

Fisher #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

The undersigned members of the System Board of Adjustment, having been designated in accordance with the Collective Bargaining Agreement, and having considered the entire record in this case, make the following AWARD:

An unconditional' resignation is not within the scope of the grievance procedures set out in the Collective Bargaining Agreement.

When the Employee was found sleeping on the job, on June 20, 1995, his resignation was activated in accordance with the terms of the Settlement Agreement dated August 4, 1994. His grievance is denied.

The Union and the Employer determined that they could not resolve the grievance of the Employee, and submitted it to the System Board of Adjustment. Pursuant to notice, a hearing was held at the Employer conference room on September 5, 1996. At the hearing, the parties were given the opportunity to present oral and written evidence, to examine and cross-examine witnesses and to make arguments. At the conclusion of the hearing, the Union and the Employer made oral summations of their respective positions. Thereafter, on September 16 a transcript of the proceedings was delivered to the Neutral Chairman.

On June 23, 1995, the Employee submitted an official grievance form in which he requested a special hearing due to the termination of his employment. Four days later, the Employer responded in a letter which states:

Your request for a Special Hearing dated June 23, 1995 is denied based on your voluntary resignation as of June 20, 1995. This resignation was a result of a Settlement Agreement reached between the Employer and the Union on August 4, 1994.

Nevertheless, the matter was processed in accordance with the procedures set out in the Collective Bargaining Agreement.

The Union contends that when the Employee signed the settlement agreement he knew in his own mind that he was never going to jeopardize his job by sleeping. It maintains that he was not sleeping on June 20, 1995. The Union asserts that the Employee has been a good employee for ten years and that he needs his job and its associated benefits. It claims that if Supervisor Person 1 had actually seen him sleeping on June 20 he would have awakened him immediately, and brought charges as he had done on previous occasions. The Union argues that the Employer position on arbitrability is erroneous, because the Employee had not waived his right to have access to the grievance procedure. It points out that there have been other resignations which it did not pursue to arbitration, because the affected employees had waived their right to rely upon the grievance procedure. The Union emphasizes that the "drop dead" letter sent to the Employee on August 5, 1994, was written in a manner which was inconsistent with all the other letters which the Labor Relations Department had issued for similar sleeping incidents.

The Employer contends that under the terms of the 1994 settlement agreement, the Employee expressly agreed to execute an undated letter of resignation with the clear understanding that if he committed another infraction of the same type, namely, sleeping on the job, he would be terminated, and his signed resignation letter would be activated. It argues that his grievance is not subject to arbitration because he had voluntarily resigned. The Employer takes the position that the System Board has no jurisdiction over resignations. While conceding that the cover letter of August 5, 1994, was not the traditional letter written by the Labor Relations Department, it maintains that is not relevant to the issue in this case, because it was the product of the grievance

hearing. The Employer claims that the Employee's disciplinary record shows that sleeping on the job has been an ongoing problem for him. It asserts that the evidence supports Supervisor Person 1's conclusion that he was asleep on June 20, 1995.

BACKGROUND

The Employee began working for Employer at its City 1 base in June, 1985, and he became a Lead Mechanic in October, 1988. In July, 1994, he was discharged for violation of the Rules of Conduct by sleeping on the job. Subsequently, the parties entered into a settlement agreement dated August 4, 1994, which reads as follows:

In full and final settlement of the above referenced grievance, the Employer, the Union and the Employee agree to the following:

1. The Employee, will be reinstated to his former position of Mechanic, Line Maintenance effective August 4, 1994 without back pay.
2. The termination dated July 30, 1994 will be reduced to a five (5) work day suspension, and will remain in the Employee's file for one year from August 4, 1994. The Employee agrees to sign the attached undated letter of resignation, which shall remain in his file for a period of one (1) year from August 4, 1994 regarding further actions of this type.
3. The Employee and the Union agree to withdraw all grievances related to this suspension.
4. This agreement is reached on a non-precedent setting and non-referable basis concerning other employees of the Employer, and shall not constitute evidence of past practice relative to the parties' interpretation or application of the current or any subsequent Collective Bargaining Agreement. In accordance with the non-precedential nature of this settlement, the parties agree that none shall refer to this settlement, or to any of its terms, nor shall they attempt to introduce this settlement, or make reference to it during the course of grievance proceedings, or in any System Board of Arbitration between the parties concerning other employees of the Employer, except to enforce the terms of this settlement or regarding further actions concerning this employee.

Thereafter, on June 20, 1995, at about 2:45, the Employee was observed by Person 1, who was responsible for the third shift maintenance operation, sitting in one of the break rooms with his

eyes closed. After concluding that the Employee was sleeping, Person 1 decided to get another supervisor to confirm his observation. When he returned with Supervisor Person 2, the Employee was walking out another door of the break room.

The Work Rules provide:

Infractions of any rules listed below may lead to disciplinary action or discharge. Such discipline may include warnings (oral/written), suspensions without pay or, in cases of serious violations, dismissal without further warning may result where the facts warrant.

9. Involvement in a deliberate slowdown, work stoppage or any intentional restriction of output, loafing, or sleeping on the job is prohibited.

The record discloses that when the grievance regarding the Employee's discharge in 1994 was resolved by a settlement agreement, the Employee agreed to sign an attached undated letter of resignation, which was to remain in his file for a period of one year "regarding further actions of this type." The resignation letter, which he signed at that time, left a blank space for the effective date. That space was subsequently filled in, and now reads as follows:

Effective June 20, 1995, I voluntarily resign my position with Employer for personal reasons.

On the day following the settlement agreement in 1994, the Employer wrote a cover letter to the Employee, and enclosed with it the settlement agreement and the letter of resignation. That letter listed four items which had been agreed upon. However, neither the letter, nor either of the enclosures, mentioned the word "sleeping." Nevertheless, it is concluded that when the parties referred to "further actions of this type" in the settlement agreement and in the letter of August 5, 1994, they meant sleeping on the job.

The Employer makes no contention that there had been an express or an implied waiver of the grievance procedure. In view of the facts of this particular case, and the documentation which

had accompanied the resignations of other employees, it is necessary to determine whether the Employee was sleeping on the job on June-20, 1995. Obviously, his resignation was conditional. That is why, in the context of the settlement agreement, there has to be a determination as to whether he engaged in "further actions of this type" within a one-year period. That is an issue which is subject to arbitration.

The testimony of the two principals as to what transpired on June 20, 1995, raises a credibility issue. The Union claims that if Person 1 had actually seen the Employee sleeping he would have awakened him, as he had done on previous occasions. The supervisor's testimony as to what had happened about a month previously explained his actions on June 20. He stated that after he had caught three other employees sleeping on the job, and imposed a time off penalty, the discipline was overturned because he did not have another witness. He testified that on June 20 he went to obtain another supervisor, so that there would be supporting testimony from another witness. There is no basis for doubting that testimony.

On the other hand, the Employee had a motive for claiming that he had not been asleep on June 20. In addition, the record discloses that he had received a previous disciplinary action which the parties refer to. On May 26, 1993, he had been observed sleeping in the women's locker room, and was suspended for a period of 30 days, effective May 27, 1993. Person 1 testified that sleeping on the job had been an ongoing problem with the Employee, and that he had discussed it with him on numerous occasions. He added that he believed that the Employee, who also worked as a real estate agent, wasn't getting enough sleep. Person 1 suggested to him that "maybe he ought to change shifts." The Employee conceded that there were occasions when he had nodded at work. His testimony that he wasn't sleeping when Person 1 observed him on June 20 is not persuasive. Person 1 also testified that on the date in question he walked up to the Employee, and

stood there for awhile, and looked in his face without noticing any movement. The Employee's head was leaning back, his mouth was open, his eyes were shut, and he was snoring softly.

In the absence of any evidence that the supervisor had any motive to falsify the testimony, the credibility issue is resolved against the Employee. Therefore, it is found that he was, in fact, sleeping during the third shift on June 20, 1995.

From the record in this case it is apparent that the resignations of other employees have been accompanied by a waiver of any right to resort to the grievance procedure. Such resignations should be considered unconditional. In view of the waiver which accompanies them, they are not within the scope of the grievance procedures set out in the Collective Bargaining Agreement.

The Employee's resignation was of a different type. It was conditional, because he did not waive access to the grievance procedure. His resignation was to become effective in the event that he engaged in "further actions of this type." In view of the finding that the Employee was, in fact, sleeping on job, his conditional resignation became effective on June 20, 1995. Therefore, it is held that his grievance is without merit.