

Densenberg #2

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

ISSUE

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

REMEDY SOUGHT

That the Employee be returned to his position with the Employer and be made whole for all wages and benefits lost as a result of this action.

BACKGROUND

With the neutral chairman sitting alone, the board held a hearing at the union offices on July 14, 1999, during which the parties were afforded an opportunity to present evidence and argument. The witnesses were sworn. The parties presented oral closing arguments. The dispute concerns the discharge of the Employee, a mechanic and shop steward with a classification date of May 9, 1988. The pertinent provision of the Employer's rules of conduct is as follows:

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.

[Joint Exhibit 2]

At the end of the Employee's shift (1430-2300) on Sunday, September 27, 1998, he was found to be in possession of 2 1/2 pounds of Employer property, consisting of five bags of machine nuts and lock washers [Employer Exhibit 21]. The property was discovered in his lunch box as he left the building on the way to his vehicle at about 11 PM. The discovery was made by Person 1, an off duty Team Leader, who testified that he had been alerted by a call to his home about 5:30 PM. The call was from a mechanic:

The mechanic's statement was that the Employee was at his thing again. He was at the computer ordering parts that were not required by ground equipment. He was in the leads' office when the phone call came from stores that a corkscrew for a 747 had been ordered by an employee not on duty all day. The Employee was the only one at the computer at that time. I asked when it was. He said 1430 and that computer was the only computer at the time where you could order parts and that was in front of the leads' office at the garage....The employee also said the order had been cancelled by stores when they questioned our need for it. I then called stores to verify that the part had been ordered and definitely been cancelled.

Person 1 said that he received another call around 6:30 PM

from the same individual, stating he believed that the Employee tried to reorder the same item, a \$350 corkscrew, and that he had been carrying back a small quantity of brown paper bags from the pick up point where parts were normally delivered from stores. I thanked the employee and said I would probably be in later...I tried to determine what the proper action would be, knowing that something may be removed from the garage that shouldn't be. I decided to get in and decide what's going on...I got to the field at approximately 1030. I was debating whether I should go into the building or not. I knew if I went in that if something improper was being done it would stop. I sat out there deciding what the best approach would be. As the time got to 11 PM, which is normal punch out time, I decided to stay in plain view by the time clock and wait for the Employee to see if he was carrying something...I waited until 2300, until employees swiped out...This is an area leading from the building to the driveway to the parking lot....I didn't know. I expected to see Employee carrying something out that he had no business. I thought it would be either the \$350 corkscrew and I had no idea what it would look like at the time and thought possibly the bags he was carrying back from the pickup

point would have aircraft parts that we do not use in the garage....The Employee approached from my left carrying a small metal box. I assumed it was a lunch box. It was the type the military use for ammunition. I asked him if I could look in it. He appeared to be a bit nervous. He walked to a pick up truck next to the building and put it on the hood. He looked uneasy, a little fidgety.

Person 1 wrote the following statement around midnight that night:

At 2300 hours on Sunday, 9-27-98, I was standing outside of hangar 5, next to the service door leading into the tool room. A few minutes later the Employee approached from my left, carrying a small metal box, possibly a lunch box. I stopped the Employee and asked him if I could look in the box. The Employee appeared to be a little nervous, and proceeded to walk over to PI 713, which was parked next to the building, and put the box on the hood of PI 713. I asked the Employee, "Do you want to open it?" And the Employee opened it and picked up what looked like a video tape and some papers. And the Employee said "O.K.?" I noticed some small paper bags at the bottom of the box that appeared to be folded over. I asked the Employee what was in those bags. And the Employee just handed me two of them. I looked inside the first two bags which contained lock washers & machine nuts. I asked the Employee what was in the other bags, and he just handed me three more bags, all with lock washers or nuts.

At this time I asked the Employee to follow me into the main office of ground equipment. I asked the Employee to take a seat, while I proceeded to call ramp service for a team leader to assist in the investigation. I then called Person 2 at home to get Person 3's home phone number. I called Person 3 to inform him of what was happening. Person 3 told me to confiscate the materials, make sure he has a union steward present, state the violation of Rule #1, remove his Employer ID after the investigation, and escort him off the field, informing him that he would be called for his hearing.

I then called Person 4, Tour I union steward, and asked him to represent the Employee. Person 5...team leader, came to the office to assist in the investigation. I then asked the Employee if he had anything to say regarding this incident. The Employee just glared at me for a few moments, and then said "No!" I told the Employee this is a serious violation of Rule # 1, and are you sure you do not want to say anything? Again he stated "No," but he wanted to "talk to his union steward in private." I agreed and Person 5 and I stepped out of the office. After about 10 minutes, Person 4 came out, and asked to talk to me. He stated that I should probably give him a stern talking to, and advised me that being as I did not have a witness when I stopped the Employee, that I would lose the case. I thanked Person 4 for his advice, but told Person 4 I was going to proceed with the investigation.

Person 4 & I stepped back into the office, where the Employee and Person 5 were waiting, and I proceeded to tell the Employee the seriousness of this matter and again asked the Employee if he had anything to say. The Employee just glared at me, and said "No!"

At this point, I asked the Employee for his Employer ID, and informed him that he would be held out of service until his hearing.

Again I had to ask the Employee for his ID, which he then handed his city badge to me. Person 4 and I escorted the Employee to the parking lot, and to his car. While he had his car door opened, I looked inside, and could see no other items visible.

[Employer Exhibit 1]

At the "free draw" area, the Employer permits mechanics to obtain commonly used items without formality, and it does not fault them for stockpiling that material in their tool boxes; but removing the material from the garage amounts to pilferage, a dischargeable offense. The Employee maintains that he did not place the nuts and washers at issue in his lunch box and cannot imagine how they got there—other than to suspect a set up. Sometime prior to the first break, the Employee said, he gathered bags of nuts and washers by the handful from the free draw area as part of a reorganization of his toolbox. He left the bags on top of his tool box, a rollaway model, in order to assist Person 6, a fellow mechanic, and the Employee forgot about the material for the rest of the shift. His lunch box also rested on the toolbox, he testified, but was not under his direct observation throughout the shift. Others might have gained access to the lunch box without the Employee's knowledge.

At the suggestion of an upgrade lead, the Employee said, he ordered out rather than eat the microwaveable sandwiches he had brought from home. He intended to refreeze the sandwiches when he returned home, if they seemed wholesome, or to discard them. He thus had no occasion to look inside the lunch box. He said that he did not notice extra weight as he carried the unopened lunch box, containing the sandwiches and the contraband, to his car that night. He recalled that the end of shift went as follows:

Like I normally do, I put tools away, washed up, swiped out, and proceeded to walk out the door. I was one of the last to walk out the door. Just as I was getting ready to cross the

street I turned around because I heard someone called my name. It was Person 1...He said come here, and I walked over towards him...

The Employee believes that he had been cooperative. When Person 1 asked to see his lunch box, he placed it on the hood of a nearby pickup truck:

I opened it. I picked up a video tape and papers. At that point he said, "What are those?" I recognized the bags, and I said I think they are nuts and bolts....Person 1 reached into box and grabbed the bags and said follow me and proceeded to walk into garage main office, and said have a seat, and I sat down and he proceeded to make phone calls. At one point Person 4 stepped in and seen me sitting there and asked if he was going to be needed. Person 1 said probably later and Person 4 stepped out....Person 1 proceeded to make phone calls. After about almost thirty minutes he finally called Person 4 back in and had him paged....We were waiting for another member of management to come down who had been paged. After a few minutes...a member of management, Person 5, arrived....He then proceeded to explain to them that he stopped me outside the door, looked in the lunch box and found items. He explained Rule One and said it is a dischargeable offense. Then he said he would recommend discharge, pending a hearing. He turned to me and asked if I had anything to say. At that point, I turned to my shop steward and wanted a word in private, and Person 1 complied... [We] stayed inside. They left the office....Person 4 asked, What's going on? Is this some kind of set up?" I said, "I don't know. Person 1 hasn't been there all night. Person 1 comes in and pulls these items out of my lunch box." Person 4 then told me that, suggested that I not say anything till have a chance to review what transpired and what's going on....After Person 4 suggested I not say anything until we work things out or investigate.... Person 4 and Person 1 had a private conversation that I wasn't privy to, and then the investigation resumed. At that point, Person 1 explained what was going to happen that he was going to take my badge, and that I would be notified of the date of the IRH. He then asked me a second time if I had anything to say. I said no. I was at that point acting under advice from Person 4 and they took my badge and escorted me out.

The Employee maintains that the sandwiches, each of which measured four inches by two inches, were still in the lunch box when he opened it for inspection outside. Person 1 testified that he saw no sandwiches. During the subsequent shift investigation, the box was not opened, and no inventory was ever made of the contents other than the Employer property that had been removed.

The union maintains that the shift investigation was deficient, because the Employee was never asked for a written statement, as is customary, nor was he questioned in detail. Instead, he was asked a single, broad question. Omission of a complete inventory of the lunch box deprived the Employee of critical evidence, it believes, since documenting the presence of the sandwiches would have helped to corroborate his assertion that he did not access his lunch box before he left the garage. During the shift investigation, the Employee said, he was confused

because I became aware someone was doing something to me. At that point I was extremely suspicious. I first suspected Person 1 was involved because he came in on his day off. There is no secret that Person 1 and I have a lot of animosity towards each other.

Since the Employer has not named the person who alerted Person 1, the union contends that it has no way of ascertaining the informant's motives or movements on the night in question. The Employer therefore has not proved that the Employee's possession of Employer property was intentional, in the union's view.

DISCUSSION

The core of the union's case is the contention that the Employee cannot be held culpable, because he was unaware that his lunch box contained contraband. It asserts that the nuts and washers were placed in the box by another employee in order to incriminate the Employee, and it regards the anonymous informant, whose identity is known to the Employer, as a likely suspect. The union even suggests that there may have been a plot involving management.

The theory that the Employee was the victim of a setup has palpable weaknesses. To begin with, a plot to incriminate the Employee by placing Employer property in his lunch box would be an ill-conceived scheme, because the Employee could be expected, at some point during the shift, to open the box, retrieve his lunch and spot the material stowed there. Employees who bring food

from home ordinarily do not order out. The phone calls to Person 1 came at 5:30 PM and 6:30 PM, which meant that there were still four and a half hours to go in the shift after the final call. The informant hardly could be sure during those hours that the Employee would decide to order out that day, leave his sandwiches uneaten and refrain from opening the box to get any of the other personal items kept there.

Another defect in the plot theory is that the box was significantly heavier—by 2 1/2 pounds—on the way out than when the Employee entered the facility. If he never accessed the box during the shift, he should have been curious about why it weighed more than when he brought it to work.

Moreover, the Employee's demeanor when the box was opened by Person 1 is not consistent with the union's theory. A person who suddenly realizes that he is the victim of planted evidence is typically flabbergasted and visibly outraged. The Employee was neither. He did not even seem surprised by the discovery, and he declined to make a statement—even a statement disavowing any knowledge of how the contraband got into his lunch box. The union insists that the Employee had a right to remain silent and did so, on the advice of his shop steward, but it is clear that he refused even before the steward arrived.

The Employer's case, however, is marred by serious procedural flaws. The shift investigation, the union points out, "is the very place where the facts of a case are determined," yet in this instance the shift investigation was less rigorous than usual for the Employer. The lunch box was opened outside, at 11 PM, in lighting conditions not described in the record. The complete contents were not put on display or inventoried when union and management representatives were present. At the third step appeal, the sandwiches became pivotal to the decision to uphold the discharge; the decision refers to their asserted absence as the "most damning evidence." Yet, owing to the lack of a complete inventory, the Employer has only Person 1's declaration, at the third step, that he

did not see them. The discrepancies between Person 1 and the Employee on this point are irresolvable, owing to the overly casual handling of potential evidence during the shift investigation by the party that bears the burden of proof.

Securing the Employee's written statement, which typically accompanies each investigation, would have helped to eliminate such uncertainties. The union correctly perceives that the written statement is a "basic component of a shift investigation." As Person 1's testimony made clear, he did not ask probing or detailed questions of the informant. The chair does not impute to the team leader any improper motive but recognizes that an investigation of an alleged Rule One violation, which can end an employee's career with the Employer, must be meticulous.

As a matter of procedural equity, moreover, the union was entitled to a reasonable opportunity to prove its theory of the case by examining the person it considers the likely plotter: the informant. Under normal circumstances, contending that someone else must have secreted Employer property in a lunch box would be regarded as unfocused—and unpersuasive—speculation. The Employee would be held accountable for whatever the box contained. But it is at least conceivable that the informant was in a position to tamper with the lunch box and had a reason to do so. By insulating that potential witness from the union's scrutiny—the union did not even become aware of his existence until the third step appeal—the Employer has given the defense grounds for contending, as it did in summation, that "there is no way for the union to determine if that person has personal animus against Employee, if it was a practical joke, or if that person was acting in concert with the Employer in their effort to fulfill their long standing suspicions."

By insisting on anonymity, the Employer unfairly deprived the Employee of a reasonable opportunity to vindicate himself and to confront the person who set in motion a chain of events that led to the discharge. To be sure, the Employer had a good reason for maintaining secrecy: a

desire to shield the informant from possible retaliation. But the protection has been provided at the Employee's expense. Examination of the informant represented a possible route to exculpation. Closing that route arbitrarily hindered the defense and rendered the proceeding unfair.

CONCLUSION

When a case for a Rule One violation has been properly made, a good record—such as the Employee's ten years without discipline—will not stand in the way of discharge. But because of the procedural deficiencies discussed above, the record fails to demonstrate that the discharge was reasonable, just and proper—the high standard set by the collective bargaining agreement. Accordingly, the Employee is entitled to a remedy that includes reinstatement with full back pay and benefits. It must be understood, however, that this case is distinguished by several unusual factors, including an absent informant whose testimony could be crucial and a substandard shift investigation. The outcome in no way detracts from the validity of the general principle that each employee is responsible for ensuring that he does not remove Employer property.