

Nevins #3

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 on June 4, 1996, where both parties participated, presented evidence, and put forth their arguments.

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

ISSUE

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

BACKGROUND

Our background facts are undisputed. The Employee was hired by the Employer in mid-1987 and, at the time of his discharge, was a Lead Storekeeper in City 1, a very responsible position of authority. On April 29, a Saturday work day for him, the Employee boxed up a battery-operated wall clock for shipment to his mother in City 2 as a Mother's Day present. He used the Powership 3 computer at work, which prints out shipping labels and receipts, and which assigns shipping charges to an appropriate account. In identifying the shipper, the Employee deleted the name of his manager,

Person 1, and substituted his own. The Employee says he set the package aside (apart from the table normally used for shipments) and that he intended to wait until the driver arrived so he could make arrangements, if possible, to personally pay for the shipment. He says that when he returned to the work area around 10 a.m. that morning, he noticed his package was gone, and he then began thinking that someone in his work unit was playing a trick on him, a notion that he says continued for the following days.

On Monday, Person 1 found on his desk the shipping receipts generated by the Employee's use of the computer, with hand-written question marks anonymously drawn toward the names of the Employee and his mother. He then used the Powership 3 (employing both the receipt's tracking number and the shipping date of April 29) to determine that the receipts reflected one of two shipments for that Saturday. (Also that Monday, and it appears on Tuesday as well, the Employee likewise entered the Powership 3 to see if his package had been sent, but he says he could not find any information concerning it, unlike Person 1.) Person 1 took steps with the shipping company to have the package returned, which was done by May 4, Thursday.

After retrieving the Employee's clock that Thursday, Person 1 conducted an investigation with the Employee. Person 1 recalls the Employee immediately identified the clock as his mother's present he was shipping, but when asked how he intended to pay for its shipment the Employee said he was waiting for the bill, that the driver was to let him know the charge. He also indicated he had forgotten to change the account for billing, but when asked he acknowledged he had no account with the shipping company (which is necessary in order to employ third-party billing). Later in the interview the Employee said he had left the package and it had disappeared, and that he had intended to ask the

driver to bill him personally for the shipment. He told Person 1 he had checked the computer on Monday and Tuesday and could find no information about the package being shipped, and he failed to mention the missing package to Person 1 because he forgot.

At that time, the Employee had a Level 1 discipline in his record for absenteeism (though this discipline was due to be removed in three weeks). Person 1 felt he had broken the Employer's Rule 12, a prohibition against unauthorized transportation of goods or materials, a rule calling for discharge "unless mitigating factors are considered applicable." Person 1 proposed discharge for the Employee.

It should be noted that the previous October, Person 1 had received an anonymous accusation that the Employee was shipping personal items without authorization. Person 1 recalls he then questioned the Employee about the hearsay accusation; the Employee ended by denying any such conduct. During their discussion, however, Person 1 recalls the Employee asking what would happen if Person 1's name were removed from the computer-generated shipping label and his own put in. Person 1 says he told him it would have no effect, because the billing account number would still be the Employer's account and the Employer would be charged, and that a person's name is only to identify who shipped the package if a problem arises. Person 1 then reviewed Rule 12 with the Employee and indicated its violation could result in discharge.

After Person 1 had proposed discharge, the Employee participated in an investigative review hearing conducted by Person 2, who imposed discharge on the Employee. He then participated in a third step grievance hearing held by Person 3, who upheld his discharge. His discharge was then duly appealed to this arbitration.

DISCUSSION

I. The Parties Basic Contentions

The contentions are straightforward. The Employer says the grievant violated its Rule 12, he should be discharged for it as no mitigating factors exist, that his claimed lack of dishonest intent is not credible, and that no meaningful disparity in discipline has been shown to defeat his discharge. The Union objects to the discharge, because the Employee never intended for the Employer to pay for his shipment, that a mere mistake occurred, that he could well have been set up by some disgruntled member of his crew, and that his discharge is wholly disparate to the lack of discipline given another employee for similar activity. The Union asks for the Employee's reinstatement with full back pay.

II. Discussion

There seems little purpose to extensively dwell on considerations surrounding the Employee's claim that he did not intend for the Employer to pay for his clock shipment, intending instead to make a direct, personal billing arrangement with the driver. The credibility considerations concerning this claim of innocence have been carefully and thoughtfully addressed by both Person 2 and Person 3. It defies reason and common sense to think that the Employee found his package missing around 10 a.m. (though the shipping records show it was not picked up until 12:03 p.m.); made no effort after that to question any of his co-workers about its disappearance; was then unable to find through the computer that it had been shipped on Saturday, even though Person 1 was able to easily uncover that same information; and continued to say nothing to anyone about his missing package until confronted about it some five days later, even though he had tried

to check for the shipment in the computer on Monday and Tuesday. The Employee surely had to be aware that the Employer's account would be charged for his shipment, since that information is contained in the Powership 3 manual (and he was considered an authority in using that method of shipment). Person 1 had specially explained that billing characteristic to him back in October of 1994 (when he was questioned about an accusation of unauthorized shipping), and since he had no account with the shipping company, there was no way he could personally be charged for the shipment.

The two things pointed to by the Union in his favor cannot be given controlling weight. That he readily admitted when confronted on May 4 that the clock was his is hardly surprising. He could do nothing else (after all, his name was on the shipping label and it was addressed to his mother), unless he wanted to irrevocably appear as a dissembler. That he substituted his name for Person 1's on the labels and receipts might only mean that he wanted to be informed if a shipping problem arose concerning the package, not that he did so in an effort to pay or be financially responsible for the shipment, which he had to have known could not be achieved by putting his own name as the shipper. (Indeed, the Employer later learned of a shipment by the Employee to his daughter, that occurred just a month before, where he had also put his name in as the shipper and it was the Employer's account that was charged for the shipment.) That he did not destroy, the receipts might appear favorable to him, but the circumstances of where the receipts were then found (by whoever put them on Person 1's desk) are really unknown. We should not ignore that the Employee dramatically changed his story of what happened when initially confronted by Person 1, making it first appear he had arranged with the shipping

company driver to be personally billed for the shipment, to eventually claiming he was waiting to make such an arrangement when his package disappeared.¹ The Employee's claims, including his claim to have put the receipts in the proper folder, cannot be simply accepted. (Of course, even if he had put them in the normal folder, the retention of such receipts would not normally lead to investigations regarding the kind of shipments they reflect, and thus their retention does not truly imply the Employee's innocent motives.) The factual circumstances are such, accordingly, to clearly demonstrate that the Employee shipped his package with the intent to have the Employer billed for that shipment. Thus, he intentionally violated Rule 12, and no mitigating factors in his favor have been cited. It was a serious violation, particularly since such misconduct was discussed with him and he was warned about it just six months before and particularly because of his responsible, authoritative lead position. There was no excuse for his purposeful, intentional rule violation, under the circumstances.

A rather strong argument is raised, however, that the Employee was treated disparately to another employee. This other employee had made personal telephone calls during work-time (some 25 hours worth) and charged them to the Employer's account. No discipline was given to this employee, although he was required to reimburse the telephone charges. Ordinarily, such a wide divergence in disciplinary approach for similar offenses could have significance. But, it appears that this other employee escaped discipline by transferring to another work location after he had made his unauthorized calls and before

¹ The Union's suggestion is a good one that one must use care in ascribing significance to an employee's spontaneous verbalizations when confronted in the (potentially intimidating) format of a formal inquiry by a supervisor, as took place on May 4. On the other hand, the Employee's change in explanations concerning the billing for his shipment cannot be assigned to anything like nervousness or confusion: they were blatant, irreconcilable, and evidently purposeful inconsistencies that cannot be explained away as mistaken statements in the context of his interview.

they were discovered, and his new supervisor at the different location would not impose discipline on that person, who he believed was a good employee of very longstanding (30 years employment). Person 1, in City 1, who had uncovered the unauthorized calls, tried and was unable to convince his fellow supervisor, in City 2, to impose discipline.

After careful consideration, it is concluded that this case of unauthorized telephone calls is not sufficiently compelling to our case to vitiate the Employee's discharge on the ground of disparate treatment. For one thing, the offense was different, although the basic ingredient of dishonest self-interest and gain is similar in both instances. More important, however, this other case seems to have fallen through the cracks of a large Employer, where such occurrences are surely not unexpected. We must use care when it comes to disparate treatment arguments, since it is rare that any two cases are exactly identical (which they virtually never are). Disparate treatment becomes most important when it reflects a meaningful divergence in treatment between employees so much so that consistency in their treatment is not apparent, or when it can result in employees being confused about or unable to understand the potential seriousness of certain conduct, or when it reflects supervisory favoritism or disparity based on personalities. One instance of what appears as an odd occurrence, where discipline was escaped through a fortuitous work transfer, does not serve as a sufficient basis for being rightfully concerned that the Employee was treated unfairly or disparately, or exposed to unexpected discipline. In sum, it must be concluded that the Employee intentionally violated Rule 12 and that his discharge was for just cause.

AWARD

The grievance is denied. The Employee's discharge was for just cause.