

Zigman #5

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

Introduction

This matter was heard by Louis M. Zigman, Esq., neutral arbitrator, on June 3, 1994. Both parties were given an opportunity to present evidence and to examine witnesses. At the conclusion of the hearing both parties made oral closing argument.

Based on the evidence and contentions of the parties, I issue the following decision and award.

Background and Material Facts

This dispute concerns the termination of the Employee.

The Employee was terminated on June 8, 1992, for purportedly engaging in an assault and battery against another employee. As a result, the Employee was charged with a violation of the house rules, Group II, Item 29 - Physical Aggression or threats to employees or customers.

While the Employee acknowledged that he did touch the employee, Person 1, nevertheless the Employee denied that his touching was anything more than a cursory touch.

According to the employer, the Employee deliberately touched Person 1 in such a way as to hurt her and his intention was to scare her.

Based upon the evidence gathered by the employer, a decision was made to terminate the Employee.

Following his termination the Employee contacted his union and he filed a timely grievance.

Inasmuch as the parties were unable to resolve the dispute, it was referred to the undersigned for arbitration.

Issue

Was the Employee terminated for just cause? If not, what is the appropriate remedy?

Pertinent House Rules

Physical aggression or threats to employees or customers.

Positions of the Parties

Employer's Position

The employer maintained that the Employee was terminated for just cause in that he committed a serious act of misconduct.

In this respect, the employer pointed out that this incident involved two Supply Agents who were working in their area on May 14, 1992.

The employer pointed to the testimony of Person 1 that when she walked by the Employee and smiled at him he apparently became very upset. She immediately felt a pull on her sleeve and as she turned, she saw that the Employee had grabbed her sleeve and was twisting it. As he was twisting her sleeve with his finger rolled inside the material, the Employee pulled Person 1 backwards towards him. She testified that her arm began to hurt and she loudly asked him to stop. At that point, according to Person 1, the Employee told her not to make faces at him and he continued to pull her towards him. Person 1 was frightened and she tried to pull away. Person 1

further testified that as the Employee continued to pull her towards him that she told him to stop pulling because her bra was going to break. The Employee responded by telling her that he didn't care and that he would not stand for "this."

When the Employee finally let Person 1 go, the Employee came forward and shoved her elbow messing up the work paper that she had been carrying.

The employer pointed out that the Employee's action left a red welt on Person 1's arm and that she was extremely frightened by him.

According to the employer, this type of conduct constituted extremely serious misconduct which justified termination. In this respect the employer noted that the physical aggression is considered as a Group II offense which justifies immediate termination. Moreover, the Employee's conduct was aggravated by the fact that he was a male and Person 1, a female. In addition, according to the employer, there was no justification for this conduct or any basis for concluding that the Employee had been provoked.

While acknowledging that the Employee's description of the incident was much different from Person 1's recollection, nevertheless the employer maintained that even the Employee acknowledged that he did in fact touch Person 1's sleeve; although he testified that he let go immediately.

According to the employer, the Person 1's testimony was corroborated by her friend, Person 2, who testified that the Employee stopped by her home immediately after leaving her shift and that the Employee was crying. Person 2 also testified that the Employee told her that the Employee had pulled her shirt and squeezed her arm really hard and that Person 1 showed her the red welt on her arm.

As further support for the employer's position, the employer pointed to the testimony of one of the shop stewards who recalled that on the following day Person 1 came to see him to ask for his assistance. The steward recalled that Person 1 was emotionally upset and that she related the events that had occurred on the night before.

According to the employer, Person 1's seeking help and reporting of the incident to her shop steward on the following day was additional evidence tending to corroborate her state of mind and the emotional turmoil which the Employee had placed her in.

As further evidence supporting its position that the Employee was aggressive in his conduct to Person 1, the employer pointed to the testimony of several other witnesses who stated that the Employee was, at times, a moody individual, that he periodically would lose his temper at work and that they tried to ignore him and would stay away from him on those occasions.

In view of the foregoing, the employer maintained that the evidence was persuasive; that it supported Person 1's testimony and that the evidence did establish misconduct on the part of the Employee on the evening in question.

While noting that the Employee had significant tenure, nonetheless the employer also pointed out that the Employee had been disciplined for similar conduct in the past, and while he had been terminated once before, the termination was modified to a suspension and his reinstatement was conditioned on the fact that he would never engage in a similar act of aggression again. As such, given the fact that he repeated his misconduct, his long tenure with the Employer could not be used as a basis for mitigating the termination in this case.

For all of these reasons, the employer maintained that the disciplinary action should be sustained and the grievance denied.