

Seidenberg #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

Issue:

Did the Employee allegedly file false moving expenses? If so, what should be the appropriate remedy?

Background:

The Employee, a mechanic with a seniority date of 1977, was initially suspended on December 18, 1992, and then terminated on January 14, 1993 for allegedly filing false receipts purportedly covering a non-existent stay at Motel 1 for the period from July 27 to August 1, 1991 and from August 5-7, 1991. These receipts were part of the moving expenses the Employee allegedly incurred as a result of being transferred from City 1 to City 2, State 1. The money involved was \$254.40 for the receipt concerning the July 27-August 1 period and \$127.20 for the August 5-7, 1991 period.

The Employee submitted his Expense Report on August 19, 1991 (Co Ex #1) for his trip claiming expenses of \$1,740.44 for which he had received an Employer advance of \$1,000.00 and was subsequently paid the \$740.44 balance on September 18, 1991.

The present incident was precipitated when an Employer supervisor, Person 1, on November 25, 1992 had received an anonymous telephone call that said that the Employee had filed a false expense account. At a staff meeting on December 9, 1992 Person 1 told Person 2, the Manager of

the Heavy Maintenance Shop, for whom the Employee worked, that a Stock Clerk had been terminated for filing a false expense account and the anonymous call said that the Employee had committed the same offense, but because he was a mechanic he had gotten away with it. Person 2, after this conversation, made a few preliminary inquiries of Motel 1 management and was convinced that the matter had to be pursued and contacted Person 3, the Employer's Security Officer.

Person 3 visited Motel 1 on December 14-15, 1992. He spoke to the then Manager, inspected the registration records and receipts for the period of the Employee's stay and also interviewed the predecessor Manager of the Motel. After his visits, Person 3 told Person 2 that there might be fraud involved and suggested a meeting with the Employee.

On December 16, 1992 such a meeting was held with the Employee, his shop Steward, the Local Union President, Person 4, Person 2 and Person 3. The Employee stated he had no recollection of whether he had stayed at the Motel for the period in question and added he would have to check his records. The Employee conferred with his local union representative and asserted that he would make no further 'statements until he conferred with Person 5, the Assistant General Chairman (Co Ex #7). Manager Person 2 stated he informed the Employee and his representatives that he had until December 17, 1992 to produce the proof that he had stayed at Motel 1 on the days in question. After the Employee had executed a waiver of the contractual five day limit within which the Employer had to progress a claim, the Employer granted an extension until January 15, 1993 (Jt Ex #2).

When the Employee was not able to furnish satisfactory proof of his stay, his December 18, 1992 suspension was converted into a discharge on January 14, 1993.

In the interim during the investigation of the Employee, Person 6, a fellow mechanic who had travelled with the Employee ' from City 1 to City 2, approached Local Union President Person 4, and discussed the filing of a false expense report. Person 4 took the matter up with Person 7, the Director of Heavy Maintenance Shop at City 2. Person 6 then confessed to Person 7 that he had improperly charged expense money for staying at Motel 1 on July 27-28, 1991 when in fact he had slept the night at a trailer that was intended to be used by the Employee and his family when they moved to City 2, and that the Employee filled out the false information on Motel 1 receipts when he gave to Person 6. On January 20, 1993, Security Officer Person 3 obtained an oral and written statement from Person 6 that tied his false receipts to the Employee (Co Ex #4).

On December 24, 1992 the Employer, after Person 6 had reimbursed the Employer for the \$84.50 he had improperly obtained, the Employer agreed not to take any disciplinary action against him. Such action was to be without precedent (Co Ex #12).

In the January 20, 1993 Statement that Person 6 gave Person 3 he stated that the Employee and he had not stayed at the Motel on July 27-28, 1991 because they had, been together those two nights and it was not at the Motel. Subsequently, on September 28, 1993, Person 6 gave the Employee, at the Employee's request, a statement which purported to explain his original written statement which implied that the Employee and he had slept at the same place on July 27-28, 1991, but in fact he did not know where the Employee had slept those two nights, because Person 6 had been drinking all day and due to his condition did not know where the Employee had spent the two nights (Union Ex 11).

On September 29, 1993, Person 6 told Person 2 that the Employee had visited him on the night of September 28, 1993 and they went over the January 20, 1993 statement given to Person 3 and

the Employee called his attention to the statement therein "together on these nights" when in fact he did not know where the Employee had spent these two nights.

In support of its position the Employer relies on Article 2(c) of the collective bargaining agreement which states covered employees shall be governed by the Employer's Rules and Regulations (Jt Ex #1). It cites its posted rules (Co Ex #11) in the Shops, and specifically Rule 31 which states in part that employees may be discharged for misrepresentation to obtain employee benefits.

The Union relies on Article 1(B) of the Collective Bargaining Agreement which provides that there shall be no discrimination against an employee because of union membership or lawful activity.

It adds Paragraph (F) states that the Employer agrees to comply with all applicable state and federal statutes and regulations concerning non discrimination against the Union. The Union cites Article 14(B)(1) and (G) which are the Agreement provisions to protect covered employees who believe that they have been unfairly treated for their Union activities or as Union officers.

Employer's Position

The Employer states that under the applicable Agreement and relevant rules it had cause to dismiss the Employee when he misrepresented his money expenses by submitting receipts for a stay at Motel 1 when he did not stay at this Motel for the days claimed.

The Employer states the objective evidence clearly shows that the Employee misrepresented the information on the receipts he offered to cover his two stays at the Motel. Those receipts purport to cover room numbers of rooms which do not exist. The Motel has only 14 rooms but the receipts purport to be for rooms 15 and 21. Moreover, improper room rates were cited on the

receipts. The rate for a night was \$30.00 per night plus tax, but the Employee claimed \$42.00 per night for the nights from July 27-August 1, 1991 when he stayed alone. He also claimed \$42.50 for the nights of August 5-7, 1991 when he claimed his wife stayed with him. The Employee claimed \$254.40 for the first set of nights and \$127.20 for the second set. The Employee admitted he signed the receipts himself using a fictitious name. It was admitted these receipts are readily available being kept at the front desk and in the bar with no employee supervision over them. The fact that the Employee falsely signed the receipts for himself is strengthened by the fact that he did the same for two nights for Person 6.

The other objective evidence that the Employee did not stay at the Motel is strengthened by the fact that there was no registration card for the Employee and no evidence of any reservation confirmation notice. The Employer asserts the Employee claimed he paid cash for his stay at Motel 1 but he used a credit card for his stay at every other motel on his trip from City 1 to City 2. Nor was there any testimony offered from any motel employee such as a maid, clerk or desk personnel to assert that the Employee stayed at the Motel.

The Employer states that its belief that the Employee falsified his Motel receipts is strengthened by Person 6's testimony at the Arbitration Hearing that the Employee suggested to him to submit receipts for two nights when Person 6 did not stay at the Motel and the Employee filled out the false information on the receipts which he gave to Person 6. At the Arbitration Hearing Person 6 admitted what he did was wrong in submitting the false receipts prepared by the Employee.

The Employer states there is no merit to the defenses proffered by the Employee because they lacked probative weight. The persons who prepared the statements did not testify at the Arbitration Hearing. Moreover, none of these statements indicated that the Employee stayed or slept, or incurred a charge at the Motel on the nights in question.

The Employer states it is significant that there were not registration cards for the Employee.

While it may be a coincidence that there was an absence of registration cards for other guests, the absence of those registration cards is no proof that the Employee stayed at the Motel. The Employer adds the Union failed to show a casual connection between the civil judgment obtained against a former manager of the Motel for failing to perform her duties at the Motel and the inability of the Employee to produce evidence that he stayed at the Motel.

The Employer states it was not guilty of treating Person 6 differently than the Employee. The former voluntarily came forward and acknowledged he had done a wrong act and wanted to make restitution for the money improperly obtained. On the other hand the Employee never admitted he had committed a wrongful act, never offered to make restitution. He admitted his expense report had been returned to him twice to correct certain insufficiencies but he never corrected Motel 1 items. Although he was put on notice that the Employer would question discrepancies, he ignored the opportunity to correct his misrepresentations. The Employer stresses that the Employee's case and Person 6's are materially different. The Employer maintains that the evidence and the testimony pose certain questions that the Arbitration Panel must ask itself such as:

1. Why did Person 2 get a telephone call tipping off the Employer that the Employee had falsified his moving expenses?
2. Why did the Employee choose to stay at a motel that was about 45 minutes from his workplace?
3. Why did the Employee take his wife to a motel which he believed was too "low class" even to invite his friends?

4. Why did he leave his two children with a friend so he could have time alone with his wife at a "low class" motel?
5. Why was it that the Employee and Person 6 slept at the same place every night travelling from City 1 to City 2, including their first night in City 2, but not together on July 27 and 28, 1991? Why did Person 6 stay at the Employee's trailer while the Employee did not?
6. Why did the Employee go to Person 6's home on the eve of the arbitration hearing to obtain another written statement from him?
7. Why would the Employee not know whether his motel room had a telephone or if he made a long distance call when he was 3000 miles from his family on the first set of dates (7/27-8/1/91)?
8. Is the Employee's explanation of how he checked in at the Motel while at the bar, believable?

The Employer asserts it is obvious that the Employee did not stay at Motel 1 on the dates in question. The Employee misrepresented that he did and on the basis of his misrepresentation obtained Employer money. The Employer has properly promulgated a rule that calls for dismissal for misrepresentation of this nature and therefore the Panel should deny the Grievance and uphold the Employee's termination.

Union's Position

The Union asserts that the Employer did not meet its burden of proof to show that the Employee was guilty of wrongdoing by obtaining money fraudulently. The Union asserts that the evidence and testimony the Employer adduced failed to produce the proof that would sustain the discharge

of an employee, especially one with 15 years seniority. The Union emphasizes that unless and until the Employer produces clear and convincing evidence of the Employee's guilt, the Arbitration Panel must rule that the Employee is not guilty. The Union maintains that the Employer had not produced such clear and convincing proof.

The Union asserts that the Employer has been vindictive and punitive in disciplining the Employee because he has been active in union affairs. The Union states that in its opinion that the Employee was unjustly terminated because of his activities as a Representative.

The Union states there is no evidence in the record that would produce registration receipts that would show the Employee registered to stay at the motel for the period in question, because these registration records were not available. Both the Employer's Security Officer and the Employee attempted to secure these receipts in December 1992 but were unsuccessful because these receipts were missing. This is due to the fact that a former manager of the Motel was guilty of theft. The Union alludes to its Exhibit 4 wherein the owner of the Motel states that some registration records were missing. He also stated that motel registrations were made in the restaurant as the Employee testified at the Arbitration Hearing.

The Union states that the Employer wants the Panel to accept this lack of registration records as not being necessary to prove the Employee's guilt. The Union maintains that the Panel must find the Employee innocent in the absence of clear and convincing evidence of guilt. Since the Employer has not produced this evidence at any step of the Grievance procedures, the Panel must sustain the Grievance and rule in favor of the Employee. The Union adds that the Employer has clouded the record with hearsay testimony to cover its failure to meet their burden of proof.

The Union states that Security Officer Person 3 testified that there was a gap in the Motel's registration records and the owner of the Motel filed a statement dated December 21, 1992

asserting that it was possible that the Employee stayed at the Motel in July-August 1991 and that the former restaurant manager who registered him may have pocketed the money and destroyed the registration card (Union Ex #9). The Union also alludes to the judgment that the Motel obtained against this former restaurant manager in May 1992. The Union adds that this judgment in the civil court in State 1, was in the amount of \$1,700 and was rendered by default because the defendant did not appear at the court trial. The judgment was rendered because the former manager failed to pay for food and other restaurant items for which she had agreed to pay (Union Ex #8). It adds that the former employee was sued for money damages rather than criminally prosecuted.

The Union alludes to the Employee's testimony where he admitted he filled out the receipts for Motel 1. It adds that the amounts filled in Motel 1 receipts were below the allowance amount of \$50.00 in the General Manual. It is not uncommon for motels/hotels, taxi cab drivers and restaurants to give blank receipts for the traveler to fill in. The Union asserts that this Motel was a small operation and the Employee found nothing out of the ordinary in completing the receipts. He never denied doing this.

The Employee testified that he arrived in City 2 on July 26, 1991 (a Friday) and checked into Motel 2. He then called Local Union President Person 4. He then went on July 27 out to Motel 1 and partied all day. He checked in and stayed at the Motel until August 1, 1991. He flew back to City 1 on August 2 and returned to City 2 on August 4 late in the evening and stayed with a friend and returned on August 5 to the Motel 1 with his wife where they remained until August 7, 1991. The Employee further testified that his wife and he were interested in permanently settling on the Lake so they used Motel 1 to get a feeling for living on the Lake until they could secure a permanent lodging.

The Employee testified that with the exception of his first night in City 2 all his lodging was at Motel 1 because all the other lake front motels had no vacancies. When he first arrived at this Motel he had partied all day and registered after dark in the restaurant where there were registration forms. He added it was not uncommon to register in the restaurant especially after dark when the motel manager was not available.

The Employee testified that he filled out the receipts in question on August 9, 1991 and not when he checked out because he never received a hotel bill. The bartender told him the room rate was \$42.50 and he paid the bill in cash from his travel advance. His wife was with him but his children remained with friends because his wife and he wanted some time alone.

The Union alluded to room rate data mentioned by Person 3.

That information was never proved to be accurate and had little to do with misrepresentations on the Employee's expense report. It did not prove that the Employee did not stay at the Motel. The Union stresses that the Employee was being questioned in December and January 1992-1993 about an incident that occurred in July and August 1991 and could not remember all the details that occurred.

The Union alludes to the several statements it introduced into the record. It cites the statement of fellow employee Person 8 (Union Ex #1) who stated the Employee had arrived in City 2 the end of July or beginning of August and one evening he went home with the Employee and at the time the Employee was staying at Motel 1. Another statement was from former fellow employee Person 9, dated December 22, 1992 (Union Ex #2) that stated on the evenings of August 5 and 6, 1991 he and his wife had picked up the Employee and his wife around 6:30 PM at Motel 1 and after a boat trip around the Lake and after dinner on August 6, they returned the Employee and his wife around 10:30 PM to the dock of Motel 1 where they were staying.

The Union asserts these two statements provide eye witness proof that the Employee was staying at the Motel. It further stresses that the statement of Person 10 (Union Ex #3), the Employee's trailer landlord, is evidence that the Employee did not occupy the trailer prior to August 8, 1991, Person 10 stated this fact was true since he lived next to the trailer and watched it every day.

The Union maintains that the statement that the Employer obtained from Person 6 on January 20, 1993 (Co Ex #4) was obtained from him under duress because he feared he would lose his job.

The Union adds that the Panel observed Person 6 as he was testifying and can judge for itself that his comprehension of the English language was obviously very limited. His January 20, 1993 statement was written by Security Officer Person 3 and while each line initialed by Person 6, this statement has to be viewed in light of Person 6's limited comprehension of the English language and his fear of being fired. The January 20th, 1993 statement was also obtained without Person 6 having union representation.

The Union states that this Employer granted Person 6 immunity from discipline for the very same offense for which they discharged the Employee.

The Union asserts that the Employer sought the Person 6 January 20, 1993 statement because up to that time it had failed to obtain sufficient facts to justify the Employee's termination. The Union asserts that the disparate treatment accorded the Employee is indicative of the Employer's hidden agenda which was to discharge the Employee for his Union activities.

Union witness Person 11 testified that he had 22 years of service between this Employer and another airline. He stated that the Employee had been a union officer of the other airline. He had also represented the Employee at the third step of the Grievance procedure. He added the Employer was not well disposed toward the Employee for his union activity.

Person 11 testified that the Employee was registered at the Motel during the period in question but unfortunately his registration was missing along with other registration cards for the period of time herein involved. This fact was attested to by Security Officer Person 3 when he made his review of the Motel registration records. Person 11 also alluded to the civil judgment against the manager of the Motel as a possible explanation of the missing registration records. Person 11 states that in addition to the statements of employees Person 8 and Person 9 there were other employees at the City 2 base that knew the Employee was living at the Motel 1.

Person 11 asserted that in light of all the evidence the charge of filing a false expense report was unfounded and the Employee's termination unwarranted.

The Union reiterated its position that the Employee should be reinstated to his position, seniority unimpaired and be made whole for all losses suffered because the Employer had failed to meet its burden of proof that the Employee did not stay at the Motel for the period of time for which he had filed his lodging receipts.

Findings:

Preliminarily the Arbitration Panel is constrained to state that it finds no merit or substance in the Union's allegations that the Employer was motivated to discipline the Employee because of his union activities. The Panel finds the most persuasive rebuttal to this charge was the testimony of Union witness Person 11. This witness related at length his participation in union affairs for many years without being subjected to any form of discrimination. When confronted with this fact in cross examination, he replied that was because he was "squeaky clean". We infer from this answer that the Employee was less than "squeaky clean".

The Panel also finds no evidence of anti union bias or disparate treatment in handling the Employee's case from that of Person 6. The record shows that Person 6 voluntarily confessed his wrongful act to the Employer before there was any intimation that he was a malefactor.

Moreover, Person 6 made restitution for the money he had wrongfully received. None of these elements or components was present in the Employee's case. In short, we find that the Employer disciplined the Employee because, it believed, based on credible evidence, that the Employee had wrongfully obtained money from it, rather than because of an anti-union bias against the Employee.

When the Panel reviews the substantive aspects of the discipline imposed on the Employee, it finds the case to be troublesome. While the record contains evidence that indicate the Employee engaged in questionable conduct and activities regarding Motel 1 stay during the latter part of July and early August of 1991, nevertheless the Panel does not find in the record conclusive proof to show that the Employee did not reside at this Motel during the requisite period of time.

We find that it was an extremely dubious procedure for the Employee to make out his own receipts for his two stays (7/27- 8/1/91) and (8/5/91) and applied them to his Expense Report.

Nevertheless, it does not prove that he did not stay at the Motel for the period designated, even though it was not a practice to be countenanced. We also find unacceptable the Union's

explanation that it is a common practice for items under \$50.00 for hotels, taxicabs, etc. for the payee to pass out blank receipts to the payer to fill out. In the instant situation the Employee

prepared one receipt for \$254.40 and the other for \$127.20 or a total of \$381.60 for his motel

lodgings. No practice would condone self prepared receipts for such an amount. Another fact that

militates against the Employee's conduct is that although he used his credit card at all the hotels

and motels across the country from City 1 to City 2, he paid cash for Motel 1 lodgings from the

\$1000.00 advance he received for expenses from the Employer. The Employer had a valid right to have a jaundiced view of this transaction.

The Panel finds that the Employee's explanation of the missing Motel registration, cards may be acceptable because all parties who reviewed the registration records for the period involved, including Person 3, reported there was a gap in these records. This may be explained by the transgressions on the part of the former restaurant manager, and admittedly it was the practice to register motel guests in the restaurant and bar. However, we, find that the civil judgment secured against the former manager not dispositive on the issue of the Employee's guilt or innocence.

The Panel finds that both Person 6's January 20, 1993 statement coupled with his testimony at the Arbitration Hearing damaging to the Employee's position. Person 6's evidence indicates that the Employee prepared for him receipts that were not bona fide proof of expenses incurred in the move to City 2. We find no evidence that Person 6 did not comprehend what he was doing or what was being done for him even though he was not facile with the English language. We find no evidence that Person 6 made his statements or gave his testimony under duress unless it was the duress of a guilty conscience.

On the other hand, there is evidence in the record, less than probative in nature, to suggest that the Employee and his wife did stay at the Motel. We are not at liberty to ignore the statements of the Employee's fellow employees as well as his trailer landlord, which indicated the Employee stayed at the Motel. The evidence proffered by the Union would have been more convincing if these individuals would have testified at the Arbitration Hearing and been subject to cross examination and rebuttal witnesses. It is also proper to ask as to why the Employee's wife who stayed with him on August 5-7, 1991 did not testify at the Arbitration Hearing.

Based on the total record, the Panel finds it is a close question whether the Employer proved conclusively that the Employee did not stay at Motel 1 during the period in question or whether the Employee proved conclusively that he was a registered guest staying at the Motel. Since we find that the evidence does not conclusively prove either position, and because to dismiss an employee for filing a false expense report could adversely affect his long term employment opportunities, the Panel finds that it cannot completely exculpate the Employee for his suspect conduct and restore him to his job with full back pay. The Panel finds that the Employee's conduct, especially with regard to his drafting receipts for Person 6 and himself warrant serious discipline but short of discharge. Certainly the Employee's conduct does not entitle him a paid vacation from January 14, 1993 to date.

Accordingly, the Panel concludes the appropriate sanction to be imposed on the Employee is to modify his discharge into a suspension, seniority unimpaired, but with no back pay.

Award:

Grievance disposed of in accordance with the Findings.