

Boyer Jr. #2

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

and

Union

STATEMENT OF JURISDICTION

The Issue as stipulated by the Parties and stated below was submitted to Arbitration. Each of the Parties presented testimony under Oath was afforded full opportunity for examination and cross-examination of witnesses, submitted exhibits in support of their respective positions, and the Hearing was declared closed.

THE ISSUE

Was the Employee discharged for sufficient just cause?

BACKGROUND

The Employee was initially hired at the Employer's City 1 facility in 1965, and had functioned as a Ramp Serviceman since 1968 until the date of his discharge.

The Record indicates the Employer has a non-punitive type disciplinary procedure that includes five (5) levels of severity, with level five (5) being discharge. Pursuant to that procedure an employee advances through the progressively more severe levels either by committing more serious offenses or by "accumulating violations during a specified time period." Conversely, employees may reduce such levels by successfully completing fixed time periods without

additional violations. Finally, the Agreement provides for removal of disciplinary letters after a period of two (2) years.

The Record indicates the Employee was placed at Level four (4), the last prior to discharge, in October 1991 for violation of Rule 38 - Failure to do job assignment, careless workmanship, or unacceptable job performance. The basis for the violation was attendance deficiencies. The matter was challenged by the Union, and was awaiting scheduling before the System Board. However, following that action, the Employer documented four (4) additional incidents characterized as "performance deficiencies" as follows:

- A) November 1991 - A Supervisor issued a Letter of Counsel for refusing to meet his assigned flight, where the Employee contended there were already sufficient Ramp Servicemen to perform the duties without him. Such allegedly contributed to the single most severe baggage mishandling incident at the facility.
- B) January 1992 - The Employee allegedly arrived late and failed to perform scheduled duties for two (2) flights and received a counseling session with the Operating Manager.
- C) February 1992 - A Supervisor counseled the Employee relative to non-performance on three (3) flights. Specifically, he allegedly left his assignment before the job was completed without the knowledge and/or approval of his Lead or Supervisor; failed to meet another flight, arrived late to assist only with the final stages of baggage unloading on another; and performed only a portion of his assigned duties on another flight.
- D) February 1992 - A Supervisor approached the Employee who was sitting idle on a tractor reading a newspaper and allegedly instructed him to pick up "FOD" (foreign objects and debris) from the ramp, but the Employee refused and failed to perform that function, and such ultimately

precipitated his discharge. Further, the Record essentially provides such facts to be undisputed. However, the singular and consistent rationale provided by the Employee for such behavior was his "opinion" there were sufficient "new people" to perform the "pick up" task. Accordingly, following the three (3) incidents cited, the Employer convened an Investigative Review Hearing on March 10 and acted to discharge the Employee effective March 27, 1992. Consequently, the Union submitted a grievance that provided in relevant part:

Statement of Grievance

Employee was not discharged for cause.

Remedy Requested

The Employee be put back to work and made whole.

However, the Employer consistently denied the Union's position and request on the basis the discharge was for sufficient cause as required by the Agreement.

Therefore, given the Parties were unable to resolve the dispute and stipulate to an absence of procedural deficiency, it was reduced to writing in accordance with Article XVIII - Bargaining and Grievance Procedure and appealed to the System Board of adjudication.

PERTINENT PROVISIONS OF:

A) THE AGREEMENT (Excerpts Only)

ARTICLE XVII - DISCIPLINARY ACTION

D. All disciplinary letters (letters of warning, reprimand, or suspension) will be removed from the employee's file after a period of two (2) years (excluding period while on layoff or Leave of Absence) from the date they were issued. Decisions relating to appeals of disciplinary action may not be used by the Employer as part of the employee's past record when assessing subsequent discipline if more than two (2) such years have elapsed from the date of the disciplinary action taken.

E. If, as a result of any hearing or appeals, it is found the suspension or discharge was not justified, the employee shall be reinstated without loss of seniority and made whole for any loss of pay he suffered by reason of his suspension or discharge, and his personnel

records shall be corrected and cleared of such charge; or, if a suspension rather than discharge results, the employee shall have that time he has been held out of service credited against his period of suspension. In determining the amount of back wages due an employee who is reinstated as a result of the procedures outlined in this Agreement, the maximum liability of the Employer shall be limited to the amount of normal wages he would have earned in the service of the Employer had he not been discharged or suspended.

ARTICLE XVIII - BARGAINING AND GRIEVANCE PROCEDURE

H. Step Four - System Board

1. The System Board of Adjustment shall consist of three members, the CHAIRMAN, who will be a neutral member selected in a manner agreeable to the Employer and Union, the EMPLOYER MEMBER, who will be appointed by the Employer, and the UNION MEMBER, who will be appointed by the Union. In matters relating to contract interpretation, all members of the Board will hear and decide the case by majority vote. In disciplinary cases, only the Chairman will sit on the Board and he shall decide the case.

3. The Board shall have the power to make sole, final and binding decisions on the Employer, the Union, and the employee(s) insofar as a grievance related to the meaning and application of this Agreement. The Board shall have no power to modify, add to, or otherwise change the terms of this Agreement, establish or change wages, rules, or working conditions covered by this Agreement.

B) EMPLOYER WORK RULES (Excerpts Only)

INTRODUCTION

As an employee represented by the Union, you are part of an important team with an important mission founded upon mutual respect and purpose.

The rules which follow in this booklet have been established to protect the rights and privileges of everyone and to insure a safe, effective, and efficient place to work.

The levels of discipline indicated for violation of a particular rule are generally intended to be non-punitive (corrective) in nature, and also progressive, based upon the employee's previous disciplinary record. In appropriate cases, however, an employee may also be suspended from service without pay.

It is important to note that the rules are not all inclusive, since no list of rules can cover every conceivable circumstance. You are expected to use good judgment and to adhere to conduct reasonably expected in a working environment as well as any specific local rules which have been established at your location or in your work function. Additionally, as conditions change, it may be necessary to establish other rules of conduct not included in this book or to modify the rules.

It is hoped that your employment relationship with the Employer will be one that is rewarding and mutually beneficial.

Violations of one or more of the following Rules will result in disciplinary action, up to and including discharge, depending on the circumstances involved and the employee's record. Discipline will commence at the Level specified, except that the circumstances of the particular situation or the employee's disciplinary record may warrant a higher Level.

38. Failure to do job assignment, careless workmanship, or unacceptable job performance. Level 1 to discharge.

POSITION OF THE PARTIES

The position and requests of the Parties were outlined by their representatives and supported by a variety of documents and testimony as follows:

THE EMPLOYER

- 1) The Employer had sufficient cause for the discharge given the Employee was consistently failing to meet reasonable standards and expectations, and appeared unable and/or unwilling to recognize the problem and -to improve his performance.
- 2) The Employee's performance deficiencies that lead to his discharge were clearly documented.
- 3) Submitted an Award that supported the Employer allegation that a combination of a series of minor offenses combined with a negative attitude toward improvement can constitute sufficient basis for discharge.
- 4) The Employee's long period of service includes a consistent pattern of job performance problems, and ought not to mitigate the discharge.
- 5) The Employee can be characterized as a "freelancer" who has consistently failed to meet job performance expectations and to accept responsibility for that behavior.
- 6) The discharge was not discriminatory given his level in the non-punitive disciplinary procedure and his pattern of chronic performance problems.
- 7) The Agreement supports the Employer's right to schedule and direct the workforce, to determine staffing levels, etc., and the Employee's refusal to acknowledge such and acted solely upon his own experience and choices.

8) The Employer has consistently and unsuccessfully attempted to modify the Employee's behavior through numerous coaching and counseling sessions and progressive discipline. However, the Employee's behavior did not change, and such non-compliance cannot be tolerated at the worksite.

9) Requested the Chairman find the discharge was for sufficient cause, and to deny the grievance of the Union in its entirety.

THE UNION

- 1) The Employer had less than sufficient cause for the discharge of a twenty-six (26) year employee.
- 2) The Employer has unfairly placed the Employee in the "spot light", and his attendance and performance had improved.
- 3) The alleged violation of failure to pick up FOD was "trivial" as compared to his prior actions and violations.
- 4) The Employee readily admitted his error in the November 1991 incident, and there was no disservice to customers or customer complaints. The Employee performs his job, but the Employer apparently dislikes his methods.
- 5) The Parties versions of the January 1992 incident vary, but the Record indicates flights were not delayed and customers were not inconvenienced.
- 6) The February 22, 1992 incident was the result of confusion relative to a scheduled gate change, and a personality conflict with his Supervisor.

- 7) The February 27, 1992 incident was the result of discriminatory treatment by a Supervisor who singled him out for the trivial clean up assignment just prior to the departure of a scheduled flight.
- 8) The 1991 incident that caused the Employee to be placed at Level 4 caused major customer inconvenience, but he was only one (1) of the many employees responsible.
- 9) The Employer developed an attitude the Employee's job performance was always less than adequate and such caused them to focus upon his behavior.
- 10) Presented other Awards that sustain its contention the Employee's extensive seniority ought to function to mitigate the discharge and result in reinstatement as requested.
- 11) Requested the Chairman sustain the grievance and direct the Employee be reinstated and made whole.

OPINION AND AWARD

On the basis of the considered evaluation of all documents, testimony, and arguments presented by the Parties, the decision of the System Board is to deny the grievance of the Union. The basic reasons for the Award are the following:

- 1) Initially, the Chairman can readily empathize with the mutual concerns and apparent frustration inherent in the disparate positions of both Parties when confronted with the emotion-laden dilemma of discharge of a long-service employee for a series of well-documented job performance problems, where the precipitating incident could be characterized as relatively insignificant in nature, which necessitated adjudication in these proceedings.

Therefore, the Award shall not be interpreted as reflecting upon the integrity of the principals given the behavior of each exhibited at the Hearing could be characterized as an open, reserved,

and sincere attempt to provide convincing argumentation supportive of their positions.

Nevertheless, the Award was predicated upon well documented standards of contract interpretation recognized by both the principals in a dispute and neutrals alike.

2) The Chairman was aware the unique provisions of the Agreement mandate the Chairman function as a singular Arbitrator, and limit his authority to a definitive finding of whether the discharge was for sufficient "just cause." Accordingly, the Chairman is compelled by the Agreement to either sustain the discharge or to reinstate and make him whole.

Therefore, the primary basis for the Award was consideration of the total record and conclusion such clearly constitutes the basis for discharge. The specifics of such conclusion are the following:

A) The Record indicates absence of any significant dispute the Employer's non-punitive disciplinary program has been appropriately and adequately promulgated and implemented. Inherent in that policy is the concept of progressive and/or corrective discipline explicitly and/or implicitly intended to afford the Employee, and other affected employees adequate awareness and/or opportunity to modify his behavior relative to compliance with both the Rules and Employer expectations relative to adequate levels of job performance.

B) There is no dispute the Employee was placed at Level 4 of that disciplinary program in October 1991, such constitutes the level just Prior to discharge, and the Employee was appropriately and completely apprised of such. Simply stated, the Record incontrovertibly indicates the Employee was aware that discharge would result if his performance behavior failed to improve.

C) However, despite such understanding of his "precipitous standing" in that disciplinary program, such that he was "on the verge of discharge", the Employee's consistent pattern of job

performance deficiencies continued and became more repetitive in the period just prior to his discharge. Simply stated, the Record as summarized above clearly documents four (4) separate incidents within a period of six (6) months following his placement in the Level 4 category of discipline. The severity of such performance deficiencies shall be addressed below, but such were clearly direct violations of the identical Rule 38 cited by the Employer in previous discussions, counseling and admonitions for improvement in job performance provided the Employee pursuant to the provisions of the non-punitive disciplinary procedure.

D) Finally, and most significantly, the Chairman was compelled to conclude the Employee clearly, consistently and apparently intentionally demonstrated a continuing pattern of negative behavior, attitude of non-compliance, and defiance of authority, and/or rules for performance that must be characterized as unacceptable and/or totally intolerable in any workplace. Specifically, such behavior clearly indicates a blatant disregard for the direction of supervision, and the Employer's characterization of his attitude as that of a "freelancer" is totally appropriate. Clearly, any organization could not function where employees individually elect to comply with directives each may feel appropriate and to disregard any others. Further, the consequences of such are clearly enhanced in the well-documented customer service orientation of the industry, and the critical "baggage handling" component associated with the Employee's classification and job. Accordingly, the Chairman was compelled to acknowledge the contentions of both Parties are correct, such that the individual incidents of non-performance/compliance with directives were relatively minor, but the Employer was also justified in perceiving such to be continuation of a chronic pattern of performance deficiencies that "collectively" constitute sufficient cause for discharge. Further, the Employee's behavior in each incident provided the equally compelling rationale for the Employer's conclusion the Employee had no intention of modifying his negative

behavior despite the numerous and consistent efforts to accomplish such by supervisory personnel.

Simply stated, the Employee's alleged rationale for the November 5, 1992 and February 27, 1993 incidents cited was singularly and collectively unacceptable; that is, the Employer had assigned too many employees to a job, essentially suggesting that "new employees" should be assigned such work while "old employees" function as observers. Finally, his determination the directive to "clean up the FOD" was given at the wrong time, that he could continue to sit idle and read a newspaper in a manner that could be incontrovertibly characterized as "flaunting", and/or demonstrating total disregard for a supervisor, shall not be tolerated in any workplace given such clearly constituted a blatant refusal to comply with a direct order for performance.

Accordingly, the Chairman was compelled to reject the central premise of the Union that the "FOD" incident was "trivial." While the immediate consequence may have been significantly less than a failure to assist a flight baggage handling crew, such was totally symbolic of his continuing attitude of non-performance and non-compliance. Simply stated, the Employee continued to act in a manner that explicitly and/or implicitly indicated his consistent and continuing attitude/behavior of electing to perform or not perform his assigned duties on the basis of his determination of their appropriateness in a manner that clearly demonstrated total disregard for both supervision and needs of co-workers; and all such behavior occurred after his placement at Level 4 of the disciplinary process, prior to the "final straw" of the "FOD" directive, and all were deemed violations of the same broad Rule 38 cited above.

3) The Chairman was also compelled to reject the Union's eloquent contentions the Employee had been the "victim" of disparate treatment. Rather, as cited above the Chairman found the discharge was for sufficient cause. Therefore, the Chairman was not compelled to assess the

disparate treatment contention on the basis of an incident-specific assessment of each violation, but a "macro" perspective associated with the acknowledged considerations of industrial "just cause." Such clearly provides that different discipline for a similar offense is commonly sustained by Neutrals when justified on the basis of any unique circumstances of an employees' situation, and such is especially common in matters where the performance problem is "continuous" as compared to a singular incident, as in the instant matter.

Accordingly, the Chairman was aware of the basic principle of dispute resolution as articulated by the often-quoted Arbitrator Whitley McCoy four (4) decades past with compelling applicability to the instant matter that:

The term "discrimination" connotes a distinction in treatment, especially an unfair distinction. The prohibition against discrimination requires like treatment under like circumstances. In the case of offenses the circumstances include the nature of the offense, the degree of fault and the mitigating and aggravating factors. There is no discrimination or no departure from the consistent or uniform treatment of employees, merely because of variations in discipline reasonably appropriate to the variations in circumstances. Two employees may refuse a work assignment. For one it is his first offense, there being no prior warning or misconduct standing against his record. The other has been warned and disciplined for the very same offense on numerous occasions. It cannot be seriously contended that discrimination results if identical penalties are not meted out.

Therefore, while the Chairman was appreciative of the Employee's extended period of employment, that record was deemed significantly less than sufficient to mitigate the sufficiency of "cause", and the Agreement specifically prohibits the Chairman from modifying or "fashioning" some creative or less severe penalty that often may be appropriate. The basis for such conclusion being the following:

A) While the Employee had a long period of employment, his documented performance problems also continued over nearly a decade. Further, such performance deficiencies were both serious and continuous, and given a long period of satisfactory service is beneficial to an

employee in such matters, a long period of problematic and questionable service specifically counters the contention that such earned seniority ought to function to either justify the last incident of gross insubordination, or the numerous prior incidents that had placed him upon the verge of discharge.

B) Similarly, long length of service carries with it the expectation that such senior employees are established and comfortable with the supervisor-employee relationship; that is, the Employee must be assumed to understand the "rules" and to have recognized the essentiality for him to modify his behavior. Such is especially appropriate for the Employee given his prior disciplinary record.

Action such as the "FOD refusal" constitute a blatant and assumedly intentional attempt to "flaunt" that extended period of service that could function to destroy the ability of supervision to function; and was appropriately perceived as critical by the Employer.

C) Finally, the Chairman was less than compelled by the explicit and implicit contention of the Union that long service ought to function as a bar to discharge for cause. Such a finding would essentially grant immunity to such senior employees by releasing them from the employment contract that dictates the mutual rights and obligations of all Parties to make the workplace function effectively. Simply stated, while length of service is a compelling and traditional emotional argument, to vest such employee with immunity would function to encourage any/all similarly long service employees to believe they could commit offenses with impunity, and such is inconsistent with the concept of employee responsibility and/or accountability for his job performance.

4) Finally, the Record indicates the Employee responded in the affirmative to the Chairman's question of the extent to which the Union had afforded full, fair and/or adequate representation throughout the proceeding.

Therefore, on the basis of the analysis and conclusions above, the System Board was compelled to render the Award.

AWARD

It's the decision of the System Board is to deny the grievance of the Employee.