

Boyer Jr. #3

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 Issue involves interpretation of the 1989-1994 Agreement given the facts giving rise to the matter are essentially not in dispute.

The Employer operates a large Executive Office facility on a campus-type setting near Airport 1 in State 1. The Employee was hired in 1966 and classified as a Mechanic in 1980 assigned to the Building and Maintenance Department at the Executive Office facility.

During June, 1993 the Employee became the subject of a shift investigation on the basis of an alleged anonymous telephone call for removing Employer property from the facility and transporting and utilizing such at his personal residence. The items involved were individual

carpet squares and several boxes of carpet squares and a vacuum cleaner, with an approximate total value of \$1,200, and at least some of such had been procured from a large garbage dumpster(s) located on the property. At some point the Employee readily admitted taking both individual pieces and boxes of tile and securing parts from several "garbage" vacuum cleaners to build an operable machine.

The crux of the matter is whether the Employee's actions constituted a direct violation of the Rules of Conduct, Rule 1 that provides:

RULES OF CONDUCT

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

1. Unauthorized actual or attempted:
 - a) possession
 - b) removal
 - c) purposeful misplacement of any Employer property including records or confidential or private information, or property of employees or customers.

The Record also indicates the items were located in the Employee's residence, some of the tile had been installed and others were still in the original boxes located in a closet with the vacuum. Further, the Employee admitted not seeking or receiving prior authorization for removal of the items.

The genesis of the dispute is the severity of the Employee's removal of the property given the sharply disparate contentions of both Employer formal policy and the alleged difference in application of such at the facility. The Union contends the property was removed from garbage dumpsters, considered to be "discarded waste", and such was alleged common practice for both bargaining unit and managerial personnel at the facility. The Employer contends the property had considerable value, and the Employee had found a way to maliciously and covertly remove such

without authorization and with full knowledge such actions were in direct violation of both policy and the Work Rule cited. Further, the Record contains a significant amount of testimony supportive of disparate contentions of both positions relative to the unique application of Employer policy at the Executive Office facility.

Subsequent to the Shift Investigation and Investigative Review Hearing, the Employee was discharged on June 24, 1993 with notification in relevant part that:

I conclude that the carpet tiles you removed may not actually have been placed in the dumpster. If they were placed there, I believe it was done with the intention of hiding them so they could be removed in a method that would go unchallenged. If they were not placed there, I believe they were removed directly from wherever they were stored. Either way, they were removed in violation of Employer policy.

8. On the basis of the foregoing I conclude that you are guilty of violating Rule of Conduct No. 1, as charged.

9. The penalty of Level 5 discipline (discharge) is appropriate for the violation.

Consequently, the Union submitted a grievance that provided:

Statement of Grievance

The discharge is not for just cause.

Remedy Requested

The discharge action should be set aside and the Employee 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 and Rules of Conduct.

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 for adjudication.

PERTINENT PROVISIONS OF:

A.) THE AGREEMENT (Excerpts Only)

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.

E. If, as a result of any hearing or appeals therefrom, 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

If the grievance remains unsettled after being processed through Step 3 above, the System General Chairman may request the case be heard by the System Board in compliance with Section 204, Title II of the Railway Labor Act as amended.

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 relates 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 RULES OF CONDUCT (Excerpts Only)

INTRODUCTION

* * * * *

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.

RULES OF CONDUCT

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

1. Unauthorized actual or attempted:
 - a) possession
 - b) removal
 - c) purposeful misplacement of any Employer property including records or confidential or private information, or property of employees or customers.

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 Employee was discharged for sufficient cause as required by the Agreement and Rules of Conduct.

- 2) The Employee admitted removing the Employer's property from the facility without authorization.
- 3) The carpet tiles were allegedly removed from the dumpster located the furthest from the property storage area which negatively reflects upon the Employee's credibility.
- 4) That some portion of the carpet tiles had glue on the back and had been used, so such would have been stored in a different area and would not likely be located in the same dumpster at the same time.
- 5) The Employer is very conservative in discarding such items, and it would be very unlikely to dispose of the items involved given their "new" or reusable condition.
- 6) The Employer believes the Employee transferred the tile to the dumpster for purposes of legitimatizing the removal of the property from the premises.
- 7) The Employee had been employed at the facility for approximately thirteen (13) years, and was well aware that unauthorized removal of property was contrary to the Rules of Conduct. He was also aware of the Rule and of its consequences.
- 8) The Union witnesses were not credible given different circumstances and other discrepancies of their allegations.
- 9) The Employee's motivation for the theft was to upgrade his residence to prepare for its sale.
- 10) Presented prior System Board Awards that supported discharge for unauthorized removal of Employer property including "garbage" items.
- 11) Requested the System Board find the discharge was for sufficient cause and to deny the grievance of the Union.

THE UNION

- 1) The Employer lacked sufficient cause to discharge the Employee who had been employed for twenty-eight (28) years with no prior discipline.
- 2) The Employee admitted taking the tile from the dumpster, while the Employer has provided only circumstantial evidence to conclude he used a covert method for placing such into the refuse container.
- 3) That witnesses consistently indicated it was common practice for employees and non-employees to remove items from the dumpsters, and the Employer cannot contend it was not aware of such occurrences.
- 4) The Employer has a practice of regularly disposing of property during a "general clean-up" activity, and many of such items were often not used and/or of significant value.
- 5) The accepted understanding of Employer policy at the Executive Office facility is that property in the dumpster is no longer Employer property.
- 6) A witness indicated a large amount of tile was discarded during the same period reported by the Employee.
- 7) The Employee was discharged for actions routinely practiced by other employees.
- 8) The Employer was not able to produce a written policy statement that allegedly prohibited the removal of items from the dumpsters.
- 9) There is no proof the Employee removed any property other than that in the dumpster.
- 10) The Employee's actions should not constitute a violation of Rule 1 as applied at the facility.
- 11) Requested the System Board sustain the grievance, and reinstate the Employee and make him whole for all losses.

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 sustain 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 his acknowledged and unauthorized removal of Employer property from garbage dumpsters whereas the Union contends such to be an accepted practice unique to the facility, that 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 is totally cognizant of both the clarity and rationale of/for the Employer's Code of Conduct Rule 1 as cited in detail above that explicitly provides for discharge of any person(s) determined to be in violation. Further, such Rules are not only common to the industry, but essential to protect the interests of all Parties including both potential liability issues and the real potential for coercion in the classification of items as "trash" to be placed in the dumpsters for some coconspirator to then remove for personal utilization, resale or other purpose; and any other combination of individual and/or collective forms of abuse and/or improper action.

Similarly, the Chairman is totally cognizant that he and other Neutrals have consistently ruled in such matters that "Employer property is Employer property" even if in a trash container, and that removal of such shall place any employee in a potential disciplinary situation, and such is typically discharge. Further, such conclusion is typically made regardless of the economic dollar value of the alleged "trash" so as not to create an explicit economic threshold value for any accusation of unauthorized possession.

However, Neutrals and the Chairman have also consistently concluded that any employee is entitled to know the rules applicable to his work situation, and the consequences of violating such, including the expectation of consistent enforcement of both the alleged policy and associated discipline. Such concepts are also inherent in the Rule 1 concept of "...unless mitigating circumstances are considered applicable", and in the instant matter such is the genesis of the dispute as detailed below.

3) A primary basis for the Award was the Chairman's conclusion on the basis of the clear preponderance of the evidence that a practice had developed and been widely acknowledged to sanction bargaining unit and managerial personnel, and perhaps even outside salvage companies, to routinely and consistently remove Employer property that had been placed in or near the trash dumpsters at the time of the discharge. Simply stated, the consistent theme of the Union's witnesses was that such practice had developed at the Executive Office complex that they acknowledge was sharply disparate from the Rule as interpreted and/or applied elsewhere in the system including the nearby Airport 1 facility.

Similarly, it is certainly not uncommon for a corporate executive office center to function with different culture, and operational criteria and priorities than any regional center. Therefore, while

it is clear that such interpretation was never provided in any formal and/or written form to indicate the material(s) were literally classified as "garbage and free for the taking", it was equally clear the Parties, including Union officials were aware of such and accessed the opportunity when appropriate. However, the basis for such a unique policy and/or practice was not clearly defined and shall remain for conjecture.

4) Similarly, the Chairman was compelled to conclude the Employee did indeed remove the discarded materials from the dumpster as acknowledged in his testimony. Further, the consistent and credible testimony of several experienced Building and Maintenance personnel and Union official was the Employer frequently and inexplicably directed the discarding of property of significant value for a variety of reasons including to secure additional storage space, that a large quantity of carpet tile squares and several non-operational vacuum cleaners had been discarded during the approximate time period of the Employee's action(s), and all such materials were routinely placed in or near the dumpsters. Further, the Record indicates it was not uncommon to dispose of "new" materials/supplies such as the carpet squares still in their shipping boxes. Further, the Record did not sustain the explicit and/or implicit contention of the Employer the Employee had covertly removed the disputed property from a location other than the dumpster, or the Employee had "plotted" to place such valuable unused materials in the dumpster for his subsequent removal.

5) Accordingly, the Chairman was compelled to conclude the following: a) that Rule 1 is totally clear and unambiguous, b) the Employee acknowledged removing the individual and boxes of carpet tile from the dumpster(s), c) the Employee admitted "piecing" together parts of several

similarly discarded vacuum cleaners, d) the Employer was not able to produce a policy clarification posting relative to the matter alleged to have been issued during the late 1980's, e) the Rule relative to non-authorized possession of Employer property is known by employees but differentially applied at the Executive Office facility for some combination of operational and/or potential reasons, and f) that both bargaining unit and other personnel apparently routinely access materials from in or near the dumpsters without authorization, and such has been a long standing and consistent practice totally contrary to the specific clarity and/or obvious intent of the Rule. Therefore, the Employee's acknowledged behavior of not seeking "formal" authorization for removal of the items was clearly in violation of the letter of the Rule, but equally not inconsistent with the operational effect and application of that Rule at the Executive Office facility at the time of the discharge and such is reflected in the Award.

6) The Record also indicates the Parties are well aware of the effect of the action and this Award is to notify all potentially affected personnel that the unique practice of routinely securing property from trash dumpsters at the facility is contrary to Rule 1 and has been discontinued. Further, the effect and intent of the Award is to sanction the clarity and applicability of the disputed Rule and its stated consequence, to notify all potentially affected personnel of a change in practice to mandate pre-authorization for such removal, and to reinstate the Employee whose action at the time of the discharge was not adjudged inconsistent with the Rule as interpreted and applied only at the Executive Office facility.

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

The decision of the System Board is to sustain the grievance of the Union. The effect of the Award is to direct that pursuant to the Parties practice and the Agreement, the Employee be returned to employment and made whole net of any other earnings and/or benefits received during the interim, and his record be accordingly.