

Denenberg #4

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

ISSUE

Was the discharge of Employee for just cause and, if not, what then shall be the remedy?

REMEDY SOUGHT

Reinstatement of the Employee to his former position with full back pay, benefits and seniority.

BACKGROUND

The dispute between the union and the employer was not resolved during the grievance procedure, and it ultimately came before this system board. A hearing was held on May 3, 1994, during which the parties were afforded an opportunity to present evidence and argument.

Witnesses were sworn.

The 1989-1994 Mechanics' Agreement includes the following provisions:

**ARTICLE X
SENIORITY**

* * *

F. An employee covered by this Agreement shall lose his seniority status and his name shall be removed from the seniority list under the following conditions:

* * *

2. He is discharged for cause.

* * *

ARTICLE XVII DISCIPLINARY ACTION

* * *

B. No employee shall be discharged without a prompt, fair and impartial investigative hearing at which he may be represented and assisted by Union Representatives. An employee will also be entitled to investigative review hearing if he so requests upon being advised of a disciplinary suspension. The hearing will be held before any suspension is served. Prior to the actual hearing the Union and employee will be given copies of any previous disciplinary action letters which are to be considered and the Union will be advised in writing of the precise charges against the employee. The Union and employee will have at least forty-eight (48) hours advance notification of the hearing should they so desire. Nothing herein shall be construed as preventing the Employer from holding an employee out of service pending such investigation.

[Joint Exhibit 11]

This matter concerns the discharge of the Employee. He had been employed in the Aircraft Mechanic classification at Employer's facility with classification seniority of July 30, 1984. On May 14, 1993, he was accused of violating Employer Rule No. 5 and held out of service. The Employer's "Rules of Conduct for Union Represented Employees" [Employer Exhibit 1] provides in part:

Violations of one or more of the following Rules will result in discharge unless mitigating factors are considered applicable:

* * *

5. Actual or attempted:

- a) threatening
- b) assaulting
- c) intimidating Supervisor or other member of management.

The dispute focuses upon the mechanics' break room in Terminal A. The break room is the site of a "coffee club" whose low prices attract not only bargaining unit employees but also supervisors and even employees of subcontractors. The refrigerator in the room is a natural center of attention because it supports a monitor charting flight progress and stands next to the coffee pot. The refrigerator was described by Person 1, Regional Manager of Maintenance Operations, as a "catchall" on which various Employer notices, private messages and other items are posted. Postings on the front and side of the appliance can be conveniently perused while pouring coffee. In the words of Person 2, a long time local union officer, "Just about every

employee at terminal A has access to read everything on the refrigerator because...they have coffee and bagels. There is a constant traffic.

On May 11, 1994, Foreman Person 3 received a phone call at home from Foreman Person 4.

Person 3 said that

Person 4...wanted to advise me he had taken down a newspaper article posted in the mechanics' break room. He made specific reference to my name being on the article in reference to the post office killings. He said he had taken it off the refrigerator and put it in an envelope and put it in my locker for me to see when I returned to work that evening. We talked a little about the fact that neither one of us could believe it...I didn't know the extent of it. I was concerned and basically disappointed or at a loss for words.

He informed Person 1, who was at home on vacation, about Person 4's call, suggesting, "We needed to do something." Person 3 arrived at work at about 10:30 PM and retrieved the article from the locker.

It was a newspaper article carrying the headline "Postal Service Pursues Changes." A sub-headline: "Office Culture Blamed for Violence." The dispatch reported that the postal service was trying to change a "strict management style that may have contributed to employee rampages in which 32 people have died since 1986." The postmaster general was quoted; he termed the agency's management style "very authoritarian." The article also reported that "murder in the workplace is the fastest rising type of homicide." These passages were underlined in black ink, and some portions had also been highlighted with a yellow marker. Scrawled across the clipping were comments, including "Read This Person 3!!! Try and understand it too!!" and "Fuck Person 3 & Person 4." Person 3 described his reaction to the posting:

At that point, there were a lot of emotions, thoughts going through my head. Initially, I was disgusted. I only read a paragraph or two, and I put it down...I would go back and start to read it again. The contents were very upsetting...It took me an hour to read it [entirely], but I finally found it in myself to read the whole article...It basically talked about killing supervisors. I felt intimidated. I felt like someone wanted to hurt me. I felt threatened. I felt like someone was trying to send me a message.

Person 3 was not able to identify the handwriting. Because he was the only maintenance foreman on duty¹ that night, he worked the entire shift and waited until the morning to telephone Person 1 again:

I told Pat...that I had felt threatened and intimidated...Pat basically said...he wanted me to report it to the local police department...Late that morning when I finally decided to leave work...I discovered my car had been vandalized...There was a substance poured all over it. I went back inside and immediately told Person 5, who happened to be there that day in Person 1's office. He is the maintenance manager of Airport 1. It's not uncommon for Person 5 to stop by in Airport 2 for administrative reasons...By the time I got [back] out to the car [the police] were there ...The police asked me what happened. I pointed to the car and showed the Skydrol...Skydrol is a [caustic] hydraulic fluid. . . . They got pretty upset with me when I told them about the newspaper article. The patrolman wanted to know why I hadn't reported it to the Port Authority. I explained it just happened, and that's exactly where I was going when this happened.

Later, detectives took the article, saying that "that they could get some fingerprints and do some handwriting analysis."

Person 3 went home about 2:00 PM and notified his local police department, as instructed by the detectives. Person 1 "told me that he did not want me at work," the Employee said. He did not work his next two normal shifts, May 12-13 and May 13-14. During the time off,

I did a lot of drinking. I called about five security outfits...I was getting estimates...of what it cost to get a security system in my house. Both nights before I could get sleep I had had two-by-fours wedged under the doors. I broke broom sticks in half and wedged them in my windows. By this time my wife wanted to know what's going on...The local police gave me some comfort. There is only one road to get in and out of my development. Normally, you never see a police car...but we saw police cars every two hours until that weekend, which was over 72 hours.

¹ A ramp supervisor normally worked nearby, but Person 3 did not inform him because "I was kind of embarrassed about the situation. Also, I didn't know how to take the thing."

When he returned to work, on May 14, he reported to a different shift, doing administrative duties:

I basically sat at Person 1's desk and talked to as few people as possible. There were a lot of emotions going through my head. I didn't want to talk to anybody.

As Person 3 was preparing to leave for home, at about 3 PM, he recalled, the Employee approached him:

He said he needed talk to me. I immediately brought him in Person 1's office . . . [He] told me that he was the one that wrote on the article...I asked him exactly what did he write. He told me he wrote, "Read this Person 3!!! Try and understand it too!!" Although there seems to be some dispute, I distinctly remember him saying that he was responsible for some of the underlining...I was disappointed in him. I told him it was probably the stupidest thing he's ever done in his life. I made a comment to him—something like you don't realize what you've just put myself and my family through. At that point, I asked him, "Why"? [His answer] was like a half hour of all the things that are wrong with Airport 2 in his view. Regardless of what he's saying, everyone has disagreements with how management should be and how a station should be run. I basically told him that was still no reason to single me out. At that point, I told him there was nothing I could do for him...

After the talk with the Employee, Person 3

went right home to tell my family...I felt relieved. I now knew who was behind this. Not knowing was worse than knowing...I'm not afraid of the Employee...I don't think I'd be comfortable [working with him again]. I thought long and hard about it, and he did something to me. I didn't think I could ever forgive him for it.

Person 1 said he told Person 5 to "go back to Airport 2 and to advise the Employee, due to this threat, he was being removed from service, pending an investigation. [The Employee] was escorted to the parking lot."

The Employee said he decided to reveal himself to Person 3 after learning that the car had been vandalized and the article taken down. The Employee testified that he has known Person 3 for

about nine years-since. He had attended Person 3's wedding. After his conversation with Person 3, the Employee believed that the foreman was

very relieved...I've always prided myself in being honest. If I had created any grief for anyone I'd known as long as I've known him, if in any way I'd caused him and his family to be upset, I was going to make it right, because it was not my intention

When he wrote on the article, he said, he intended it as a personal message to someone he regarded as a contemporary as well as a supervisor: "Since we are the same age...I figured a young person could institute some changes in management and in the style of management." The Employee said that he did not deliver his management critique in person because he and Person 3 were on different shifts and work areas: "You could go months without seeing him. It's difficult to find off-shift foremen. I just never saw him."

Person 1 conducted an Investigative Review Hearing on May 25. According to his testimony before the system board,

I attempted to find out what understanding was reached that the Employee would endorse an article that identified Person 3 in relationship to murder in the workplace. In that hearing, I was attempting to find out if the underlining was the reason for Employee to single out Person 3 in this article. The Employee did talk about some things going on in Airport 2 that, in his opinion, needed to be changed. However, I did not find anything that was not normally identified through proper channels and, if inappropriate, would be corrected. The only explanation that the Employee could give me was that he must have been operating with his emotions rather than his brains. Being I'm a member of management, I fully support the corporate position that the Employer does not condone nor tolerate any individual being threatened for any reason. Due to the impact on a foreman of aircraft maintenance and his family, I elected to remove him from employment.

DISCUSSION

There is little dispute about the significant facts in this dispute. The Employee was discharged after acknowledging that he embellished an article posted on the break room refrigerator with a hand-written exhortation: "Read this Person 3!!! Try and understand it too!!!" The Employer

contends that the message, combined with the subject of the article, amounts to a threat against the foreman, in violation of Employer Rule 5.

Testimony from witnesses on both sides of the table demonstrates that the refrigerator was regarded as a lively forum for self-expression. Person 2, for example, testified that the refrigerator drew more attention than the bulletin boards on which he posted notices pertaining to union and Employer business: "I just wish the membership at large would read my bulletin boards as vividly and actively as they do the material posted on the refrigerator." Although management had at least attempted to keep inflammatory or derogatory material off the refrigerator, there were, in Person 2's words "degrading remarks and out and out profanity from one end of the spectrum to another." It is clear that employees routinely leave messages there as a way of sounding off, and they generally incur no discipline.

The Employer contends that the Employee went beyond the unbuttoned conventions of the coffee club. The contention is valid insofar as superimposing Person 3's name on the article caused the foreman to feel personally threatened. But there is no compelling evidence that the Employee intended such an effect—that he deliberately sought to instill fear in his onetime friend and work mate.

The Employee's characterization of the incident as an impulsive gesture is credible. He was not accused of posting the article; he merely reacted to seeing it on the refrigerator. Therefore, premeditation must be ruled out. Nothing in the record, moreover, refutes the Employee's assertion that when he put his pen to the article the only mark on it was yellow highlighting of the lead paragraph and following sentence (as recreated in Union Exhibit 6). By the time supervisors removed the article, it had been further annotated. A reference to murder in the workplace, among other passages, had been underlined, and the crude epithet ("Fuck Person 3 +

Person 4") added.² These additions, which intensified the ominous quality of the posting, cannot be blamed on the Employee, nor can the Skydrol incident, which magnified the foreman's concern, according to Person 3's testimony.

The Employee's essential blunder was attempting to communicate with the foreman without signing the communication. It was the anonymity that bred a sense of menace. The Employee erred in failing to appreciate the impact of an unsigned message of this sort. Once the writer's identity was known, Person 3 acknowledged, he felt relieved.³ He testified that he was "not afraid of the Employee."

By no means can the Employee's impetuous misstep be compared with the misconduct of the unknown person who was responsible for another refrigerator posting: a reprehensible collage, evoking the lynching of a black supervisor [Union Exhibit 2]. That posting was deliberately constructed to deliver an unmistakable racial threat. Here, in contrast, an article clipped from a general circulation newspaper and posted in the break room, presented the Employee—a passerby—with an opportunity to goad the foreman about his approach to management. The Employee's ill-advised effort to seize the opportunity miscarried; along with other annotators, he caused Person 3 to become concerned about his safety. The Employee was certainly inept, as

² Although Person 3 recalled the Employee saying he was responsible for some of the underlining, no direct evidence of that has been produced. The epithet and underlining were in black ink. Whereas the Employee's message was in blue ink. In all there were traces of four different writing instruments, including marker, on the article.

³ The Employer pointed out that the Employee delayed speaking to Person 3 for one day, which prolonged the anxiety. The Employee explained the delay by noting that Person 3 was not on duty when, on the Employee's first first day back at work after his regular days off, he became aware of the vandalism and the removal of the article. He also said that he did not know Person 3's home phone number. Although he wanted to speak to Person 3 in person, the Employee undoubtedly could have spared the foreman another day of feeling vulnerable. At the same time, since there is no allegation that the Employee was responsible for the car vandalism, not all of the anxiety suffered by the foreman is attributable to the Employee.

Person 3 recognized when he told the Employee it was "the stupidest thing he's ever done in his life." But the record does not establish that creating an aura of physical danger was the Employee's objective. The absence of intent must be deemed a mitigating factor, within the meaning of Rule 5.

Another mitigating factor is the Employee's spontaneous acknowledgement that he wrote the message. It is far from certain that the Employer would have discovered the culprit had he not identified himself voluntarily when he learned of the Skydrol vandalism. Describing his behavior, the Employee said:

I walked into [Person 3's] office and explained I was sorry about his car being vandalized . I also told him, while I did not post the newspaper article, that I did write on it and was referring only to the highlighted portion of the original copy . . . He made the statement that he knew I was not a vindictive or malicious individual and that while he would have to notify his superiors he would do for me what he could . . . I was very upset that he was upset. The last thing I wanted to do was to make him upset. I've known him for a long time. . . .

According to the IRH and Third Step Appeal decisions, the Employee appeared contrite and regretted the anguish he caused Person 3 and his family.

The parties have consistently valued forthright behavior and encouraged employees to take responsibility for their actions. In this instance, the Employee came forward, despite the possibility of job jeopardy; he deserves some credit in the matter of penalty assessment for doing so.

Although the Employer properly refuses to tolerate threats towards supervisors, the evidence in this case fails to establish that the Employee intended to threaten or intimidate the foreman.

Person 3 understandably felt traumatized by the Employee's cryptic attempt to offer management advice, but due weight must be given to the absence of genuine malice, as well as the Employee's contrition and readiness to acknowledge his mistake. In light of these mitigating factors, just

cause is lacking for a penalty as severe as dismissal. By the same token, the turmoil experienced by Person 3 and his family as a result of the Employee's miscalculation relieves the Employer of any obligation to provide the Employee with back pay.

CONCLUSION

For the reasons discussed above, and after considering all arguments and the entire record, the neutral chairman finds that the employer lacked just cause to discharge Employee but did have just cause to impose lesser discipline. As a remedy, he shall be reinstated to his former position with no break in seniority but without back pay or other benefits for the period of his separation from the Employer.

DECISION

The undersigned chairman of the System Board of Adjustment, having been designated in accordance with the collective bargaining agreement entered into by the above-named parties, and having duly heard the proofs and allegations of the parties, awards as follows:

The employer lacked just cause for the discharge of the Employee but did have just cause for a lesser penalty. As a remedy, he shall be reinstated to his former position, with no break in seniority but without back pay and other benefits for the period of his separation from the Employer.