Denenberg #2

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

ISSUE

Was the discharge of the Employee just and proper; if not, what then shall be the remedy?

REMEDY SOUGHT

Reinstate the Employee to his former position.

BACKGROUND

The dispute between the union and the employer was not resolved during the grievance procedure, and it ultimately came before this system board. A hearing was held on May 4, 1993, during which the parties were afforded an opportunity to present evidence and argument. Witnesses were sworn.

The 1989-1994 Ramp and Stores Agreement provides:

ARTICLE XIV
SICK LEAVE
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> G. The employees covered by this Agreement and the Union recognize their obligation of being truthful and honest in preventing unnecessary absence or other abuse of either non-occupational or occupational illness or injury leave privileges. No employee shall be reprimanded for the legitimate use of sick and/or injury leave. An employee whose dependability record is unsatisfactory shall be so advised, furnished a copy of his record, and given a reasonable opportunity for improvement before any disciplinary action is taken.

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ARTICLE XVII
DISCIPLINARY ACTION
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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.

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Letter 87-2R
November 25, 1987

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In the application of the Employer's Non-Punitive Disciplinary System, the following features will be included:

1. An Investigative Review Hearing will be conducted prior to issuing a Report of Non-Punitive Discipline at Level 4 and Level 5. Any appeals of such discipline shall be made directly to Step three of the grievance procedure using the rules and time limits which apply to that Step.

2. If an employee has received a Report of Non-Punitive Discipline at Level 4, that discipline shall be reduced to Level 3 after a period of one year (excluding periods while on layoff or leave of absence) without issuance of a Notice of Investigative Review Hearing which results in further disciplinary action.
(Joint Exhibit 1]

This matter involves the termination on February 13, 1992, of day-shift Ramp Serviceman, the

Employee, on the ground that he violated the following Employer rules of conduct:

32. Failure to maintain an acceptable level of dependability. Level 1 to discharge.

* * *

33. Unauthorized absence from work. Level 1 to discharge.

* * *

34. Repeated failure to properly notify the Employer of absence. Level 1 to discharge.
[Employer Exhibit 11

Much of the factual basis for the termination is not in dispute. In its opening statement, the Employer characterized the Employee's record as follows:

In the space of 15 1/2 months' employment, the Employee compiled a record of 23 unauthorized absences from work, 9 days of illness absence on 9 occasions, and 3 occasions late to work, for a total of 35 attendance irregularities. All but 2 of these occurrences took place within a 7 1/2 month period. Furthermore, in 19 of these incidents no contact was received by the Employer, despite repeated direction from Management as to this requirement.

As a result, a series of disciplinary actions had been assessed. The Third Step decision of July 20, 1992, summarized the Employee's record:

Level 2 (10/13/91): Failure to comply with a direct order; Unauthorized absence from work

Level 3 (11/23/91): Poor dependability; Failure to properly notify the Employer of absence

Level 4 (12/06/91): Failure to properly notify the Employer of absence

In an IRH decision of February 12, 1992, the Employee was issued a Level 5. Ramp Service Manager Person 1, who wrote the decision, noted that in the two months separating the Level 4 from the Level 5 the Employee's recorded "three (3) WOP days, one (1) sick and one (1) late. You failed to notify the Employer of your intended absences on all three (3) WOP days" [Employer Exhibit 10, at p. 2].

The Employee's brief period of employment reflects a pattern of unauthorized absence, often on weekends and in conjunction with days off, the Employer asserts.

The union concedes that the Employee's dependability record was deficient in many ways. But it asks the board to take into account the fact that while the Employee was advancing quickly

through the Employer's Non-Punitive Disciplinary System he was struggling to keep his infant daughter safe. In the throes of addiction, the child's mother would unpredictably deposit her on his doorstep or threaten to leave her unattended on the street. Although he was offered help by the Employee Assistance Program, the Employee did not consider the referrals effective since he had no control over the mother, to whom he was never married. Erratic behavior eventually led her to be arrested on charges of theft.

After his termination, the Employee obtained sole custody of his daughter and asserts that he has now brought stability to both their lives. As the custodial parent, he maintains, he can make permanent child care arrangements; if reinstated, he could be both a responsible father and a diligent employee.

The union also argues that the disciplinary progression was defective in the Employee's case because a hearing was never held when the Level 4 was assessed. The union acknowledges that the Employee voluntarily waived the hearing but insists that neither he nor his local committeeman had the authority to waive a contract term. The union maintains that the hearing was skipped only because the Employee unwisely sought to spare himself the embarrassment of disclosing details of his private life.

Under Letter 87-2R of the contract, the union argues, the parties mandated that an Investigative Review Hearing be held prior to a Level 4 in order to ensure that an offending employee would be put on notice firmly that continued substandard performance meant job loss. Before the letter was adopted, the union had observed, employees could be marched out the door with a paper trail alone. In the Employee's case, the union believes, failing to hold an IRH hearing diminished the corrective effect that the disciplinary process should have had and blurred the unmistakable warning that the parties envisioned when they signed Letter 87-2R. Although the union does not

claim a contract violation here, it does argue that the omission of the hearing should be treated as a mitigating factor when considering the penalty.

In the Employer's view, the Employee's domestic troubles, while distressing, do not excuse his behavior or call the discharge into question, especially since he is a short service employee. Although the Employer had no quarrel with the Employee's work per se, it emphasizes that he failed to put his personal house in order in spite of the assistance offered and clear warnings. Committeeman Person 2 and Ramp Service Supervisor Person 3 conducted a joint counseling session with the Employee on October 1, 1991, to underscore the seriousness of his deficiencies and the need for reform. An appointment was made for him to see the EAR. He was also cautioned that although "no discipline was taken now it will be done at the next irregularity" [Employer Exhibit 41. But he continued to be undependable. The waiver of a hearing at Level 4 would not have made a difference, the Employer argues: two days after appearing at the IRH for the Level 5, the Employee was again absent without calling in advance personally, demonstrating that such sessions have little effect on him.[1] Finally, although the Employee did advance through the disciplinary program rather quickly, the Employer maintains that it was, in the words of Arbitrator Sam Kagel, "[the Employee's] conduct, not the Employer's that accounted for this unacceptable record" [A10492-LAX, p. 7]. None of the levels prior to the Level 5 was grieved, the Employer points out.

DISCUSSION

During his relatively brief career with the Employer, the Employee has compiled a dismal dependability record, as even he acknowledges. His absenteeism was excessive, and he often made matters worse by repeatedly failing to notify the Employer properly. Typically, he

[1] The call was received about two hours after his shift began, and it was from someone else.

neglected not only to telephone in advance of a missed shift but to contact the Employer at any time until his next shift. Even if he had to rush out unexpectedly to rescue his daughter, he should have been able to fulfill his minimum responsibility: to telephone the employer at some point about the absence. Supervisors testified that they had to scramble to obtain coverage when he was absent without warning.

Since "no-show, no-call" offenses are particularly egregious, an employee with a record as poor as the Employee's normally would merit discharge. In this instance, however, there are factors that argue for mitigation of the penalty. The record demonstrates that the poor performance was related to an episode of acute distress, in which the Employee's daughter was in the hands of an unstable mother and thus in considerable danger. Most of the Employee's absences occurred during a seven-month period, which suggests that he was overwhelmed by the domestic turmoil. Although he tried being a responsible parent, he lacked insight into the problem, resisting both the referrals of the EAP and, as the custody papers attest, counseling about domestic violence. In rejecting the advice proffered, it is evident, the Employee was in denial; he failed to comprehend the concept of addiction co-dependency and the complex dynamics of family dysfunction.

For that reason, it is all the more regrettable that the Level 4 hearing was omitted. Even though the omission, stemming from embarrassment, resulted from his own request and was sanctioned by a committeeman, it allowed the Employee to ignore the precariousness of his situation until it was too late.[2] The omission plainly violated the spirit of Letter 87-2R, which was to compel the failing employee to confront his job jeopardy in a face-to-face proceeding, rather than relying exclusively on written notices. The letter was added in 1987 to cure a perceived defect in the non-punitive disciplinary program, according to Assistant General Chairman Person 4, who has

[2] The Employer demonstrated that waivers were not uncommon, but the Union contends that in practice many form part of de facto settlements, reducing a discharge to Level 4.

been on the union negotiating team for the last five agreements. He testified that in the original version of the program, adopted in 1982, the only time an employee faced an IRH was just prior to discharge. He recalled:

> Other than that, the levels were given without a lot of talking. It was easier to hand out papers, and that was the end of it. In the initial application of the non-punitive program, some stations put the report in an employee's mailbox without talk.

The union also cited a cogent 1988 memo from Person 5, then a Employer industrial relations manager, explaining the importance of Letter 87-2R. He quoted poet W.H. Auden:

> "We are left alone without day, and the time is short,
> And History to the defeated may say 'Alas!'
> But cannot help or pardon."

> This describes perfectly my reason for writing this letter. Because a defeated someone is going to say "…why wasn't I told?"
>
> * * *
>
> . . . the Union proposal that we agreed to which generated Letter 87-2 simply asked that we treat Level 4's the same as we've been treating Level 5's.
> [Union Exhibit 131

The Employer introduced cases in which personal or health problems were not deemed mitigating factors. Nevertheless, the omission of the contractually significant Level 4 hearing in the context of the Employee's parental crisis sets this case apart and casts doubt on the propriety of the penalty.

The crisis has now receded, owing to the grant of custody. Given the stabilization of his family situation, the union's theory, that the Employee can now conform to Employer attendance standards, is plausible. The union represents that the Employee understands he cannot allow parental responsibilities to interfere with his duty to his employer. Accordingly, a last-chance reinstatement is warranted. It affords a final opportunity for the Employee, with the

encouragement of his union, to demonstrate to the employer's satisfaction that he can maintain acceptable dependability. If poor dependability--especially of the no show, no call variety[3]--persists, the employer will be fully justified in discharging him.

CONCLUSION

For the reasons discussed above, and after considering all arguments and the entire record, the neutral chairman rules as follows:

The Employee shall be reinstated to his former position as a Ramp Serviceman on a last-chance basis, remaining at Level 4 of the disciplinary program. He shall retain his seniority but receive no back pay or retroactive benefits. As a condition of reinstatement, he shall:

1. Maintain acceptable dependability.

2. Submit to evaluation by the Employee Assistance Program and faithfully comply with any course of treatment, counseling or education recommended.

DECISION

The undersigned chairman of the System Board of Adjustment, having been designated in accordance with the collective bargaining agreement entered into by the above-named parties, and having duly heard the proofs and allegations of the parties, awards as follows:

Employee shall be reinstated to his former position as a Ramp Serviceman on a last-chance basis, remaining at Level 4 of the disciplinary program.

[3] The Employer demanded that the Employee telephone personally to warn of impending absence. Although the union objects to this requirement, it is reasonable under the circumstances. According to Supervisor Gary Dyer, the Employee would sometimes say, "Didn't so-and-so call? They were supposed to."

He shall retain his seniority but receive no back pay or retroactive benefits. As a condition of reinstatement, he shall:

1. Maintain acceptable dependability.

2. Submit to evaluation by the Employee Assistance Program and faithfully comply with any course of treatment, counseling or education recommended.