

**Boyer Jr. #4**

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. Both of the Parties presented testimony under Oath, were afforded full opportunity for examination and cross-examination of witnesses, submitted exhibits in support of their respective positions, and the Hearing was declared closed.

**ISSUE**

Was the Employee discharged for sufficient just cause? If not, what shall be the appropriate remedy?

**BACKGROUND**

The incident occurred at the Employer's facility in City 1, State 1. The Employee was employed as a Ramp Serviceman in September, 1978, and promoted to Lead Ramp Serviceman in July, 1990. In that classification, the Employee was responsible for a crew that delivered food from a large kitchen area to parked aircraft with trucks, and was assigned to the 4:00 P.M. to 12 Midnight shift.

The genesis of the dispute is the Employee's action on May 28, 1993. Approximately two (2) hours prior to the end of his scheduled shift the Employee requested twenty (20) miniature

bottles of liquor (Barcardi Rum) from the Liquor Control Clerk. The Record indicates a difference of opinion as to the Employee's stated intention at the time. The Employee indicated he informed the Liquor Control Clerk of his desire to "borrow the liquor for a party that night"; whereas the Clerk's statement suggests such was a routine catering request "for liquor for an aircraft." Nevertheless, the Liquor Control Clerk issued the liquor as requested, and recorded such on the log sheet as required.

The Employee then placed the liquor in a sack on his desk top until the end of the shift, and the Record indicates he may have offered/given a bottle(s) to a co-worker in the parking lot as he departed. Further, the Record also indicates that such occurred at a time when many employees were planning to attend a retirement party for a co-worker.

Subsequently, in June, 1993, the Liquor Control Clerk's notation was noted as "unusual", and such initiated an investigation. The Employee was routinely questioned by the Supervisor and the Manager - Catering and Manager - Cargo & Ramp Services, and allegedly contended having made the Clerk aware that such had been borrowed for a retirement party that evening, and was not aware of any rule violation. Further, at some point the Employee acknowledged the liquor was for a private party, not the co-worker matter cited above, and reportedly requested the matter be "forgotten." Finally, on June 5, 1993, the Employee returned the same number of miniature liquor bottles to the Liquor Control area.

The Union consistently contended that had the Employee intended to steal the liquor, he had ample opportunity to do so from other sources/locations at the facility, and such liquor is also provided to other airlines at the facility and not controlled and/or otherwise secured during that loading and offloading process; that is, such was readily available at many sources that would preclude the probability of being detected if he had desired to "steal" the product.

Subsequent to the investigation, the Employer issued a Report of Non-Punitive Disciplinary Action that provided for the discharge as follows:

This discipline is for violation of Rule(s) of Conduct No(s): #1 - UNAUTHORIZED POSSESSION OR REMOVAL OR ATTEMPTED POSSESSION OR REMOVAL OF ANY EMPLOYER PROPERTY INCLUDING RECORDS OR CONFIDENTIAL OR PRIVATE INFORMATION, OR PROPERTY OF EMPLOYEES OR CUSTOMERS.

Remarks and details of violation:

On May 28, 1993, you approached the Liquor Clerk and asked him for twenty liquor minis. The reason that you took the minis is that several of the afternoon RSM's on that day had approached you to get them liquor to bring to the retirement party being held that evening for the employee, Person 1. You stated to myself and Person 2 that you took the minis from the liquor room, put them in a bag and put them in your Ramp Lead's office.

At approximately 0015, your punch out time, you proceeded to punch out with minis in hand and leave the flight kitchen and go home. We both asked you if you could produce the minis, but you said they had been all consumed. In fact, on your way out you gave two minis to Person 3, when he asked you what was in the bag. This is a dischargeable offense and you are being held out of service pending an investigative review hearing for violating Rules of Conduct #1.

Consequently, the Union submitted a grievance that constitutes the basis for the dispute that provided:

Statement of Grievance

The Employee was not discharged for just cause.

Remedy Requested

The Employee be reinstated to his former position and made whole.

However, the Employer consistently denied the position and request of the Union on the basis the Employee was discharged for sufficient just cause as required by the Agreement and applicable Rules of Conduct.

Therefore, given the matter was void of any procedural deficiency, such 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

##### **E. 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

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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.

## C) EMPLOYEE CODE OF CONDUCT (Excerpt Only)

### Section 4 THEFT, FRAUD, AND FALSE STATEMENTS

The Employer expressly prohibits any employee at any time from stealing, or otherwise misappropriating any item of property or thing of value, including that of the Employer,

regardless of whether or not such act could result in a criminal proceeding. This prohibition includes unauthorized use of the Employer's communications equipment, computers and related facilities, or other Employer assets, including proprietary information and trade secrets. Employees are also prohibited from misappropriating or benefiting from any Employer business opportunity. All employees are also prohibited from engaging in any scheme to defraud anyone of money, property, services, or other thing of value. Such activities are specifically prohibited by a variety of federal and state statutes. In addition, the Employer prohibits all employees from making false or misleading statements of any kind, either directly or indirectly, to government officials, representatives or their agents. Both the Employer and its employees can be prosecuted for such conduct, fines may be imposed on the Employer and individuals, and individuals may be sentenced to jail terms in addition to fines.

## **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 just cause as required by the Agreement and Rules of Conduct.
- 2) There is no dispute the Employee took the liquor bottles from the Employer's premises, and lacked the authority to take such for his personal use. As a Lead Ramp Serviceman he was aware of the policy and the consequences of violating such was discharge.
- 3) That had the Employee intended only to borrow the liquor, why was such not returned for eight (8) days, and such occurred two (2) days after the investigatory interview?
- 4) The Employee did not reference the intended use at a retirement party until the third investigatory interview.
- 5) The error of the inexperienced Liquor Control Clerk in providing such to the Employee shall not absolve the Employee of his responsibility for the improper action. The Employee's misappropriation has "broken the trust" related to his Lead Ramp Serviceman classification.

- 6) The Record fails to establish any other employee has ever been permitted to borrow liquor for personal use.
- 7) Presented prior Awards that sustained discharge for the "intent to steal" absent any mitigating circumstances.
- 8) Requested the Chairman sustain the discharge and deny the grievance of the Union in its entirety.

#### THE UNION

- 1) The discharge was for less than sufficient just cause, given the Employee had fifteen (15) years of service without any prior discipline.
- 2) The Employee's Lead Ramp Serviceman classification vests him with the authority to operate without constant supervision, and he assumed he had the authority to borrow the liquor.
- 3) The Employee could have easily stolen liquor if he desired, but elected to request such and sign for it with the Liquor Control Clerk.
- 4) The Employer was not able to establish either actual theft or the intent to steal by the Employee.
- 5) The criteria for proving theft must be clear and convincing or beyond a reasonable doubt, not a lesser preponderance of evidence standard. Presented prior Awards that allegedly support such contention.
- 6) That throughout the investigatory process the Employee readily acknowledged having borrowed the liquor, which was subsequently returned.
- 7) Requested the System Board find the Employee was discharged for less than sufficient just cause and to direct the Employee be reinstated and made whole.

## **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 to the limited extent provided. 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 relatively long-service employee assigned to a Lead classification for his acknowledged Oral request and recorded removal of Employer property without required authorization, 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) A primary basis for the Award was the undisputed fact the Employee did act to remove liquor from the Employer's facility for his personal use and without prior authorization, and such incontrovertibly constituted "possession" and/or "removal" as cited in Rule 1 of the Employer Rules of Conduct. Simply stated, the Chairman has concluded the Employee did act to secure the liquor, and either was aware or should be reasonably assumed to have been aware that such action was inappropriate.

Further, the Record is void of any evidence the Employer has either explicitly and/or implicitly sanctioned any employee acting to "borrow" liquor for any personal usage.

Similarly, the Record indicates that removal of food products from the facility has been addressed in written communications to all employees, and the Parties were mutually aware that liquor is considered a more "sensitive" item, subject to the unique supervision of a bargaining unit Liquor Control Clerk, who was later issued a written reprimand for his lack of compliance with alleged proper procedure.

Accordingly, the Chairman was compelled to conclude the Employee's behavior constituted inappropriate removal/misappropriation of the liquor, despite his awareness that such was less than a routine procedure, and such readily constitutes a grievous offense. Simply stated, the Chairman could not accept the explicit and implicit Union contention that "borrowing" of liquor for personal usage is either routine and/or an established practice and/or has ever been previously permitted with or without prior authorization. Clearly such was a highly unusual request and the Employee ought to be assumed to have known such. Similarly, his act of modifying his explanation of its alleged intended usage during the investigatory process functioned to negatively reflect upon his initial credibility and alleged "open" behavior with the Liquor Control Clerk, given such did not occur until the urgency and probable consequences of his behavior were readily apparent, and all such conclusions are reflected in the Award.

3) The Chairman was also compelled to characterize the Employee's behavior as more severe given his Lead classification and knowledge the Liquor Control Clerk on duty was a very inexperienced part-time employee. Simply stated, in that capacity, the Employee should have been aware his actions were inappropriate, or at the very minimum been sensitive to the need to seek clarification and/or authorization from appropriate supervisory personnel. Further, in that Lead capacity the Employee was literally in a position to improperly influence and/or coerce the

inexperienced Liquor Control Clerk with his title and authority it denotes, both formally and informally on the job. Accordingly, the Chairman was compelled to reject the explicit and/or implicit contention of the Union the Employee's "Lead authority" and/or discretionary autonomy was less than clear and such caused him to "believe" the action was acceptable.

Rather, the Lead position vests him with considerable discretionary authority for operational decision-making with minimal supervision premised upon an earned "trust" relationship, and such is especially significant on the evening and/or night shifts. Further, even if such action is not deemed to constitute theft, such incontrovertibly must be characterized as extremely poor judgment in the exercise of that vested authority, And such would preclude his ability to function in that Lead position because of the resultant loss of confidence by applicable supervisory and co-worker personnel.

4) Nevertheless, given the findings above, the Chairman was less than compelled by the Employer contention that the Employee's action/behavior constituted the incontrovertible "intent to Commit theft" that was the basis for the discharge, and such is reflected in the Award.

The Record is highly unique given the Employee openly acted to ostensibly comply with "normal" procedure for receipt of Employer property such as liquor, by literally "signing" such out through the Liquor Control Clerk. However, the extent to which his communicated intent was for its customary and usual usage on a waiting aircraft or for a retirement party was less than clear, but the former appears far more plausible. Nevertheless, such functioned to create a significant and reasonable doubt the Employee intended to steal the liquor. Such conclusion was buttressed by his equally open placement of such on his readily visible and accessible desk, rather than making any covert attempt to disguise and/or hide the liquor prior to his departure

from the premises. However, the extent to which such was simply bravado premised upon his position or casual openness must remain for conjecture. That conclusion is critical to the Award, given the discharge was premised upon the Employee's willful attempt to steal the liquor.

Therefore, while the Chairman was not totally convinced the liquor was being borrowed with intent to be returned, the Employee's totality of conduct both during and after securing the product functioned to buttress his contention.

Accordingly, while clear and/or simply theft of Employer property would constitute a persuasive cause for discharge in the instant or any other workplace, a grievous exercise of extremely poor judgment shall not be characterized as equally sufficient. And in the instant matter the minimal preponderance of the Record compels a conclusion the latter was more characteristic of his behavior; and such is also reflected in the Award.

Therefore, the remedy directed is not an attempt to "split the baby" but is perceived to be responsive to the Employee's grievous abuse of authority, and to acknowledge the reasonable doubt cited and his unblemished prior record of service.

Further, given the time period since the date of the incident and the imposition of a highly significant economic and job-rights penalty, the reinstatement date and directive he be made whole for a brief period was determined appropriate discipline.

However, the Chairman was compelled to reject the explicit and/or implicit contention of the Union the alleged ample opportunity(s) to steal readily available liquor ought to be interpreted to enhance the Employee's credibility. Simply stated, such was determined to be irrelevant and premised upon blatant conjecture. Similarly, such would improperly imply that liquor and other materials for which the Employer has assigned responsibility for to the Employee and/or co-

workers may be routinely stolen by employees because of the lack of supervision and/or control on such shifts, and the Chairman shall not, sanction that contention and/or conclusion.

Also, the Chairman was less than compelled by the effect of the Employee's eventual return of an equivalent product or by his alleged requests to "drop" the matter. Returning of a product or its equivalent after being detected for theft shall not constitute a significant mitigating circumstance, nor is it an atypical action of any employee when accused of theft and faced with the probability of discharge. Similarly, a routine request(s) to "drop" the action could also be characterized as a routine request given his alleged intent to return the products and his extensive service and absence of prior discipline.

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 to a limited extent.

The effect of the Award is to direct the following:

- 1) Within ten (10) days of receipt of the Award the Employer shall offer a conditioned reinstatement to the Employee. The conditions of the reinstatement shall be as follows:

a) The Employee shall be returned as a Ramp Serviceman, and shall not be eligible for the Lead Ramp Serviceman position for a minimum of twelve (12) months commencing with the date of reinstatement.

b) The Employee shall be returned to the same facility/location, but his shift schedule and assignment shall be determined by the Employer in consultation with the Union.

c) The conditioned reinstatement shall be effective the date of the Hearing and the Employee shall be made whole from that date, less any interim earnings and/or public assistance received during the total period since his discharge. Accordingly, the Employee's record shall be modified to include a six (6) month suspension without pay and unpaid leave of absence for the remaining period to his date of reinstatement.

2) Should the Employee elect to accept the conditioned reinstatement, such shall be implemented within fifteen (15) days of his acceptance. However, should the Employee elect to reject such, his record shall be modified to indicate a voluntary resignation effective that date.

3) The Chairman assumes and appreciates the Parties intent to cooperate in implementation of the Award. However, the System Board shall retain jurisdiction to resolve any matters associated with implementation and/or administration of the Award.