

Zigman #4

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

Introduction

This matter was heard before Louis M. Zigman, Esq., neutral arbitrator, on June 2, 1992. Both parties were given an opportunity to present evidence and to examine witnesses. At the conclusion of the hearing both parties made oral closing argument.

Based upon the evidence and contentions of the parties, I issue the following decision and award.

Background and Material Facts

This dispute concerns the termination of the Employee. At the time of her termination the Employee was employed as a full time cleaner and she had been employed for approximately 8 years.

Her supervisor, Person 1, made the recommendation to terminate the Employee because of an incident which occurred on the graveyard shift on January 5, 1993. While the Employee was in the office talking to another employee, Person 2, she saw another cleaner, Person 3. Person 3 called out to her and the two engaged in a brief conversation. Almost immediately thereafter, a physical altercation occurred involving the Person 3 and the Employee.

Person 3 reported incident to the State 1 Police Department and two days later a police officer came to the Employer to investigate Person 3's allegations. At that point Person 1 was informed

of the incident and he then began his own investigation and he spoke with Person 3, the Employee and with Person 2. He also spoke with other employees and he reviewed the Employee's personnel file.

After having completing his investigation he conferred with his superior and a decision was made to terminate the Employee.

Person 1 testified that he made the decision to terminate the Employee because of the incident on January 5, and because the Employee had demonstrated a similar loss of control of her temper on previous occasions. Moreover, Person 1 noted that the Employee had been counseled and warned about such activities in the past, and in view of this latest occurrence he felt that her conduct could no longer be condoned.

In this regard, the evidence was undisputed that the Employee had slapped another employee in the face in 1989; that she had been terminated and then reinstated following that incident.

The evidence also disclosed that the Employee had been counseled on many occasions about her short temper in dealing with employees. As for example, in February, 1992 the Employee was demoted from her position of assistant manager because of her problems in dealing with her subordinate employees. Furthermore, in her June, 1992 performance evaluation she was cautioned that she would have to concentrate more closely on situations when dealing with individuals on a one to one basis.

The Employee herself acknowledged that she had some difficulties in supervising employees because many would tend to ignore her. As such, the Employee testified that she made a strong effort to enforce the rules and to report those individuals who were not following the rules. As the Employee conceded, she was not particularly well liked by many of the employees.

In her testimony, the Employee denied that she touched or put her hands on Person 3 during the incident on January 5. The Employee also denied allegations that she tended to lose her temper when dealing with the employees. Although the Employee acknowledged that she was a strong individual and that she would stand up for herself, nevertheless she maintained that the criticisms made by Person 1 about her dealing with others were unfounded and untrue.

After the Employee was informed of the decision to terminate her she filed an appeal and then a grievance protesting the discharge. Inasmuch as the parties were unable to resolve this dispute in the grievance procedure it was referred to the undersigned for arbitration.

Issue

Was the Employee terminated for just cause? If not, what is the appropriate remedy?

House Rules

All of our futures depend upon maintaining an efficient, well run Employer so that we can compete successfully in the transportation market. Our Employer has set certain reasonable rules not to limit our activities unnecessarily but to help us do our jobs comfortably, safely and efficiently. So you may be aware of those infractions for which employees will be subject to varying degrees of discipline up to and including discharge ... the following:

Group 1:

Violations - Reprimand to Discharge .

Group 2:

Violation - Discharge

29. Physical Aggression or Threat to Employees or Customers.

Positions of the Parties

Employer's Position

The employer maintained that just cause did exist for the termination inasmuch as the Employee committed a serious act of misconduct on January 5, 1993. In this regard to employer asserted that the Employee became involved in a physical altercation with another employee, Person 3, and that this conduct constituted a Group 2 violation, and cause for immediate discharge.

While noting that there was a conflict in the evidence as to whether the Employee placed her hands on Person 3 or vice versa, nevertheless the employer maintained that the Employee's participation in that incident constituted serious misconduct.

Instead of terminating the Employee on this incident alone, her supervisor made a thorough investigation and he found that one witness, Person 2, corroborated Person 3's statement that the Employee did put her hand on, and that she did shove Person 3.

In addition to speaking to other employees, Person 1 also reviewed the Employee's personnel record and he noted that she had been counseled, on more than one occasion, about her loss of temper. More particularly, the employer noted that the Employee had been given strong disciplinary action in 1989, when she slapped another employee across the face and that she would have been terminated at that time but for a technical and procedural error whereby the Employer was forced to take her back to work.

Person 1 also testified that he was aware of the Employee's loss of temper when dealing with employees as he had witnessed her-temper at various times when the Employee had been working as a lead or as an assistant manager.

Inasmuch as the Employee's conduct constituted a repetition of her loss of control and of her difficulty in dealing with other employees, Person 1 concluded that her conduct on January 5, constituted grounds for termination.

While the employer acknowledged that it was unfortunate that it had to resort to termination, nevertheless the employer maintained that it could not ignore and overlook this type of misconduct, especially as it was now trying to tighten up in this whole area of employee discipline.

Based upon the foregoing, the employer maintained that just cause did exist to substantiate the termination and that the undersigned should so find.

Union's Position

The union denied that just cause existed for the termination action and therefore asserted that the Employee should be reinstated to her former position of employment with full back pay and benefits.

In this regard, the union pointed to the Employee's testimony wherein she specifically and categorically denied that she touched and/or shoved Person 3. Given the fact that she did not precipitate a physical altercation, the union maintained that she should not been disciplined for that event. As such, because she was terminated for that event the termination action could not be justified as having been for just cause.

The union also noted that the employer overreacted in an attempt to make an example out of the Employee. As the evidence demonstrated, other supervisors on the graveyard shift were lax in the enforcement of rules and regulations and they routinely condoned such activity. As such, even if the Employee did have words with Person 3, given the climate and atmosphere that

existed on the graveyard shift, there should have been no discipline inasmuch as strong words between employees were routinely condoned. Therefore, to have singled out the Employee and Person 3 for termination actions constituted unequal treatment vis a vis other employees who have engaged in similar activities.

The union also asserted that the employer placed the Employee in a rather untenable situation. On the one hand the employer wanted the Employee to act as a strong lead and/or assistant manager in controlling the employees' conduct on the graveyard shift, while on the other hand the employer later criticized her for her good faith attempts to bring the employees into line. The fact that some of the employees were unhappy with her efforts should not have been surprising given the lax atmosphere which had existed on that shift for a long time. To have criticized the Employee as having been too strong with these employees was itself unfair inasmuch as the Employee had been acting in a good faith attempt to carry out the objectives of her supervisors by tightening up on the lax and casual attitude of those employees.

In view of the foregoing, and in noting the testimony of other witnesses who corroborated her testimony with respect to the laxity in the enforcement of rules and regulations on the graveyard shift, the union maintained that the employer failed to establish just cause to sustain the termination.

Accordingly, the union asserted that the grievance should be sustained and that the Employee should be reinstated to her former position of employment with full back pay and benefits.

Analysis and Conclusion

This is somewhat of a difficult situation inasmuch as the Employee presented a very impassioned plea on her behalf. As she testified, she was extremely happy to have been hired by this

Employer at her stage in her life and she felt a special obligation to be a good and a loyal employee.

The problem in this case is that the evidence is persuasive in demonstrating that the Employee took her responsibilities too much to heart and that she tended to overreact in supervising and in working with her fellow employees. While the record appears to indicate that the Employee's actions were much a product of her own desires to protect the Employer and of other factors in her inability to work with the other members of the crew, nevertheless the evidence demonstrated that the Employee exhibited interpersonal problems on a repetitive basis and that at some point these problems could no longer be tolerated.

As the union pointed out, the first question which must be answered is whether the Employee was culpable of misconduct in the altercation on January 5, 1993. As the union also noted, there was a conflict in the evidence.

In viewing the entirety of the record, there was considerable difficulty in crediting the Employee's account for several different reasons.

Initially, I note that there were a number of inconsistencies in the Employee's testimony and in her recollection of the events at that time. Unfortunately, the inconsistencies in her testimony could not be described as insignificant.

As for example, in her testimony at the hearing the Employee explained that as she approached Person 3, that Person 3 put her hands up and backed away from the Employee. Yet in the Employee's statement to the Police Department a couple of days after the incident, the Employee stated that Person 3 pushed her. As such, the Employee's own words and recollection were considerably different and the inconsistency in her recollection certainly weakened the ultimate

weight that I could give to her testimony; especially where her testimony was at issue with others.

In addition to the inconsistency with respect to the physical altercation, I also noted that the evidence of the Employee's "own" witness, Person 2, consisted of a written statement in which Person 2 stated that the Employee had shoved Person 3.

Given this evidence, I must candidly state that the Employee's recollection of this incident on the evening of January 5, approximately 1 1/2 years ago, was somewhat difficult to accept. As such, the evidence appeared much more persuasive to the effect that the physical altercation occurred as described in Person 1's investigation.

The Employee's credibility was also weakened by her testimony in which she denied the allegations about her by her immediate supervisor, Person 1. In this respect the Employee acknowledged that she had worked well with him in the past and she respected him. To now suggest that he was lying in his testimony and in his recollection of difficulties that she had in dealing with others again tended to weaken the weight of her testimony. Moreover, the fact that the Employee's niece agreed that Person 1 was a good and trustworthy supervisor again tended to weaken the Employee's assertions that Person 1 was untruthful in his testimony with respect to the Employee's prior conduct and emotional history.

Furthermore, the Employee's candor in acknowledging that many of the employees felt that she was too strong, because she would stand up for herself, and the Employee's candor in having acknowledged that, in 1989 that she did slap another employee in the face while taunting him to hit her, was again evidence tending to support the employer's assertion that the Employee did demonstrate a pattern of emotional problems and a short temper in dealing with employees. As

noted above, this evidence does add considerable weight to the employer's contention that the Employee was culpable and responsible for the incident which occurred on January 5, 1993. Given the Employee's own testimony and given the fact that her conduct in dealing with employees has been documented over the previous three years, and given her removal from supervisory/lead status in the past, these events do give credence to the fact that the employer did establish by a preponderance of the evidence that the Employee was culpable for the altercation which occurred on January 5. Furthermore, inasmuch as the burden of proof required in these cases is by a preponderance of the evidence rather than by proof beyond a reasonable doubt, and given the Employee's own testimony, I am persuaded that the evidence is persuasive and does establish that the Employee lost control of her temper on January 5, that she placed her hands on Person 3 and she shoved her and that her conduct did constitute a violation of Employer rules. The fact that the Employee may have believed that Person 3 was going to do something to undermine the employees on the Employee's shift does not justify her actions and cannot serve to reverse the disciplinary action in view of the Employee's prior work history. Simply put, the employer does not have to sit and wait for yet another incident to occur.

In making this determination and in noting that there was some evidence tending to show a laxity of enforcement of the rules and regulations, nevertheless the evidence also demonstrated that the employer had been taking measures to begin enforcing rules. Furthermore, because the Employee had been cautioned on several occasions to control her temper, I did not find the union's arguments persuasive that the Employee was unfairly singled out vis a vis other employees, especially since Person 3 herself was also disciplined/terminated over this incident. In view of the foregoing, I found that the employer did present persuasive evidence to have established misconduct and the grievance is therefore denied.