Gentile #3

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

ISSUE

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

A hearing in the above referred to matter was held on June 3, 1993, before the undersigned who was mutually designated by the Employer and the Union to serve as arbitrator pursuant to the terms of the collective bargaining agreement. The parties had full opportunity to be heard, to present evidence and testimony in support of their respective positions.

BACKGROUND

The Employee was employed by the Employer for fourteen and one half years and enjoyed the job title and hourly rate of pay of a Cabin Serviceman. The Employee's employment relationship with the Employer was terminated on May 24, 1991, resulting from his failure to maintain an acceptable record of dependability. The offense was a violation of Rule No. 32.

The Employee grieved the Employer's determination. The matter was processed through the grievance machinery pursuant to Article XV111 of the collective bargaining-agreement. The parties were unable to resolve the dispute and a demand for arbitration was served upon the Employer by the Union in behalf of the Employee.

The pertinent Articles & Rules of Conduct involved are as follows:

> Article XXI: General and Miscellaneous
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> L. The right to hire; promote; discharge or discipline for cause, and to maintain discipline and efficiency of employees is the sole responsibility of the Employer except that employees will not be discriminated against because of Union membership or activities. In addition, it is understood and agreed that the routes to be flown; the equipment to be used; the location of plants, hangars, facilities, stations and offices; the scheduling of airplanes; the scheduling of overhaul, repair and servicing of equipment; the methods to be followed in the overhaul, repair and servicing of equipment; the methods to be followed in the overhaul, repair and servicing of airplanes are the sole and exclusive function and responsibility of the Employer.
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> Rules of Conduct
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> Rule 32: Failure to maintain an acceptable record of dependability.

EMPLOYER'S POSITION

It is the Employer's contention that the Employee had repeatedly been counseled and progressively warned regarding his unacceptable dependability. The Employee had a history of such difficulties throughout his fourteen and one half years of service with the Employer. The Employer made representations to assist the Employee. The Employee was advised of the Employer's EAP program and encouraged his participation. The Union's assistance was sought and a joint counseling session was held for the Employee's benefit. The Employer instituted its progressive non-punitive discipline policy with the intent of correcting the Employee's continued absences. The Employee was subsequently given a break when he was assessed a Level 4 last chance opportunity to save his job other than the appropriate Level 5 discharge. The Employer contents that there has not been any abuse of discretion by the Employer which would justify overturning the Employer's action in the instant grievance.

UNION'S POSITION

It is the Union's contention that the Employer failed to look at the Employee as a human being. The Employee experienced two recent devastating and dramatic incidents that affected his life. An experience that he couldn't work his way out of and one --that he sought assistance through the EAP program. Today the Employee has turned his life around and should be afforded an opportunity to once again become a productive employee.

DISCUSSION AND OPINION

There is a minimum of disagreement as to the salient facts that gave rise to the instant dispute. In that the Employee had, on varied occasions received discipline pursuant to the agreed to Non Punitive Discipline policy as outlined in Employer Exhibit #2. The Employee, on May 24, 1991, was discharged for violation of Rule 32. The discharged was grieved by the Employee. The matter to be determined is whether the discharge of Employee is just and proper.

The prior disciplinary record of the Employee is not in dispute nor was any of the prior disciplines grieved by the Employee. Therefore this arbitrator need not revisit each prior discipline to determine the appropriateness of the penalties imposed. The absence of the filing of a grievance precludes the airing of the propriety of the Employer's prior determinations. In addition, the Employee's failure to grieve is tantamount to an admission of culpability. The Union conceded the Employee's lack of dependability as espoused in Rule 32. However, the Union contends that extenuating circumstances are present to justify his previous unexplained absences.

The Union alleged that there exist sufficient extenuating and mitigating circumstances to allow this arbitration to asses a lesser the penalty than discharge. The justification of this claim is based

upon what the Union has characterized as the personal and tragic experiences by the Employee. In that, the Employee suffered two devastating episodes affecting his private life; namely the loss of his father and the death of a brother in-law to AIDS.

One can empathize to such personal family losses. However, tragic they may be. Such life experiences generally touch all at one time or another in our lives. If standing alone, one would assess greater weight to these unhappy personal circumstances. However the record does not reflect an absence of other like circumstance. The employment history of his failure of dependency eclipses these unhappy events. Ironically, the issue at hand postdates these personal losses.

When considering a claim of mitigating circumstance, arbitrators must ascertain, if given another chance, will the grievant prospectively correct his unacceptable conduct and become a more productive employee. I fear that this may not be the case as it affects the Employee. The Employee testified that as of recent, he terminated his employment with his last employer because of personal family matters; a continuation of like circumstances that affected his lack of dependency with this Employer. It is quite evident from the Employee's testimony that this unacceptable conduct had indeed extended beyond the severed employment relationship with the Employer.

Arbitrators are reluctant to supplant their judgment upon management in matter of discipline unless extenuating or mitigating circumstances exist, and/or if management had acted in an arbitrary or capricious manner. In the instant grievance, I find no such circumstance. The Employee had amassed varied non punitive disciplines for a number of years. The agreed to Non Punitive Discipline policy had been administered in a fair and equitable manner. The policy had been applied evenhandedly in all instances. The Employee opted not to grieve any of the

disciplines imposed other than his discharge. This arbitrator need not review all the instances of discipline since they are a matter of record. However, what consideration is warranted must be weighed against the fact that the Employee four months prior to his discharge had been assessed a Level 5 discipline and a lesser penalty was imposed predicated upon a last chance disciplinary warning. The direct result of the reduction in the level of discipline assessed put the Employee on notice that his continued employment relationship with the Employer was precarious. This was a last chance warning that he failed to heed.

In Grievance # A 19914 SFO, dated April 21, 1988, Arbitrator Margery Gootnick succinctly addressed this concern.

> "Employee's record of undependability, not the Employer's actions, precipitated the termination. The Chairman finds that Employee was given a more than fair opportunity to improve his dependability record. The Employer was more than patient, including giving him the last chance Level 4. Employee was not terminated until it became clear that there was no reasonable hope that his record would become acceptable. Employee was given an extra opportunity to improve when he was given a second Level 4 on February 5, 1987 as a last chance. Discharge would have been expected after the first Level 4. The second Level 4 was in recognition of the Employee's 21 years of seniority and other mitigating circumstance"

The Union, today, is proposing that this arbitrator consider a second last chance opportunity for the Employee. Unfortunately, this request is absent a compelling argument other than the Employee's fourteen years of service. Lacking a compelling argument to the contrary, an arbitrator is constrained not intrude upon management's right to discipline its work force for cause. In the instant grievance, the absence of any persuasive mitigating argument blended with an employee who has amassed a blemished employment history clearly does not justify an intrusion upon management contractual rights.

The rationalization for the Union's appeal is the tragic loss of the Employee's father and brother in-law. The loss of a family member is indeed an unhappy event, however, the loss of his father and brother in-law had occurred in 1989. The Employee's disciplinary record for the period attributed to by this grievance substantially covered the period of August 1989 up to the Spring of 1991 (Employer Exhibit #10), a period that post dated the demise of the Employee's father and brother in-law.

In the absence of any rational defense, the Employee endeavored to shift his defense from that of being grieved by the Employer to that of experiencing family problems. Other than a general statement that he had a grievance against the Employer the Employee failed to elaborate upon any facts that he believes supported this allegation.

I am not persuaded that cultural upbringing of the Employee prohibited him from conveying personal matters without compromising these alleged cultural restraints. This belated appeal to cultural sensitivities cannot change the fact that, all stages of the grievance proceedings, nary a word was mentioned of the Employee's disheartened experiences other than that of being harassed by his supervisor.

The Employee's demeanor conveyed to this arbitrator that he .was an individual of normal intelligence who was cognizant of how precarious his continued employment was with the Employer. Yet the Employee failed to take corrective steps to alleviate this problem. One must be conscious of the fact that the Employer merely enforces the rules that were jointly agreed to. The Employee’s lack of dependency resulted in his termination, not the Employer.

As in every endeavor, there must be finality to any disciplinary system if it is going to survive as a viable instrument for what it is intended. Clearly, if it is to survive for its intended purpose, it must have integrity and it must be viewed as such by the work force. Employees are comfortable

with a system that they have confidence in and one they believe is fairly, administered and fairly enforced.

In consideration of all the facts, evidence and testimony adduced at the hearing, I find:

AWARD

The discharge of Employee was just and proper. The grievance is denied.