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| **In the Matter of the Arbitration** | ) | |
| | ) | |
| **Between** | ) | |
| | ) | |
| **INTERNATIONAL ASSOCIATION OF MACHINISTS** | ) | |
| **AND AEROSPACE WORKERS,** | ) | **Opinion and Award of** |
| **DISTRICT LODGE NO. 389** | ) | **Impartial Arbitrator** |
| | ) | **MARK BURSTEIN** |
| **and** | ) | |
| | ) | |
| **SOLAR TURBINES, INCORPORATED** | ) | |
| | ) | |
| | ) | |
| **ATTENDANCE POLICY** | ) | |

**Arbitrator**

Mark Burstein

**Appearances**

| | |
|---|---|
| **For International Association of Machinists and Aerospace Workers, District Lodge No. 389** | David W. M. Fujimoto<br>Weinberg, Roger & Rosenfeld<br>1001 Marina Village Parkway<br>Suite 200<br>Alameda, CA 94501 |
| **For Solar Turbines, Incorporated** | Frederick C. Miner<br>Littler Mendelson P.C.<br>2425 East Camelback Road<br>Suite 900<br>Phoenix, AZ 85016 |

## STATEMENT OF THE CASE

Pursuant to Article 7 of the Agreement (Joint Exhibit 1) between Solar Turbines Incorporated, a Caterpillar Company, hereinafter called the Company, and the International Association of Machinists and Aerospace Workers, District Lodge No. 389, hereinafter called the Union, Darrin Williamson, Union's Chief Steward, at the Company's Harbor Drive facility filed a November 8, 2018 grievance (Joint Exhibit 10) in which he alleged that the Company failed to bargain in good faith with the Union about a new Attendance Policy. After the Company denied the grievance (Joint Exhibit 11), the Union requested arbitration (Joint Exhibit 12).

At the arbitration hearing held on December 12, 2019 in San Diego, California, David W. M. Fujimoto represented the Union and Frederick C. Miner represented the Company. Each party had the opportunity to make opening statements, introduce evidence, examine and cross-examine witnesses. After the parties submitted post-hearing briefs that were submitted on or before January 31, 2020, the matter was submitted for a final and binding decision.

## STATEMENT OF ISSUES

At the hearing, the parties stipulated to the following statement of the issues:

> Whether the Company violated the Agreement when it established a revised Attendance Policy effective January 1, 2019?
>
> If so, what is the appropriate remedy?

In its post-hearing brief, the Union had set forth a different statement of the issues. It contended that the issues were as follows:

> Did the Company violate the (Agreement) when it unilaterally implemented, and without bargaining with the Union, implemented the new Attendance Policy on June 1, 2019?
>
> If so, what is the appropriate remedy?

Since the parties had stipulated to the issues at the hearing and the Company has not agreed to the Union's formation of the issues set forth in the Union's post-hearing brief, I conclude that the issues are as both parties had stipulated at the hearing.

## RELEVANT PROVISIONS OF THE AGREEMENT

**Joint Exhibit 1**

### ARTICLE 7 – GRIEVANCE PROCEDURE

***

7.10 The functions of the arbitrator shall be to determine controversies arising out of interpretations of the provisions of this Agreement, and his/her decision shall be final. However, he/she shall have no power to add or subtract from or change any of the terms of this Agreement…

***

### ARTICLE 17 – AMENDMENT PROVISION

17.01 … The right to establish plant rules and regulations is vested solely in the Company. Employees who are disciplined as a result of alleged violations of plant rules and regulations may, if they feel the discipline is unjust, have recourse to the grievance procedure.

17.02 Either party desiring to amend any of the terms of this Agreement or to negotiate new provisions, shall notify the other party in writing of its desire, and shall specify the nature of the amendment or amendments sought.

***

## STATEMENT OF FACTS

### Background

The instant dispute involves the change that the Company made to its Attendance Policy, effective January 1, 2019 and specifically the change to unexcused absences. Most of the underlying facts are not in dispute.

The Company manufactures gas turbines for industrial application and its Harbor Drive and Kearny Mesa facilities in San Diego, California. Brad Cripps, the Manager of Packaging Operations at the Company's Kearney Mesa facility, testified that he managed a team that builds and tests the new gas turbine generators and compressor sets and gets them ready to ship to customers. He testified that the production process is not automated but rather, is manual and is customized for each customer. Mr. Cripps testified that there are multiple points where Company representatives meet with the customer about the project.

In 1983, the Company implemented its first Attendance Policy (Joint Exhibit 7). In 1985, the Company implemented a new Attendance Policy (Joint Exhibit 6) that included the following "Attendance Standards":

> An employee who exceeds any one of the following standards will be considered in violation of Company Attendance Standards.
>
> 2 instances of Absence in any rolling one month service period, OR
>
> 3 instances of Absence in any rolling two month service period, OR
>
> 7 instances of Absence in any rolling twelve month service period.

The Attendance Policy also included the following "Corrective Action":

> 1st violation: Verbal Notice
>
> 2nd violation: Written Notice (if within 12-month service period following Verbal Notice)
>
> 3rd violation: Final Written Notice (if within 12-month service period following Written Notice)
>
> 4th violation: Discharge (if within 12-month service period following Final Written Notice)

Pursuant to the Policy, all corrective notices for the Attendance Policy would be removed after the employee involved completed a 12 consecutive month service period without corrective notices for attendance.

Mr. Williamson testified that in 2006 when he was a Steward, the Chief Steward called a meeting of the Stewards and informed them that the Company intended to change the Attendance Policy. According to Mr. Williamson, the changes that were going to be made were favorable to the Union and as a result, the Stewards were in agreement and they did not voice any objections.

In 2006, The Attendance Policy (Joint Exhibit 5) included the following "Attendance Standards":

> An employee who **EXCEEDS** any one of the following standards will be considered in violation of Solar Turbines Incorporated Attendance Standards:
>
> 2 instances of Absence in any rolling (1) month service period, OR
>
> 3 instances of Absence in any rolling two (2) month service period, OR
>
> 7 instances of Absence in any rolling twelve (12) month service period.

The Attendance Policy included the following "Corrective Action":

> **1st Violation:** Verbal Notice
>
> **2nd Violation:** Written Notice (If within 12-month service period following Verbal Notice)
>
> **3rd Violation:** Final Written Notice (If within 12-month service period following Written Notice)
>
> **4th Violation: Discharged** (If within 12-month service period following Final Written Notice)

The Attendance Policy set forth that "(a)ll corrective notices for attendance will expire after the employee involved has completed a 12 consecutive-month service period without further corrective notices for attendance.

The Attendance Policy identified nine approved absences and set forth additional leaves of absence without pay, most of which were subject to approval by the employee's supervisor.

**The implementation of the 2019 Attendance Policy**

Rosaura Vacchi, who has been with the Company for almost nine years and had been the Company's Employee Relations Manager for about two years at the time of the hearing, testified that two Manufacturing Directors had expressed concerns about the impact of unexcused absences on the quality of work. Mr. Cripps testified that when employees were absent without prior notice or when they did not call in, there were production problems since assignments had to be changed and overtime resulted. He

opined that it was not fair to other employees when employees did not show up to work.

Ms. Vacchi requested a meeting of Management personnel to discuss the need for reviewing and revising the Company's Attendance Policy. She testified that the Management representatives, which became known as the A Team, reviewed the Attendance Policies of other Caterpillar facilities and that they were used as benchmarks; the A Team included Mr. Cripps, Tom Burke who was the Manager at the Company Harbor Drive facility, and Wisdom Beasley, a Labor Relations Specialist. During the discussions, the A Team decided to make some changes to the Attendance Policy but also decided not to make any changes to the language in the Agreement since if changes were made in the Agreement, those changes would have to be negotiated with the Union. The A Team decided to notify the Union of the changes to the Attendance Policy in order to give the Union the opportunity to object, raise concerns and make suggestions which could be taken into account before the changes were finalized. Ms. Vacchi testified that the Company had engaged in that practice in the past. The draft of the revised Attendance Policy was sent to Legal and was then discussed with the supervisors.

On or about October 31, 2018, Ms. Vacchi and several other members of Management met with Mr. Williamson and other members of the Union. After a safety briefing, Ms. Vacchi began to

discuss the new Attendance Policy and when Mr. Williamson asked to meet and confer about the changes, Ms. Vacchi stated that pursuant to Article 17.01 of the Agreement, the Company was not required to negotiate with the Union about the changes. Ms. Vacchi testified that she showed slides (Company Exhibit 16) about the changes to the Attendance Policy and that she answered most of Mr. Williamson's questions. When Mr. Williamson asked what would happen with the current disciplines, Ms. Vacchi responded that all existing unexcused absences would be reduced to zero and that all existing disciplines would remain but would be reduced one level. She testified that some of Mr. Williamson's questions could not be answered immediately and that Mr. Williamson was provided with answers within a few days. Ms. Vacchi testified that Mr. Williamson was notified that the Attendance Policy would be rolled out January 1, 2019.

Ms. Vacchi testified that she subsequently met with employees and discussed the new Attendance Policy.

The Attendance Policy (Joint Exhibit 4) that became effective on January 1, 2019, included the following section entitled "Unauthorized Absence":

> 1. Each day of absence, other than Paid Sick Leave or Approved Absences, 1-23 above.
>
>    a. Consecutive absences of two (2), or three (3) scheduled days of work due to employee illness will be considered a single absence if supported by a written statement from a health care provider.

> To be acceptable, the health care provider's note must include the date the employee was seen, the dates the employee is excused, and must be presented to the employee's HR Representative or Supervisor on the day he/she returns to work
>
> 2. Each tardy or early departure.
>
>  a. A tardy within the first 30 minutes of the beginning of the scheduled shift will be considered as one-half an absence.

The Attendance Policy included the following "Attendance Standards and Corrective Action":

> An employee who incurs the following number of unauthorized or unapproved absences in any rolling twelve (12) month service period will be considered in violation of Solar Turbines Incorporated attendance standards. The following corrective actions will apply:
>
> - DOCUMENTED VERBAL NOTICE: two (2) unauthorized/unapproved absences
> - WRITTEN NOTICE: Currently on an active Documented Verbal Notice and incurs two (2) additional unauthorized/unapproved absences
> - FINAL WRITTEN NOTICE: Currently on an active Written Notice and incurs two (2) additional unauthorized/unapproved absences
> - DISCHARGE: Currently on an active Final Written Notice and incurs two (2) additional unauthorized/unapproved absences

The Attendance Policy set forth that "all corrective notices will be in effect for a twelve (12) month rolling service period".

The Attendance Policy identified twenty-three approved absences and an additional eight "Informal Personal Leaves" which were deemed to be "good and sufficient" with appropriate documentation.

**The impact of 2019 Attendance Policy**

Ms. Vacchi testified that she had reviewed documents after the new Attendance Policy became effective and that they reflected that absenteeism and discipline for absenteeism had decreased.

## DISCUSSION

**The Company's right to implement the 2019 Attendance Policy**

Whenever there is a question about the meaning of a provision of a Collective Bargaining Agreement between parties, it is the responsibility and obligation of the Arbitrator to ascertain and implement the intent of the parties. In the instant matter, it is not necessary to discuss or address the various maxims of contract interpretation since the plain, clear and unambiguous language of Article 17.01 dictates that the "right to establish plant rules and regulations is vested solely in the Company". I find that since the right to establish plant rules and regulations is vested solely in the Company, it is reasonable to conclude that the right to make modifications in those rules and regulations also rests solely with the Company. I note that there is nothing in the parties' Agreement about any Attendance Policy and nothing in the parties' Agreement that impacts the Company's right to establish plant rules and regulations about absenteeism.

Further, the evidence established that in 2006, the Company made changes to the Attendance Policy without negotiating with the Union about the changes. Rather, as in the instant case, the Company notified and then discussed the changes with the Union before the changes were implemented. The Company also introduced evidence about other plant rules and regulations that it established without first negotiating with the Union.

For the reasons discussed above, I find that pursuant to Article 17.01 of the Agreement, the Company had the right to make changes to the Attendance Policy without negotiating those changes with the Union.

However, notwithstanding the Company's right to make changes to the Attendance Policy, the revisions cannot be arbitrary but rather, they must be reasonable. The Union argued that the changes in the Attendance Policy were a "radical" departure from the system that had been in place and significantly altered the triggers for the levels of discipline. The Union contended that the Company fundamentally changed the meaning of the Agreement's terms and implemented unreasonable changes to the Attendance Policy. The Union also contended that as a result of the changes, numerous employees were harmed not only because of the changes to the disciplinary structure but also because the changes rendered ineligible for certain

benefits identified in the Agreement. Specifically, the Union contended that the following Articles were affected:

> 10.07 Job Posting for Classification Change
>
> (A) Any employee who has completed at least twelve (12) months in his/her classification and who does not have active, formal disciplinary action related to attendance, work quality, productivity, misuse of company time, environmental health & safety or insubordination, may apply for a posted position to **current**, *higher, lower, or lateral rated classifications. …
>
> 12.08 Overtime Distribution: When overtime is necessary, the Company will distribute overtime among the full-time employees in the same overtime group by department, cost center classification and shift. Employees with an active written notice of disciplinary action pertaining to attendance, quality, productivity, insubordination, safety or misuse of company time and/or whose most recent performance appraisal is below average, shall be removed from the overtime list. …
>
> 13.13 **Merit Wage Increase: …**
>
> ***
>
> **Employees with active written notice of disciplinary action for attendance, quality, productivity, insubordination, safety or misuse of time are not eligible for merit increases. … (Emphasis not supplied)**

It is axiomatic that since the Union alleged that the Company violated the Agreement, it had the burden of proof. For the reasons discussed below, I find that the Union's arguments are not persuasive.

The evidence established that the Company wanted to improve the attendance of its employees since the unexcused absences impacted production. The A Team reviewed the attendance policies at other Caterpillar facilities and decided to implement, inter alia, the rolling 12-month accounting period that was in existence in all of the other Attendance Policies

that it reviewed. The A Team determined that the existing Attendance Policy was too lenient and made the administration somewhat difficult.

In the 2019 Attendance Policy, the number of unexcused absences for each level of discipline was not changed but rather, the different accounting periods for the levels of discipline were eliminated and the accounting period became a rolling 12-month period. In addition, the Company expanded the types of absences that were deemed to be excused and it decreased the levels of discipline for employees by one level when the 2019 Attendance Policy became effective.

Based upon the totality of the record, I find that the Company's decision to replace the numerous accounting periods with a single rolling 12-month period in the manner that it did was not radical as the Union contended but rather, was reasonable. [1] The evidence established that under the Attendance Policy that had previously been in existence, depending on when the unexcused absences occurred, an employee could accumulate numerous unexcused absences without any discipline and that employees with the same number of unexcused absences could

[1] The Union noted that there was no evidence that any of the policies were at unionized workplaces and that the other facilities were in different parts of the country. I find that those factors do not impact the reasonableness of the Company's decision to institute the 12-month rolling period.

receive different disciplines. I find that rather than being unreasonable, the 2019 Attendance Policy established a uniform policy that was applicable to all employees and resulted in a consistent and less arbitrary method for the imposition of discipline. In addition, the Company increased the types of absences that could be approved, reduced the employee's number of unexcused absences to zero and decreased the employee's level of discipline by one level.

The Union's presentation in its post-hearing brief regarding the disciplines of employees that were imposed under the 2019 Attendance Policy compared to the discipline that would have been imposed under the prior policy does not establish that the 2019 Attendance Policy was unreasonable. The Union's comparisons reflected that numerous employees had four unexcused absences and pursuant to the 2019 Attendance Policy, they received a verbal notice for the first two and a written notice for the second two. Based upon the prior policy, the employee would not have received any discipline because of when the absences occurred. Several employees who had a verbal warning when the 2019 Attendance Policy became effective had five additional unexcused absences and they were given a verbal notice, a written notice and a final written notice under the 2019 Attendance Policy; under the prior policy, no discipline would have been imposed because of when the additional absences

occurred. Several employees who had six unexcused absences were up to final written notice based upon the 2019 Attendance Policy but would have received only a verbal notice under the prior policy. I find that the comparison established that the prior policy was rather lenient and resulted in different levels of discipline for the same number of unexcused absences depending on when they occurred presented.

The case of *Alcan-Toyo America*, 102 LA 566 (Draznin 1993) cited by the Union does not require a different result. In that case, there was a Management Rights clause that gave the Employer the exclusive right to make changes to plant rules and the Employer imposed a no-fault attendance policy in which the number of absences, whether excused or not, triggered discipline. Arbitrator Draznin concluded that "management's right to operate the workplace does not abrogate its duty about major working condition changes. It cannot point to the former as an excuse to run rough shod over the latter". I find that in *Alcan-Toyo America*, there was a drastic change since a new Attendance Policy was instituted while in the instant case, the 2019 Attendance Policy only made a modification to the existing policy. Even if I were to have agreed with the analysis and conclusions of Arbitrator Draznin, I find that the facts in *Alcan-Toyo America* are so significantly different that the case is not applicable to the instant matter.

For the reasons discussed above, I find that the 2019 Attendance Policy did not constitute an unreasonable change to the Company's Attendance Policy.

**The alleged unreasonable impact on provisions of the Agreement**

The Union's argument that the 2019 Attendance Policy was unreasonable since it impacted the just cause provision and the three cited Articles of the Agreement was not persuasive. The changes made in the 2019 Attendance Policy did not contradict or alter the Articles of the Agreement since the language was not changed. The number of unexcused absences remained the same and what was changed was the accounting period for when the disciplines were triggered. I find that since the trigger points for the imposition of discipline were standardized, the just cause standard was made less arbitrary.

With regard to Articles 10.07, 12.08 and 13.13, those provisions disqualify an employee from the benefits set forth in those provisions if the employee has any written notice of disciplinary action for attendance. As with case of the just cause standard, since the trigger points at which the disciplines are imposed have become standardized and less arbitrary, I find that the bases for employees losing the benefits have become standardized and less arbitrary.

For the reasons discussed above, I find that the changes effectuated in the 2019 Attendance Policy did not have an unreasonable impact on provisions of the Agreement.

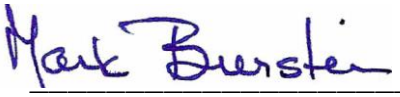
**Conclusion**

For the reasons discussed above, I find that the Company did not violate the Agreement when it established a revised Attendance Policy effective January 1, 2019. [2]

**AWARD**

The grievance is denied.

DATED: June 4, 2020



Mark Burstein
Arbitrator

[2] Assuming arguendo that the issues were as framed in the Union's post-hearing brief, my finding would still be that the Company did not violate the Agreement.