Beitner 7

American Arbitration Association

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

EMPLOYER

-and

UNION

OPINION

An arbitration hearing was held in the City A City Hall on June 24, 1980 in accordance with the applicable provisions of the collective bargaining agreement in effect between the parties.

Background:

Grievant PERSON 1 was disciplined with a five-day suspension for an incident that occurred on March 9, 1980. That incident is described in the following letter (Joint #4) from the Employer Manager dated March 14, 1980:

> Dear Mr. Person 1:
>
> Mr. Person 2, Street Maintenance Superintendent, has recommended that you be suspended from work as of 10:30 p.m., March 13, 1980, for a period of five (5) working days, without pay.
>
> The reasons for Mr. Person 2's recommendation are as follows:
>
> 1. On March 9, 1980, at approximately 12:45 a.m., you disrupted a training test session and were directed to leave and go back to the lunch room to wait to be called. You challenged the authority of the supervisor and disregarded his instructions by returning to further disrupt the test session and again challenged the authority of the supervisor, Mr. Person 3.
>
> 2. On March 10, 1980, at approximately 6:10 a.m., you refused to obey the repeated orders of Mr. Person 4, supervisor, to wash truck #6934. You

> also verbally abused the supervisor by saying, "Don't fuck with me, John;" and "I am telling you, John, don't fuck with me you're too old."
>
> Your conduct in these incidents constitute violations of Section II, Rule No. 8, and Section II, Rule No. 19, of the Employer Rules and Regulations.
>
> You are hereby notified that I concur in the above mentioned recommendation and you are suspended from work, without pay, for a period of five (5) working days, commencing at the aforementioned time. Therefore, you will report back to work at 10:30 p.m. on March 20, 1980.
>
> Should there be any further incidents of this nature, you will be discharged from the employ of the Employer.
>
> Sincerely,
>
> s/Person 5 Employer Manager
>
> [Corrections in times and dates in the above letter were made by letter dated March 19, 1980. These corrections are incorporated in the above.]

With regard to the incident of March 9, 1980 PERSON 3, a Foreperson, testified that he was in the process of giving the driving portion of an examination for forklift operator at or about 12:45 a. m. The applicants, including the Grievant, had just finished taking a written examination in the lunchroom and had been given a fifteen minute break. During this break PERSON 3 was giving one of the applicants a driving examination. This applicant had a small accident when his forklift got caught, and the other applicants in the area began heckling him. PERSON 3 told them to go back to the lunchroom and wait to be called. According to PERSON 3, the Grievant challenged him, saying "You are not my foreman; you can't tell me what to do." Another person in the crowd said something to the effect, "But I am your foreman, and I can tell you what to do. I am telling you to go back to work."

Later, according to PERSON 3, the Grievant came back into the area with two people and again insisted that the Foreperson had no business telling him where to go because he was on a break and this was his work area. The Grievant went through the garage.

The Grievant, PERSON 1, testified that he had completed taking the written part of the examination and was on a fifteen minute break. The area of the practical driving test for the forklift operator was in the area where he worked, and it was customary to take breaks in the work area. He did hear Foreperson PERSON 3 tell him to go back but denied challenging PERSON 3's authority. He testified that he started to go back but remembered he had a candy bar in his car and walked through the garage to get it. When he walked back, he denied having any words with the foreperson.

PERSON 6, a co-employee of the Grievant, testified that he also took the test in the lunchroom on March 9, 1980. When the applicants were told they were on a fifteen minute break, PERSON 6 got a cup of coffee and went to the work area. He remembers hearing PERSON 3 tell them to go back to the lunchroom, and he started to go back. Then he followed the Grievant through the garage to the car. He, together with another person who was behind the Grievant walking to his car, received a reprimand for this.

Sometime prior to the filing of this grievance, during the winter months, PERSON 3 -- according to the testimony of PERSON 1 -- swore at him. The Grievant was at the time showing somebody how to use a machine when PERSON 3 pushed his hand away and called him a 'fucker.' The Grievant went to the office and made out an incident report against PERSON 3.

PERSON 4, another Street Maintenance Foreperson and an employee of the Employer for the past 25 years, was working during the March 10th incident. He testified that at about 6:10 a. m. he told another employee, PERSON 7, to take a truck off the rack and tell the Grievant to put truck #6934 on the rack and wash it. Shortly thereafter, PERSON 4 spoke to the Grievant when he saw he was not washing the car. The shift ends at 7:00 a. m. and the employees are granted a fifteen minute personal wash-up period prior to the end of the shift. In addition, it takes five or ten minutes to clean up the work area. According to PERSON 4, it takes about 45 minutes to do a good job washing a vehicle. PERSON 4 also testified that if there was not sufficient time to complete the washing of the car, the second shift would complete that job.

According to PERSON 4, he ordered the Grievant to wash the car. The Grievant replied that he did not have the key, that PERSON 7 had given him the key, but that he had placed it on the ledge where keys were kept, which was about 300 feet away from the wash rack. PERSON 4 stated he said, "I am giving you a direct order to wash the car," and the Grievant replied, "Don't fuck with me, John. I'm telling you, John, don't fuck with me. You're too old." PERSON 4 looked on the ledge for the key but could not find it. He then went into the office to pick up a master key and advised his supervisor, PERSON 8, of the incident. PERSON 8 told- PERSON 4 to give the Grievant the key and, if he still ref used to wash the car, to send him to the office for discipline. PERSON 4 testified that he went back and gave the key to the Grievant, but when the Grievant refused it, he gave the key to PERSON 7, telling him to move the vehicle. He then told the Grievant to come into the office.

PERSON 7, was in the immediate area at the time of the incident, but when asked by PERSON 8 what had happened, he stated he did not hear anything. He testified at the hearing that he was a probationary employee at that time and did not want to get involved in the dispute. According to his testimony at the hearing, he told the Grievant that PERSON 4 wanted the truck put up, and the Grievant said there was not time to wash the vehicle. He had given the Grievant the key and testified that he saw him turn off the air hose -- which is what one would do to leave the area -- in the process of going toward the ledge. While he saw the Grievant shut down the hose, he did not actually see him go to the ledge and return the key.

Later PERSON 7 heard a conversation between PERSON 4 and the Grievant in which PERSON 4 was telling the Grievant to wash the truck and the Grievant was answering that he had no key. He saw the Foreperson return from Supervisor PERSON 8's office, walk toward him, and give him the key ring, and then turn toward the Grievant and tell him to go to the office. He did not see PERSON 4 attempt to give the key to the Grievant, but rather observed the Foreperson coming toward him (PERSON 7) with the key.

Grievant PERSON 1 acknowledged that he was given the key by PERSON 7 to move the vehicle and wash it but stated there was no time to do it. He said he took the key and put it on the ledge. PERSON 4 came up to him, saying "Get the truck up." The Grievant answered that there would not be time to wash the truck. The Foreperson's response was, "Wash the truck" PERSON 1 then stated that he needed a key: he had placed the key on the ledge. PERSON 4 went to the ledge to get the key, according to the Grievant, but came back without it and continued to tell him to put the truck on the rack.

It was at this time that the Grievant acknowledged saying to PERSON 4, "Don't fuck with me. I'm telling you, don't fuck with me. You're too old." The Grievant stated that he did not go to the ledge to get the key because PERSON 4 went over to get it. When PERSON 4 returned from the office with the master key, he went directly to PERSON 7, gave him the key, and told the Grievant to go to the office to see PERSON 8.

Foreperson PERSON 4 had once received a suspension for sleeping on the job: the incident of sleeping had been reported to the Company by the Grievant, PERSON 1. PERSON 9, Labor Relations Supervisor, testified that he reviewed the disciplinary records for the Employer and compiled a list (Employer #8) of other employees who had received identical five-day suspensions for a violation of Section II, Rule 19: "Disregarding or refusing to obey an order, either written or verbal, from a foreman, supervisor, or other appropriately identified Management personnel." This exhibit lists nine employees who received a five-day suspension from October 11, 1976 through June 20, 1978.

On December 6, 1978 the Grievant had been involved in an accident with his truck at a time when no supervisory employee was present. He subsequently reported the accident to two supervisors in the course of his shift. Either on that shift or the following night he was advised that his supervisor wished to discuss the accident with him the next morning. He refused to attend the meeting without his steward being present because he believed that the meeting was disciplinary in nature. When he received a five-day suspension for refusing to follow an order, he appealed that suspension through the grievance procedure. Although it was concluded by the arbitrator that he had violated

work rule 19, it was determined that there were mitigating factors which persuaded the arbitrator to reduce the penalty to a written reprimand.

Contract Provisions:

Article IV. Management Rights:

Section 1. Except as otherwise specifically provided in this Agreement, the Management of the Employer and the direction of the work force, including but not limited to the right to hire, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish positions, the right to make rules and regulations governing conduct and safety, the right to determine schedules of work, the right to subcontract work (when it is not feasible or economical for the Employer employees to perform such work), together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management. Management, in exercising these functions, will not discriminate against any employee because of his or her membership in the Union.

Article IX. Grievance Procedure:

Section 3. Step 4. B. Arbitration:

(In Pertinent Part)

(b). . . The power of the arbitrator shall be limited to the interpretation and application of the express terms of this Agreement and he shall have no power to alter, add to, subtract from or otherwise modify the terms of this Agreement as written.

(c). The fee and expenses of the arbitrator shall be paid by the party which loses the appeal to arbitration except as the arbitrator directs otherwise. Each party shall fully bear its costs regarding witnesses and any other persons it requests to attend the arbitration.

Employer - Employer Rules and Regulations: (In Pertinent Part)

The purpose of these Rules and Regulations is not to restrict the rights of anyone, but to define them and to protect the rights of all and to insure cooperation.

All Employees Shall Abide By The Following Requirements. Failure To Do So Shall Result In Disciplinary Action.

Committing any of the following violations will be sufficient grounds for disciplinary action, up to and including discharge, depending upon the seriousness of the offense in the judgment of Management.

8. Using abusive language, threatening, intimidating, coercing and/or fighting with employees, Management or the general public.

19. Disregarding or refusing to obey an order, either written or verbal, from a foreman, supervisor, or other appropriately identified Management personnel.

Employer's Position:

The Employer maintains that it has met its burden of proving that the Grievant was disruptive during the training session, that he refused direct orders and that he used abusive language: The penalty invoked, a five-day suspension, is consistent with other penalties invoked by the Employer for violation of work rule 19: "Disregarding [4]" or refusing to obey an order, either written or verbal, from a foreman, supervisor, or other appropriately identified Management personnel."

Union's Position:

The Union maintains that the Grievant had every right to be in his work area on his break on March 9th and to go to his car to get a candy bar. He did not challenge the supervisor's authority and should not have been disciplined for that. With regard to the incident that occurred on March 10th, the Grievant was ordered to wash the truck when there was not sufficient time to do it and when he did not have the key to drive the vehicle. The Employer has failed to prove that the Foreperson gave him the key and then ordered him to do it. While the Grievant admits using the language complained of, it is not uncommon in the shop to talk in that fashion and is excusable as "shop talk."

Discussion and Decision:

It is undisputed in disciplinary cases that the burden of proof lies with the Employer. The standard of that proof in arbitration cases is generally that of the civil law: a preponderance of the evidence. The rationale underlying this choice is to be found in the fact that an error in fact finding in a criminal case could have a detrimental social effect. Justice Harlan addresses this issue in the matter of Samuel Winship, 25 LEd2d 368, 379 (1970), as follows:

> . . . In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.
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> The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.
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> When one makes such an assessment, the reason for different standards of proof in civil as opposed to criminal litigation becomes apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. A preponderance of the evidence standard therefore seems peculiarly appropriate for, as explained most sensibly, it simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence."

The social disutility in a discipline case such as this is no greater in general if an error is made in favor of one party or the other. The standard, as stated above, is then a

preponderance of the evidence. Put simply, what this means is that one side must present more credible evidence than the other side.

It must then be determined whether the Employer has met its burden of proof with regard to the first incident on March 9, 1980. In cases where there is conflict in testimony, it is necessary for a fact finder to determine the credibility of the witnesses by weighing varying factors: demeanor of the witness, bias or motivation of the witness, the character and consistency (or inconsistency) of the testimony, and the inherent probability of the testimony. This first incident was apparently not viewed by management to be as serious as the March 10th incident. The following facts are undisputed with regard to that March 9th occurrence: 1) The Grievant, with others, had completed the written part of the examination for forklift operator and had been advised that he was on a fifteen minute break; 2) During this break he was in the area where an operator being given a driving test had a minor collision and was heckled by people standing by; 3) PERSON 3, the Foreperson, advised everybody to go back to the lunchroom and wait to be called.

The Grievant denies that he questioned PERSON 3's authority in ordering him back to the lunchroom. His vague testimony with regard to that allegation supports the Foreperson's position, however, that it occurred. While it is true that several people were standing around, it is also true that PERSON 3 knew the Grievant: he had no doubt in his mind that his authority had been challenged. I am also persuaded that when the Grievant returned the second time, he again challenged PERSON 3' authority. He admits that he did not tell PERSON 3 he was going to his car to get a candy bar. It would appear that the Grievant felt that the Foreperson had no authority over him and that, in addition, he

(PERSON 1) was entitled as a matter of right to take his break in his work area regardless of what was taking place. I am not persuaded that he was correct in this perception: although breaks are normally taken in the work area, there is no absolute right of an employee to take his break there, especially when the area is being used for a different purpose. In this case a driving test was being given and the presence of others watching the test had proven to be disruptive.

It is determined that the Employer has met its burden of proof with regard to the allegations made concerning the March 9th incident. It also seems likely that the original heckling was good natured and not malicious and that the Grievant did feel he had a right to be in the area. The Employer, quite correctly, did not view this as a very serious offense because the penalty meted out against the other two participants with the Grievant was only a written reprimand. Were this matter standing alone, the appropriate discipline for the Grievant for the offense would also have been a written reprimand.

Turning now to the second incident, again there are certain facts that are not in dispute: 1) Foreperson PERSON 4 gave PERSON 7 the key to a truck and told PERSON 7 to tell the Grievant to move it on the rack and wash it; 2) The Grievant did not move and wash the truck originally because he felt there was not enough time; 3) When PERSON 4 spoke to him personally, he originally said there was not enough time and then later volunteered the fact that he did not have the key and that he had placed it on the ledge; 4) The Grievant said -¬by his own admission -- to the Foreperson, "Don't fuck with me. I'm telling you, don't fuck with me. You're too old."

What is disputed is whether Foreperson PERSON 3, after obtaining another key, came back to the Grievant and instructed him a second time to wash the car. The

Grievant denies this, stating that the Foreperson gave the key to PERSON 7 and told the Grievant to come to the office to be disciplined. PERSON 7 testified that the Foreperson did give him (PERSON 7) the key. PERSON 7 believed that PERSON 4 had come to him directly and not b the Grievant.

The fact that there may or may not have been time to wash the car has no real significance in this matter. When there is not sufficient time to complete a job, the job is completed by the following shift. It was not for the Grievant to determine that the work could not be performed if he was ordered to do it. If, however, he did not have the key, he could not have completed the assignment.

Frequently, in situations where a supervisor's testimony stands against a Grievant, some consideration is given to the motivations of the parties. Often it is said that the Grievant is the more interested party, having the most to lose, and has, therefore, a greater motivation to slant the testimony than does the supervisor. That is not the case here. The Foreperson, having experienced a suspension f or 'steeping on the job after being turned in by the Grievant, very possibly could have been motivated to discipline the Grievant. There is a real doubt as to whether the order was given again after the Foreperson returned with the key. I am not persuaded that it was, and the Company has failed to meet its burden in that regard. The prior order could not have been carried out if the Grievant did not have the key. His action in not going to get the key is explained by the fact that the Foreperson went over to the ledge himself to get it. PERSON 3 suspected that the Grievant had not put the key on the ledge at all, but rather was secreting it and denying the existence of the key. While this is not impossible, it has not been proven. It

should be borne in mind that all the parties testified under oath and there was no direct testimony of any such occurrence.

Undisputed, however, is the fact that the Grievant said to his supervisor, "Don't fuck with me. I'm telling you, don't fuck with me. You're too old. 'I The Union would minimize this type of talk as being ordinary "shop talk." It is true that in the shop every other word of a conversation can be the word f--k, which is not necessarily in and of itself offensive. It can, however, be used in an offensive fashion. In fact, the Grievant by his own actions and testimony acknowledges that such use of language can be offensive and inappropriate in the job setting. When he was called a f----r by Foreperson PERSON 3, he felt sufficiently aggrieved to make out an incident report. In this case -- the March 10th incident - the phrase was, in addition, threatening: "I'm telling you, don't fuck with me. You're too old" clearly suggests a threat that the Foreperson is too old to take on the young Grievant in a fight. Such conduct is unacceptable, insubordinate, and threatening to a member of supervisory personnel. This clearly demonstrates the fact that under certain circumstances this type of language cannot be tolerated as "shop talk."

It is concluded that what was said to the Foreperson was not innocuous nor was it shop talk. Instead, the statements constituted offensive conduct that has no, place in the work setting and which is specifically barred by work rule #8 listed in Section II of the Employer Rules and Regulations.

Ordinarily, it, would not be appropriate to challenge management's invocation of a five-day suspension. On its face, such a loss of time is not unreasonable. The proof offered by the Employer of the reasonableness of that penalty is that a five day suspension was the penalty in other disciplinary actions in which rule 19 was violated. It

is determined that it has not been proven with regard to the incident of March 10th that rule 19 was violated. It has been determined that the facts alleged in the incident of March 9th have been proven but the Employer itself in that instance assessed that which it considered a reasonable penalty for the other participants to be a written reprimand. I concur in that assessment of the appropriate penalty for that type of offense. It becomes necessary, therefore, for a determination to be made as the appropriate penalty to be applied for the coercive language.

I do not think a five-day suspension is unreasonable for using such threatening language. It would appear, however, that the Employer itself might consider that penalty to be a greater one than what is called for. This assumption is based on the fact that it assessed a five-day suspension for the rule 19 violation coupled with the other two violations of which the supervisor complained. It, therefore, logically follows that the Employer, were it to assess the penalty for this language alone, would have assessed a lesser penalty than a five-day suspension. The penalty of five days is, therefore, reduced to a three-day suspension without pay.

It is further ordered -- neither party having wholly lost -- that the arbitrator's fee and costs be split evenly between the parties in accordance with Article IX, Section 3, Step 4B(c).