

**Nevins #1**

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

**PRELIMINARY STATEMENT**

David C. Nevins, Arbitrator: This proceeding involves a dispute between the Union and the Employer. A hearing was held before the parties' System Board of Adjustment on September 12, 1995, where both parties participated, presented evidence, and submitted their arguments.

The question to be resolved in this proceeding can be stated as follows:

**ISSUE**

Was the Level 5 discharge under the non-punitive disciplinary procedure given to the Employee, a mechanic, just and proper? If not, what should the remedy be?

**BACKGROUND**

The Employee was a ground mechanic for the Employer, with a seniority date of May 12, 1986, working at Airport 1. He was discharged for events occurring late on the afternoon of January 18, 1995, when he was working on the inside of a recently landed aircraft being readied for another flight. He was and is charged with violating two of the Employer's Rules of Conduct:

Violations of one or more 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.

Violations of one or more of the following Rules will result in disciplinary action, up to and including discharge, depending on the circumstances involved and the employee's record. Discipline will commence at the Level Specified, except that the circumstances of the particular situation or the employee's disciplinary record may warrant a higher level.

23. While on Employer property, on Employer business, or in other work-related circumstances: a) fighting or provoking a fight b) threatening c) coercing d) intimidating e) assaulting other individuals. Level 4 to discharge.

We have, in essence, two versions of what transpired at about 5:30 p.m. First we have the recollection of Person 1, who worked for an outside food caterer and who was responsible for seeing that the aircraft in question had the appropriate food supplies for its next flight. Person 1, having already left a few added food items on the counter in the aircraft's first-class galley, was returning to the first-class galley when she observed, from a side view of him, the Employee standing in the galley, opening a ramekin of mixed nuts he was holding, and beginning to eat the nuts, pouring them into his hand. According to Person 1, she asked him what he was doing, and he replied that someone had told him the aircraft was from an in-coming flight and that he could have some of its food; Person 1 says she told the Employee it was not in-bound and even if it were he had no business taking the food. Person 1 says the Employee then asked if she was going to turn him in, to which she did not respond. She left the aircraft and went into the adjoining jet-way, where she placed a telephone call to her facility to request another ramekin of nuts. The Employee followed Person 1 into the jet-way and, according to her, kept asking her if she was going to turn him in. He was standing only a foot or two away from her during the phone call. Because she felt intimidated by the Employee, who Person 1 recalls as having a clinched fist down at his side, she told her coworker on the phone that she needed the extra nuts

because she had dropped the ramekin (a story she shortly afterward reversed in a second telephone call, when she informed her Employer of her accusation against and feeling of intimidation from the Employee), after which the Employee departed the jet-way.

The Employee says he was in the first-class galley repairing an upper refrigerator compartment, which one of the incoming flight crew had told him was stuck. He says he got up on the counter to make the repair, that when trying to get the door unstuck he fell sideways, where some trays had been placed (by Person 1) with food on them (including the ramekin), that his hand broke through the ramekin's cellophane wrapping, that the nuts spilled over, as well as a couple of trays being jilted, and that he got down and began picking up the nuts, some of which were on the floor, when Person 1 confronted him. He recalls being startled and apologizing for the mess he had made and saying he hoped there would be no problem or trouble about it. The Employee says that Person 1 said nothing to him and left. He recalls he then followed her into the jet-way, where he waited (without making a clinched fist) while she made her telephone call, and when she had completed it he again apologized for the mess.

## **ANALYSIS AND DISCUSSION**

### **I. The Nature of Our Dispute.**

Our dispute is relatively straightforward. The Employer sees the Employee as possessing or removing, or attempting to remove, property belonging to the Employer, the nuts, and then trying to intimidate Person 1 to discourage her from reporting him. While it cannot substantiate the Employee's receiving a copy of its Rules of Conduct, the Employer claims he was given a set. The Union, however, sees the Employee's conduct as being misinterpreted by Person 1; it says

that he was not trying to possess the Employer's nuts and that he did not thereafter act in an intimidating manner toward Person 1. The Union points out that the Employee says he has never seen the Employer's Rules of Conduct and that Employer cannot substantiate that he ever received a set.

## **II. Discussion.**

Resolution of the two charges against the Employee emerges quite naturally from the evidence in our case. First, of course, it is quite obvious that Person 1 had no motive to distort her perceptions of the Employee's conduct or to fabricate her claims against him. Second, her observations of his opening a ramekin of nuts, pouring them into his hand, and beginning to eat them are completely unlikely to have come from a misinterpretation or misperception of his gathering spilled nuts from both the counter and floor and putting them back into a ramekin. In other words, we have virtually no chance that Person 1's charge against the Employee comes from mistake or misperception.

Third, Person 1's account of the events makes far more sense than the Employee's do. She describes the Employee as trying to explain away his conduct (that he was entitled to eat the nuts as part of the aircraft's incoming food), that when she disagreed with him he asked whether she would report him, and then he followed her out into the jet-way when she refused to give him such an assurance. The sequence of behavior all makes sense and is understandable. The Employee, however, says that he was engaged in a repeated effort to apologize to Person 1 for spilling the nuts and that he followed her into the jet-way to continue that apology. While an initial apology for spilling nuts might make some sense, it is difficult to understand why the

Employee would persist in that apology for something as trivial as spilling nuts, particularly in following her into the jet-way to again repeat his apology.

Fourth, the Employee's description of how the nuts were loosened from their cellophane wrapping makes little or no sense. It is difficult to picture how he could have so thoroughly broken through the surrounding cellophane by falling into the wrapped ramekin with one of his hands.<sup>1</sup> Indeed, he made no such claim when first questioned about the incident, shortly after it occurred (when he merely claimed having bumped the ramekin, without even claiming he was up on the counter), by Supervisor Person 2. In fact, if he had broken through the cellophane wrapping, one can only wonder why the wrapping was no longer a part of the package (when the ramekin was brought to Supervisor Person 2 after the incident).

Fifth, the Employee's reason for being present in the first-class galley is also contrary to our evidence. According to the computer list of repairs to perform during the aircraft's ground-time, nothing needed repair in the first-class section or galley. Although the Employee claims a flight crew member orally asked him to repair a stuck refrigerator door in the first-class galley, statements from flight crew members, given to the Employer and made part of the disciplinary process from the very outset, describe that he was asked to repair an upper carrier door in the business-class (connoisseur class), not first-class, and was even shown the door which needed repair. From no one among the flight crew is there any corroborating evidence that the Employee was asked to make a repair in the first-class galley. It must be concluded that he had no legitimate purpose for being in the first-class galley.

The foregoing reasons make clear that the Employee was caught eating, or trying to eat, nuts that were part of the passenger food service, property belonging to the Employer. The evidence

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<sup>1</sup> The ramekin, it should be noted, was placed inside a larger tinfoil tray and around that tray was heavy cellophane wrapping.

against him is strong, convincing, and clear, and his explanations to the contrary cannot be credited. While the evidence of his Rule 1 violation is clear and convincing, however, the evidence surrounding the Employer's second charge, that of intimidation, is much more problematic.

It is agreed, of course, that the Employee followed Person 1 into the jet-way, right after she had told him he was wrong in eating the nuts and after she refused to tell him whether she would report him for it. While we need not approve of his following Person 1, what he did does not necessarily arise to intimidating conduct. That he was probably concerned that Person 1 would report him and that he was probably worried about his job security were she to report him could certainly explain why he followed Person 1 to see what she would do. But such possible concerns on his part, despite being brought upon by his own misconduct, do not necessarily lead to or create intimidating or coercive conduct. That Person 1 interpreted the Employee's ensuing conduct as menacing or intimidating, because she did not know him and did not know what he might do, may be quite understandable, but it does not end our inquiry.

Our evidence, in all fairness, falls short of portraying the Employee as engaging in threatening, coercing, or intimidating conduct. He stood in the jet-way a foot or more from Person 1, in an area used by a number of people, he said nothing threatening to Person 1, he raised no physical gestures toward her (he did not, for example, lean into or toward her), and she describes nothing in his voice or words stating or even implying a threat to her. She says he had one hand in a fist down at his side; he denies it. She also says he had the other hand in his pocket. It could be that Person 1, being understandably concerned and perhaps frightened, might have misperceived the Employee's clinched hand, and even if she accurately recalls the fist down at his side his overall physical demeanor and hand placement does not portray a threat to her.

The rule in question, Rule 23, is aimed at employee conduct, not how another person might perceive that conduct. Something definite, something manifest, something objective from that conduct should exist before we can rule it as threatening, coercing, or intimidating, and the employee in violation of Rule 23. A worried observer, who we might agree felt frightened or intimidated, but who cannot portray the type of conduct we can objectively characterize as coercive, threatening, or intimidating, should not be the lynch pin for conviction under Rule 23. Nonetheless, the Employee clearly breached Rule 1, whose breach calls for discharge unless there are applicable mitigating circumstances. Of course, rules against theft or misappropriation of property, like Rule 1, generally rank in high importance among employment rules, are generally well-known whether published and posted or not, and are understood not just within an employment relationship but in general society. That the Employee has gone to some lengths in trying to camouflage his misappropriation of the nuts shows that he too understood and still understands his misconduct and its seriousness. That he found it so difficult to answer whether he knew it would be wrong for someone to eat the nuts in question, repeatedly avoiding the question posed to him at our arbitration, is further evidence he understood the potential consequences of his conduct, just as was his following Person 1 into the jet-way to see if she would report him, only seconds after the event. Although the Employer cannot come forward with evidence that he was given a copy of the Rules of Conduct (though it is hard to believe he has not seen these Rules while working at three different bases over some 8 years), the Employee can nonetheless be held responsible for knowing he was not entitled to eat the Employer's nuts and not entitled to misappropriate its property. Our evidence shows no mitigating factors in connection with the Employee's misconduct. The evidence shows purposeful, intentional misconduct by the Employee, not some accidental act or mental error on his part.

**AWARD**

The grievance is denied. The Employee's discharge was just and proper.