relating to the absenteeism program was mentioned in the first counseling session with the Grievant, but she still did not ask for a copy of the attendance regulations, according to her testimony. The Company takes issue with the Grievant's statement that she did not receive a copy of the attendance program booklet until she was at the three-day suspension level.

Furthermore, the Company notes that even after she received the booklet and transferred to Shahfer Generating Station she continued to have absenteeism and tardiness problems. The Company disputes the Grievant's contention that her personal business absences resulted primarily from the great distance she had to drive to work, as a result of being bumped out of her position in the location where she lived. The Company contends that most of the absences which were discussed at the arbitration hearing had nothing to do with the Grievant's distance from work. According to the Company, the Grievant accumulated twelve (12) points while she was still assigned to Fort Wayne, her home. The Company also argues that the Warsaw incident and the LaPorte incident had nothing to do with the Grievant's long commute.

The Company argues further that the problems which the Grievant alleged caused her personal absences could not have been addressed by the EAP program. The Company notes that the Grievant denied that she did not have her license because of alcohol or drug abuse problems. In addition, the Grievant being stopped for speeding in Warsaw and getting lost on the way to the Training Center had nothing to do with any personal problems that the EAP program could address, the Company asserts.

The Company also suggests that the Grievant's credibility regarding her testimony regarding her license is questionable. The Grievant had the opportunity to present any evidence that might indicate that her being detained in Warsaw was a miscarriage of justice, the Company asserts. The Company notes that the Grievant retained an attorney to help her with the situation but she did not provide any documentation to indicate that she was erroneously held by the police.

Furthermore, the Company notes that although the Grievant claimed no knowledge of the EAP program, she had used it several months before December, 1992 in order to obtain a three-day leave to address a personal problem. The Company suggests that through this contact with the program, the Grievant knew that it was not limited only to helping employees with drug and alcohol abuse problems.

The Company further asserts that the Grievant never filed a request for a special review indicating that her absence related to either a divorce or the long distance of her commute. She only took advantage of the special review provision once she received a ten-day suspension. At that point, the Company asserts, she did not provide good documentation, within the time limits, to excuse her absences.

The Company asserts further that the Union never before the arbitration hearing raised the issue of having a Union official, at the level of grievance committeeman or higher, at the formal review of the Grievant's record. The Company asserts that the Union should have raised the issue before this date.

In addition, the Company contests the Union's assertion of disparate treatment of the Grievant. The Company argues that the Union has the burden of establishing disparate treatment and did not do so. The Company points out that the Grievant had a relatively short tenure with the Company as opposed to the other employees with whom she is being compared. In addition, the Company points out the Grievant's extensive disciplinary history during her relatively short tenure, and the proximity of the last incident in relationship to the disciplinary action she had just received as factors which set her apart from some of the other employees.

The Company further argues that it has applied progressive discipline with the Grievant, and has given her an opportunity to correct her past mistakes. She has been sufficiently warned and counseled prior to discharge, the Company contends, and therefore the discharge should be upheld.

The Union's Position

The Union argues first, that whatever the attendance program says, there is still an issue of just cause, and whether the Company abided by that concept in discharging the Grievant. The Union contends that the requirements of just cause were not met in this case.

In support of this position, the Union first points out that the Company's attendance program booklet was not given to the Grievant when she first began working, even though she was subject to its provisions from the first day she began working. In addition, the Grievant never received a copy of the labor agreement when she began working. The Union notes that the evidence indicates that the Grievant did not receive an attendance program booklet until fifteen (15) months after she first became employed, and not until her first meeting with management at which she had a Union representative.

In further support of its case, the Union points to the fact that after receiving information about the program the Grievant started to improve her record and continued to do so until she got bumped to a location very distant from her home. The Union speculates about what her record would have been at that point if she had received the attendance booklet on the first day, as is the normal procedure. The Union also points to the evidence that the Grievant was not present at the session in which the changes to the attendance program were introduced.

Once the Grievant was bumped out of her job in Fort Wayne, the Union notes, she had to travel at least 120 miles each way, leaving at 3:30 a.m., after taking her two-year-old son to a babysitter. The Union also points out that the Grievant was trying to bid on jobs closer to home, and in fact was working as a meter reader in Fort Wayne at the time of her discharge.

The Union also points to the evidence that other employees received more negative points through the Company's attendance program and were not discharged or given time off. The Union argues further that although one of the stated purposes of the program is to provide assistance rather than punishment, there was no offer of assistance to the Grievant. The Union argues further that the extenuating circumstances of the Grievant's case, such as having to drive so far, were never taken into account.

The Union asserts further that the provision of the attendance program which calls for the attendance of a Union official of a certain rank to be present at all formal reviews is a very important provision and was not followed here. The Union argues that the provision is not optional, and the meeting could have been postponed until the proper Union official was available.

The Union argues further that no one was held up when the Grievant was late, because she normally works alone. However, the Company did not take this into consideration, the Union asserts. For all of the above reasons the Union requests that the Grievant be reinstated immediately and that eventually backpay be awarded.

Opinion

This is the first case involving a discharge for personal business absences, under the Company's absenteeism policy instituted in 1986. The Parties have submitted the following issue(s) to the Arbitrator for resolution:

1. Did the Employer have just cause to discharge the Grievant?
2. If not, what shall the remedy be?

The Arbitrator has considered the testimony, other evidence and arguments of the Parties and concludes that the Employer did not have just cause to discharge the Grievant. The Arbitrator's findings, conclusions and reasoning are set forth below.

The Parties presented evidence about the operation of the Company's absenteeism program. The program was instituted by the Company in 1986, and has been described at some length in the *Background* section of this opinion. The program tracks personal business absences separate from absences for illness. Personal business absences include absences for reasons such as car problems, sickness of family members, attendance to legal matters as well as general tardiness.

The Grievant was hired in as a custodian at one of the Company's locations in Fort Wayne, Indiana, where the Grievant resides. As described in the *Background* section of this opinion, she later accepted a job bid at a location one hundred twenty (120) miles from Fort Wayne, after her relatively low seniority caused her to be bumped from her position in Fort Wayne.

The Grievant received negative points through the attendance system

for absences caused by a variety of reasons. The Company notes that the Grievant was repeatedly warned that future absences could cause more serious discipline and the Grievant did in fact receive progressive discipline in accordance with the terms of the attendance program.

The Union argues, however, that the Grievant was treated differently than other employees, and that the Company did not give enough weight to the legitimate reasons for some of her absences. As to the first point, the Union has presented evidence that other employees who received the same number of negative points, or even more points than the Grievant, were not discharged. The Company relies upon testimony that all of these employees had more seniority than the Grievant.

The Arbitrator, of course, was not presented with all of the evidence concerning the circumstances which prompted the Company not to discharge other employees who had more negative points in the absentee program than the Grievant. However, the Arbitrator notes that discharge is not automatic once an employee has exceeded the twenty point level more than once, and it is reasonable for the Company to consider length of service in determining whether an employee should be discharged at that point. Of course, length of service also is one of the factors arbitrators examine in determining whether the employee was discharged for just cause.

Therefore, the Arbitrator cannot conclude that simply because other employees were not discharged who had more points than the Grievant that the Grievant was necessarily the victim of disparate treatment. However, there are several other aspects of this case that convince the Arbitrator that the discharge should be overturned.

A major problem in this case is that the Grievant was not given a copy of the attendance program booklet, or a copy of the collective bargaining agreement, at the time she was hired. As the Arbitrator understands it, she did not receive a copy of the attendance booklet until December, 1991, about fifteen months after she was hired. At that point she already had accumulated fifteen (15) negative points in the Company's attendance program.

The Company argues that she had received discipline under the program before she reached the fifteen (15) point level and it strains credibility to assume that the Grievant did not know that she was in trouble under the program, and should improve her attendance. The Arbitrator concurs that the Company did inform the Grievant that she was having attendance problems, and that additional absences would subject her to more severe discipline.

However, without receiving the attendance booklet, it is unlikely that the Grievant knew precisely how the attendance program operated. No two attendance programs are identical, and specific provisions of each program can be somewhat complicated. In particular, the Grievant should have known about the opportunity for a Request for Special Review under the program. This form allows an employee to request a review of a particular absence because of extenuating circumstances; if the request is granted negative points assigned for that absence may be removed.

Without this information it is not clear that any employee would know that she could get negative points removed. Nor would an employee necessarily know exactly how to earn positive points each month through good attendance, which can erase negative points.

Furthermore, as the Arbitrator understands it, this procedure of earning positive points has been changed during the revisions to the program put into effect in 1992. The evidence indicates that the Grievant did not attend any of the sessions in which management and Union officials discussed the changes to the program which occurred in 1992.

Therefore, the Grievant was not officially informed about the original terms of the program until the end of 1991, and was not informed about the changes in the program which went into effect in 1992. The evidence indicates that other employees were routinely given the attendance program booklet at the time they were hired. The evidence also indicates that other employees were informed through meetings about the terms of the new program. It is not entirely clear why the Grievant did not attend such a meeting, but there was no evidence that she had any responsibility for her nonattendance.

The evidence also indicates that at the point at which the Grievant was provided with the booklet her record did improve considerably. It declined again somewhat after she was transferred to the facility 120 miles from her home. However, even with the substantial improvement in her record which occurred after she received the book, she still had eight negative points remaining from the period be-

fore she received the attendance booklet, at the time of her transfer.

Furthermore, the Grievant indicated that she did not know of the availability of the Employee Assistance Program (EAP) during the period in question. The Employer has argued that the EAP would not have helped the Grievant with some of her most recent attendance problems, such as receiving a speeding ticket and getting lost on her way to the training center. This is a reasonable argument. The Arbitrator also notes that the Grievant had the attendance booklet by the time these incidents occurred. Therefore, she had at least some opportunity to know that the EAP program was available to her.

However, setting aside for the moment the issue of whether the Company had a greater responsibility to offer the services of the EAP program, it is clear that during the first fifteen (15) months of her tenure, the Grievant did not have the booklet and there is no convincing evidence that the Company offered her the assistance of the program. The Grievant testified that she believed the program applied only to employees with drug or alcohol problems. This is not an unreasonable assumption. The attendance booklet suggests that the program may be used by employees with other problems, but the Grievant did not have the book during this period. She also testified that she was going through a divorce at that time and had some problems associated with the divorce.

The Arbitrator recognizes that the Grievant had an opportunity to improve her record, and erase some of the negative points she received in the past after she received the booklet. She did do that until the time she was transferred to a location which required her to drive about two hours to work each day. The Arbitrator does not mean to suggest that employees who do drive such distances somehow become exempt from rules against tardiness. But the great distance she had to drive every day do demonstrate a certain loyalty to her employment which it is not clear the Company fully considered in examining her personal business absences, especially in regard to the final two absences, the one in which she was caught speeding in Warsaw and the one in which she became lost going to the training center in LaPorte.

The Arbitrator notes that the Grievant's point total already was relatively high at the time she received the attendance booklet. These points were attained without the benefit of knowing, as other employees did, how to erase the points. In fact, the Grievant also was not given a copy of the collective bargaining agreement when she was hired, so it is not entirely clear that she knew about the grievance procedure, or that she had certain rights to Union representation either.

Therefore, some of the points which the Grievant received under the attendance program were received under different circumstances than other employees. If the Grievant had received only one or two points in this way the ultimate outcome of this case might be different. However, because the Grievant received fifteen (15) points during this period, which in her case was two- thirds of the way towards discharge, the Arbitrator concludes that the fact that she did not have a copy of the attendance rules is significant.

Having concluded that the lack of proper notice to the Grievant about the precise nature of the attendance program is significant enough to challenge the justice of the discharge, the Arbitrator concludes that he need not consider the other issues in this case, such as the adequacy of the Union representation at the formal review stage.

However, the Arbitrator also notes that the Grievant is a relatively short term employee with a poor attendance record, and whatever mistakes the Company may have made in addressing her situation, she is ultimately responsible for seeing that she gets to work on time regularly. The Arbitrator further notes that the Grievant continued to have problems even after she was notified about the terms of the policy. Therefore, the Arbitrator concludes that full back pay is not appropriate in this case.

Consequently, the Arbitrator will remand the case to the Parties for further negotiation over the terms and conditions of the Grievant's reinstatement.

AWARD

The discharge is overturned and the Grievant is to be reinstated. The dispute is remanded to the Parties for negotiation over the terms and conditions of the reinstatement. The Parties shall have thirty (30) days to negotiate these terms and conditions. The Arbitrator shall retain jurisdiction of this aspect of the dispute.