

LABOR & EMPLOYMENT

Arbitration Decisions

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Labor Arbitration Decision, Employer v. Union, 139 BNA LA 1721

Pagination
* BNA LA

Decision of Arbitrator

In the Matter of: _____, EMPLOYER, and _____, UNION.

FMCS Case No. [Redacted]

May 20, 2019

Hide Headnotes

BNA Headnotes

LABOR ARBITRATION

SUMMARY

[1] Discharge - Assault - Name calling -- Work rules ► 118.642 [Show Topic Path]

An employer failed to prove it had just cause to discharge an employee for violating a shop rule proscribing threatening or assaulting a co-worker, when a male co-worker went to the female grievant's work station to discuss repayment of a loan the grievant had extended, and there was a verbal altercation with some pushing after the co-worker's wife arrived, Arbitrator Lee Hornberger ruled in a redacted opinion. According to Hornberger, neither the notice of discipline nor the male co-worker's statement alleged that the grievant assaulted anyone, and during an investigatory interview the co-worker's wife didn't allege she was assaulted by the grievant. The male co-worker's wife-who worked the same shift as the grievant and was discharged over the incident-initiated the confrontation by going to the grievant's work station and by grabbing her first, Hornberger said.

For the employer _____.

For the Union _____.

LEE HORNBERGER, Arbitrator.

LABOR ARBITRATION PROCEEDING FEDERAL MEDIATION AND CONCILIATION SERVICE DECISION AND AWARD INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between _____ (Employer) and _____ (Union). The Union contends that the Employer violated the CBA when it discharged the Grievant. The Employer maintains that it did not violate the CBA when it discharged the Grievant.

Pursuant to the procedures of the Federal Mediation and Conciliation Service, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on March 21, 2019, in _____. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for the introduction of relevant exhibits. The hearing was transcribed. The transcript was received by me on April 9,

2019. The dispute was deemed submitted on May 8, 2019, the date the last post-hearing submission was received by me.

The parties stipulated that the grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

Both advocates did an excellent job in representing their clients. All involved in the arbitration were courteous and professional.

ISSUE

The Employer frames the issues as follows.

Did the Employer have just cause to discharge the Grievant because of her physical and verbal altercation with [1 ____]?

The Union frames the issue as follows.

Did the Employer have just cause when it terminated the Grievant. And, if not, what is the proper remedy?

I frame the issue as follows.

Did the Employer have just cause when it terminated the Grievant? And, if not, what is the proper remedy?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 3

Management Rights

Section 2: Sole Right to Discipline for Cause

The Company retains the sole right to discipline and discharge employees for cause, provided that in the exercise of these rights it will not act wrongfully or unjustly or in violation of the terms of this Agreement. [*1722]

Article 5

Grievance Procedure

Section 3: Arbitration

In the event the grievance cannot be settled satisfactorily by the parties, the party arbitration shall notify the Federal Mediation and Conciliation Service within ten (10) working days following the notice to arbitrate. It shall be referred to an Arbitrator

... The Arbitrator's decision shall be final and binding on both parties.

Section 5: Arbitrators Fee

The fees and expenses of the Arbitrator shall be shared equally by the parties. All other expenses shall be born by the party incurring them. The decision of the Arbitrator shall be final and binding on all parties to the agreement.

Section 6: Power of Arbitrator

The Arbitrator shall not be empowered to add to, subtract from, or change any of the terms of this Agreement, any supplements or additions thereto, nor be empowered to order back pay for a period longer than thirty (30) days prior to the date of submission of the written grievance. The Arbitrator shall have jurisdiction only to interpret, apply and determine compliance with the provisions of this agreement and to modify the degree of discipline imposed by the Company, insofar as the Arbitrator may deem necessary for the determination of the grievance appealed to them. The Arbitrator shall have no power to establish wage rates, work, or schedules. The Arbitrator shall have no power to substitute his/her discretion in cases where the Company is given sole discretion to act by this Agreement or any supplement or amendment thereto. In the event the Arbitrator decides they have no power to decide or rule on an issue, they shall so rule and the matter shall be referred back to their parties.

Article 6

Seniority

Section 3: Loss of Seniority

An Employee shall be terminated and lose seniority if: ...

2. The employee is discharged for Just Cause and not reinstated.

RELEVANT SHOP RULES

Committing any of the following violations will be sufficient grounds for disciplinary action from verbal warning to immediate discharge, depending on the seriousness of the offense in the judgment of Management.

16. Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor. Threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.

FACTUAL OUTLINE

Introduction

The Employer is _____. The Employer employed the Grievant at _____. At _____, the Employer assembles _____. The _____ hourly employees are represented by the Union under the terms of a CBA. The Employer has promulgated a set of Shop Rules.

Grievant [2 _____] was re-hired in 2015 with prior seniority from 2000 to 2005 in another plant that closed. She had no prior disciplines. She worked the second shift. She was discharged in September 2017.

[3 _____] is a Superintendent, In September 2017 he worked the first shift. He is the husband of former hourly employee [1 _____].

[1 _____] was formerly an hourly employee. She worked the second shift. [3 _____] is married to [1 _____]. She was discharged in September 2017.

HR Manager [4 _____] was hired August 2017. [4 _____] arrived at the plant two months before the incident.

[5 _____] was the Division HR Manager in 2017.

[6 _____] is a _____ Chairperson.

[7 _____] is a _____ Chairperson.

The first shift hours are 6:30 a.m. to 2:30 p.m. The second shift hours are 2:30 p.m. to 10:30 p.m.

Early 2017 loaning of money

According to [3 _____], in early 2017 he was buying something from another employee and did not have change for \$100.00. He needed approximately \$60.00 for change. [3 _____] testified [*1723] that:

The reason I borrowed the money from [the Grievant], I was buying something from another employee. I had a \$100 dollar bill and I didn't have change. She said that she had change and she provided it to me, and I said once I got the change for the \$100 bill I would give it back to her. Tr. 128.

According to the Grievant, the money was loaned a few months before when they were friends. The loan amount was \$95.00.

2017 hotline

According to [5 _____], Division HR Manager in 2017, there is a hotline to the corporate office. There were allegations of employee interaction. [5 _____] was told to investigate. He talked with the Grievant and other employees. [5 _____] told the Grievant concerning [1 _____], [8 _____], and [9 _____] that the Grievant must stay out of their areas and not communicate with them anymore. [5 _____] said to the Grievant that he would say something to these people. [5 _____] testified that:

There was some communication through the hotline to corporate office where there were some allegations in reference to interaction between employees. I was communicated with from division, asked to go down and investigate the allegations. Tr. 124.

Q. In your communications with [the Grievant] did you have any instructions for her?

A. I communicated to her in regards to [1 ____] and [9 ____] as well as others, I believe [8 ____]. that she stay out of their areas and not to communicate with them any longer based on their previous history.

Q. And did you tell her about any steps that you were going to take with respect to these other individuals?

A. I would communicate the same to them as well in respect to them being out of her area as well as communication with her. Tr. 125.

September 25, 2017, in the hallway

[3 ____] was the Superintendent of the first shift. [1 ____] was on the second shift. The Grievant was also on the second shift. [3 ____] was the supervisor of neither of them.

According to [3 ____], he had finished his shift. There is an approximate one hour turnover period. During this time, there is coordination with the next Superintendent. [3 ____] was exiting the Quality Department. The Grievant approached him. She said he owed her money, and why was he trashing her to HR. [3 ____] had last spoken to the Grievant a few months before. He was surprised to hear from her. [3 ____] did not respond. His path with the Grievant had passed many times. This was the first time that she asked for the money back. [3 ____] owed the money to the Grievant. He had seen her countless times before then but had had no discussions.

[The Grievant] approached me, told me that I owed her money, and that ... she doesn't understand why I've been trashing her name to HR. Tr. 27

According to the Grievant, the initial conversation was at the first set of doors to the far left set of double doors. [3 ____] and she did not work on same shift. He had not paid the Grievant back. She did not ask for the money in a mean way.

The only conversation I had - and it was a very normal conversation - I just walked up and said I'd just like to know if you could pay me back the money you owe me and I won't bother you again. That was the whole conversation. Then I went to work. Tr. 83.

September 25, 2017, at the Grievant's work station

According to [3 ____], the Grievant walked away to her work station that was in a different area of the plant. He walked over to the Grievant's station to get some "clarification" from her and "clear the air." Immediately the Grievant apologized. The Grievant was a little agitated. One could hear her voice at the next station. [3 ____] asked her to calm her voice down. He tried to deescalate the situation. The Grievant started to walk towards the compressor station. The Grievant called [1 ____] a "bitch." The Grievant was very angry and was using a loud voice. [1 ____] responded with, "You are a bitch." [1 ____] and the Grievant were walking towards each other. [3 ____] got between the two of them. He told both of them to go back to their areas. They were face to face. Both of them reached out. [3 ____] pushed [1 ____]'s arm back. There was no more confrontation after that. There was no grabbing by the throat or choking. The Grievant left the area. [3 ____] informed second shift Superintendent [10 ____] of the situation. There was no further involvement that day other than [3 ____] gave a statement to [4 ____]. [3 ____] "saw the Grievant grab [1 ____]." The Grievant's demeanor was very [*1724] agitated. They both reached up. [3 ____] grabbed the Grievant's arm and around the collar area. [3 ____] testified that:

I walked over to [the Grievant's] station just to try to get some ... clarification of exactly, ... - I was shocked, so I wanted to try to clear the air and inform her that I had no issues with her and I would pay her her money. Tr. 28-29.

[The Grievant] started to walk towards the compressor station which is the next job. And as she was walking to the compressor station I heard her call [[1 ____]] a bitch. Tr. 30.

... And what happened there, did [1 ____] say anything or do anything?

A. She responded with the same comment, told her she was a bitch. And [the Grievant] walked back towards the area, towards the marriage station where they were working.

Q. Did [the Grievant] walk ... towards where [1 ____] was?

A. Yes, sir. Because they were walking towards [the Grievant's] area.

...

Q. So they were - as I understand it, they were walking towards each other?

A. Correct. Tr. 31-32.

The situation continued to escalate and when they got close enough face to face, I saw [1 ____] reach out and I saw ____ reach out and I grabbed [1 ____]'s arm and pushed her back towards her station and told her to go back to work. Tr. 32.

... where did they grab each other?

A. Around the collar areas. Tr. 32. I saw [1 ____] reach out, and I saw [the Grievant]'s arm go up and reach out, and I grabbed [1 ____]'s arm and pushed her back - [the Grievant], I'm sorry, and [1 ____].

Q. And where were they grabbing or holding each other?

A. Around the collar area. Tr. 130.

Q. Did you see ... [1 ____] grab [the Grievant] by the throat?

A. No, sir, she did not.

Q. Did she choke her?

A. No, sir, she did not.

Q. Did [the Grievant] grab [1 ____] by the throat?

A. No, sir.

Q. Did she choke her?

A. No, sir. Tr. 32-33.

Q. Your testimony was that you didn't see your wife grab [the Grievant]?

A. I saw her grab her but - my testimony was I saw her grab her, yes, it is. Tr. 35.

According to the Grievant, after the conversation in the hall way, the Grievant went to the Grievant's work station. [3 ____] went to his wife, [1 ____]. Then [3 ____] went over to the Grievant's work station. He wanted to dispute a few dollars. Then [1 ____] approached them. [1 ____] said, "hell, no, bitch" and got the Grievant by the throat. [3 ____] pulled [1 ____] off. [1 ____] choked the Grievant and grabbed her throat. [1 ____] stood across from the Grievant. [1 ____] cursed at the Grievant. The Grievant ran off "after he pulled her off." The Grievant testified that:

... [A]fter this conversation with [3 ____] what happened next, where did you go next?

A. To my work station and started working. Tr. 84.

Q. ... When you were at your work station what happened next?

A. Well, initially after I talked to [3 ____], he started to go back like he was going to go to the office where he should have gone, and instead he went over to his wife, [1 ____] ... and then he came back over to me and wanted to dispute the few dollars amount that it was. And the next thing you know, here comes [1 ____] over by us, and she started saying something. I said this has nothing to do with you, please step away, I'm going to HR. And at that instant - Tr. 85.

Then I asked her to please step away, I'm going to HR. And she said, exact words: Hell no, bitch, and grabbed me by the throat. And he pulled her off, [3 ____] pulled her off, and I ran off. Tr. 86.

Later in the day on September 25, 2017

According to [3 ____], [1 ____] was questioned by the police. She was not arrested. [1 ____] was discharged and is still discharged.

According to the Grievant, the Grievant went to the front and called the police. The Grievant took pictures of her neck immediately and later. [1 ____] is a foot shorter than the Grievant. [1 ____] is heavier than the Grievant. The Grievant stayed away from [1 ____]. She had prior

problems with [1 ____]. [1 ____] did physical harm and she was previously suspended for three days. The Grievant never called [1 ____] names. Photos were taken outside of the plant. The police took their own photos.

According to [4 ____], on September 25, 2017, [4 ____] heard about the altercation. All of [*1725] sudden Grievant comes up the aisle way saying "Call my brother." [1 ____] said the Grievant put her hand on [1 ____]. [4 ____] suspended both of them pending investigation. [4 ____] did an investigation. The Grievant was disrespectful to [4 ____]. The Grievant had called police to the plant. The Grievant was initially with the police. [4 ____] took [1 ____]'s statement. A Union person was present. [1 ____] signed a statement. [4 ____] talked with the Grievant after the Grievant talked with the police. The police left then. [4 ____] got a Union person. The Grievant wrote down the police officers' names. The Grievant turned to [4 ____] and said, "And what is your name?" [4 ____] told her her name. Then Union representative [7 ____] walked in. The Grievant said she was talking to [3 ____] about a personal matter and then [1 ____] appeared and called the Grievant a bitch. The Grievant's statement was typed. After the statement, [4 ____] suspended the Grievant pending investigation. [4 ____] got statements from other employees, including [11 ____]. [11 ____] said the Grievant was pointing. [11 ____] did not tell [4 ____] much. [11 ____] saw no grabbing. [4 ____] spoke with [3 ____]. He said the same as he testified at the arbitration hearing. She spoke with [10 ____], the Supervisor on the third shift. He agreed with [3 ____]. She spoke with [12 ____], an hourly employee working in that area. [12 ____] said she witnessed the Grievant get up in [1 ____]'s face. [12 ____] did not see any contact. [4 ____] attempted to talk with hourly employee [13 ____]. He declined to give a statement. [4 ____] testified that:

Right after she writes down his name she turns to me and asks me: And what is your name. And I found that surprising because I'm the HR manager, she's talked to me before. And I stated to her, just to answer the question, but it was very abrasive, I told her my name was [4 ____]. Tr. 45-46.

And what did [the Grievant] have to say about the incident?

A. She said she was talking to [3 ____] about a personal matter. [1 ____] approached them, called her a "B," and she put her hands on her and choked her. Tr. 46.

[1 ____] said that her and [the Grievant] had some verbal interactions. [The Grievant] asked her did she call her a bitch or what have you and walked up on her. When I asked [1 ____] did she grab or choke [the Grievant], she stated no in her statement. Tr. 43.

Q. And what did [11 ____] advise you?

A. She stated that [the Grievant] and [3 ____] were talking, this is what she witnessed, and she witnessed [the Grievant] pointing towards her and [1 ____]'s way as she was talking to [3 ____]. Tr. 50.

Did she witness either one of them grabbing each other?

A. She stated she didn't see anything. Tr. 50-51.

Q. What did [12 ____] tell you?

A. She said she witnessed - she witnessed [the Grievant] approach [1 ____], get up in her face. But she didn't see any contact, she was walking out the door or something. Tr. 51.

[4 ____] concluded that the Grievant when she came to work instigated the situation. She was disrespectful. The Grievant caused the whole situation to occur. She was yelling in the hallway. She was getting into [1 ____]'s face. There was abrasive conduct towards [8 ____]. The Grievant instigated the entire situation. [1 ____] and the Grievant made contact. [4 ____] terminated both employees. They had violated Shop Rule 16. [4 ____] testified that:

A. I came to the conclusion that [the Grievant], when she came to work, she instigated the entire situation due to the fact that she hadn't spoken to [3 ____] in months about owing her some money, she called him over to her and, you know, pretty much was - I thought that was all disrespectful, you know, you owe me money, you're trashing my name in HR, it's not aligning with the Company's code of conduct. She was well aware that his wife was near the vicinity when she pointed over to there. They could hear her call - they could hear her talk loudly about them. Tr. 52.

... And so I deemed that she caused the entire situation to occur when she contacted the supervisor that wasn't even on her shift at an opportune time that one of the employees that she didn't get along with in the past was present. That conduct was not in line with the Company policy or shop rules.

Also, you know, stopping and yelling through the hallway, not allowing a Company representative to get involved by making an appropriate

statement. And I felt - I mean I deemed it as though per my investigation her getting up in an employee's face per my notes, I confirmed it with a couple of statements, that that was inappropriate. And that based on her behavior with other employees as well as [8 ____] and getting feedback from other witnesses regarding that situation [*1726] per [14 ____]'s statement, she had been abrasive toward [8 ____]. Any time she worked near her, Sue [14 ____] stated that her language was always abrasive, it was overheard by other employees. So her behavior was not in alignment with the Company policy. Tr. 54-55.

And what was your conclusion as far as [1 ____]?

A. My conclusion as far as [1 ____], she made contact and so did [the Grievant] when [3 ____] had to jump in between the middle of them and his statement stated that they both made contact. Tr. 55-56.

September 26, 2017

According to [3 ____], the next day [3 ____] was questioned by HR Manager [4 ____]. [3 ____] told the [4 ____] what happened.

According to Chairperson [7 ____], he was involved with the grievance processing. He sat in on the interviews other than the interviews of [12 ____] and [13 ____]. He was not present on the work floor on the date of the incident. He learned of it immediately after it happened. The Grievant came to the front office. There were red marks on her neck and throat. She said she was calling the police. There were interviews with [10 ____] and [3 ____]. They said [1 ____] placed her hands on the Grievant. They did not say the Grievant put her hands on [1 ____]. The Grievant and [1 ____] were both suspended pending investigation. Both suspensions were converted to a termination. The Grievant's discharge document does not mention assault. The [1 ____] discharge document mentions assault. In the interview with the Grievant, the Grievant did not admit to touching anyone or being disrespectful. No one said the Grievant went to [1 ____]'s work area. Some said [1 ____] went to the Grievant's work area. At the interview with [1 ____], [1 ____] did not say there was physical contact by the Grievant.

According to [7 ____], there were red marks on the Grievant's neck when she was in the HR Manager's office. [7 ____] testified that:

... [The Grievant] and [1 ____] had a bit of a history between them; correct?

A. Correct.

Q. And had been told to stay away from one another; correct?

A. Correct. Tr. 76.

Q. During your interviews did anyone say that [the Grievant] went to [1 ____]'s work area?

A. No.

Q. Did anyone during those interviews say that [1 ____] came to [the Grievant's] work area?

A. Yes.

Q. Can you say who?

A. [3 ____].

Q. Okay.

A. [10 ____]. Tr. 76.

September 25, 2017, written statements

The September 25, 2017, unsigned statement from the Grievant says, in part:

I was speaking to [3 ____], [1 ____]'s husband, on the side of the line about a personal matter. I went back to work. Shortly afterwards I saw him approach [1 ____]. Afterwards, [3 ____] came to me to talk further about the matter. I asked him to step away because he was rambling things on. Then [1 ____] came behind him. I said I would not speak in front of her because it did not concern her. She was saying something, then said "Wait a minute bitch" and then she grabbed me by the throat

while [3 ____] stood there. That's when I immediately ran off and came up to the front office because I will not physically touch anyone.

The September 25, 2017, signed statement from [1 ____] says, in part:

Today, [Grievant] was talking to [3 ____], I went over to where they were standing. The next thing that happened is that ____ yells out. I know she is not coming over here this is a private matter. I then said, "Are you serious? Whatever ____." That's when ____ said, "I know she didn't she call me a bitch?" I then said, "What if I did?" ____ then turned around, started running and said call my daughter. She ran towards ____ and he handed ____ her head set.

September 25, 2017, Notices of Disciplinary Actions

The September 25, 2017, Notice to the Grievant said "The employee is being suspended due to an alleged altercation with another employee. The suspension is pending the results of an investigation."

The September 25, 2017, Notice to [1 ____] said "The employee is being suspended due to an alleged altercation with another employee. The suspension is pending the results of an investigation." [*1727]

September 29, 2017, Notices of Disciplinary Action

The September 29, 2017, discharge notice to the Grievant said "Termination for violating shop rule # 16 on 9/25/17. Shop Rule # 16 - Disrespectful and threatening a superior and co-worker."

A September 29, 2017, letter to the Grievant said "The purpose of this letter is to inform you that due to the results of the investigation regarding your altercation with a fellow co-worker on 9/25/2017, it was determined that you violated shop rule #16 when you were disrespectful and threatening towards a supervisor and co-worker."

The September 29, 2017, discharge notice to [1 ____] said "Termination for violating shop rule # 16 on 9/25/17. Shop Rule # 16 - Disrespectful, threatening and assaulting a co-worker."

A September 29, 2017, letter to [1 ____] said "The purpose of this letter is to inform you that due to the results of the investigation regarding your altercation with a fellow co-worker on 9/25/2017, it was determined that you violated shop rule #16 when you were disrespectful and threatening towards a supervisor and co-worker. This also lead to you assaulting the same co-worker."

According to [4 ____], assault was not mentioned in the Grievant's discharge notice. [4 ____] telephoned the Grievant to tell her of the termination prior to sending the termination letter. [4 ____] read Shop Rule 16 to the Grievant. [4 ____] followed up with a letter. [4 ____] concluded the Grievant and [1 ____] both had a part in the altercation and had both made contact. Leaving the word "assault" out of the discharge letter was a "simple error." [4 ____] did not see red marks on the Grievant's neck at the time of the interview.

Why didn't you write the word "assault" in the documentation that went to [the Grievant]?

A. It was a simple error in the letter sent to her.

Q. When [3 ____] spoke to you to tell you what had happened, what did he say as far as who grabbed whom?

A. He said they grabbed each other. Tr. 114-115.

According to the Grievant, [4 ____] did not contact the Grievant by telephone. [4 ____] never told the Grievant she was in trouble for an assault. The Grievant was terminated by [4 ____].

[7 ____] testified that:

Visibly I seen red marks on [the Grievant's] neck. Tr. 66.

Looked like she was grasped by the throat, yes. Tr. 66.

A. [1 ____] placed hands on [the Grievant]. ...

Q. All right. Did they say that [the Grievant] put hands on [1 ____]?

A. No.

Q. Okay. And you're clear you seen red marks on [the Grievant]'s neck?

A. Yes, sir. Tr. 67.

Q. Was the red marks that you spoke of on [the Grievant]'s neck when she was in the HR manager's office for her interview?

A. Yes. Tr. 70.

September 29, 2017, Grievance

A Grievance was filed concerning the discharge of the Grievant. This proceeded through the Step proceedings and went to the arbitration hearing on March 21, 2019.

CONTENTIONS OF THE PARTIES

a. For the Employer

According to the Employer, the Employer instructed the Grievant and [1 ____] to stay away from one another. The Grievant and [1 ____] ignored the instruction to stay away from each other and got into an altercation.

The Employer investigated the altercation and terminated the Grievant and [1 ____]. The Employer had just cause to discharge the Grievant for her altercation with [1 ____]. Employer [Redacted], 2016 LA Supp. 205283 (Nadelbach, 2016), and United Parcel Service, 2010 BNA LA Supp. 119367 (Paolucci, 2010).

According to the Employer, I must not substitute my judgment for the Employer's decision that discharge was the appropriate penalty.

No extenuating or mitigating circumstances warrant an arbitral modification of the discharge penalty

The Employer requests that I uphold the discharge and deny the grievance.

b. For the Union

The Union argues that the Employer failed to follow the seven tests for just cause that were established by Arbitrator Daugherty that [*1728] have been the standard since 1964, when determining whether a discharge was proper. Enterprise Wire Company, 46 LA 359 (1966). The seven tests are as follows.

1. The employee knew of the employer's policy.
2. The employer's policy was reasonable.
3. The employer investigated to determine that the employee violated the policy.
4. The investigation was fair and objective.
5. Substantial evidence existed of the employee's violation of the policy.
6. The employer's policy was consistently applied.
7. The discipline was reasonable and proportional.

The Union contends that the Employer did not meet its burden of proof when terminating the Grievant. She had no prior adverse record and did not violate the Shop Rule, which even if she had, the punishment was harsh and excessive compared to discipline issued to other employees for admittedly worse offenses.

DISCUSSION AND DECISION

Introduction

The CBA provides that an employee cannot be disciplined without just cause. It is well established in labor arbitration that where, as in the present case, an employer's right to discipline an employee is limited by the requirement that such action be for just cause, the employer has the burden of proving that the discipline was for just cause. "Just cause" is a term of art in CBAs. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he was disciplined. Other elements include a requirement that an employee know or could reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline; the existence of a reasonable relationship between an employee's misconduct and the punishment imposed; and a

requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

For the following reasons, I conclude that the Employer violated the CBA when it discharged the Grievant.

Discipline

The Employer contends that the Grievant violated Shop Rule 16. The Union contends that the Grievant did not violate Shop Rule 16.

Shop Rule 16 and its preamble say as follows.

Committing any of the following violations will be sufficient grounds for disciplinary action from verbal warning to immediate discharge, depending on the seriousness of the offense in the judgment of Management.

16. Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor. Threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.

Burden of proof

The Employer has the burden of proof in a discipline case. Elkouri & Elkouri, *How Arbitration Works* (8th ed.), pp. 15-26 to 15-32; Abrams, *Inside Arbitration* (2013), pp. 206-209.

Witness credibility

The Employer contends that the recollections of [4 ____] and [3 ____] are accurate. The Union contends that the recollections of the Grievant, [7 ____], and the documents are accurate.

One of my duties is to decide how credible each witness was. It is up to me to decide if a witness's testimony was believable, and how much weight I think it deserves.

I start my credibility analysis with the viewpoint that all witnesses are equal and deserving of equal deference concerning their recollections. At the onset, neither Employer nor Union witnesses should be given higher deference. Supervisors should not necessarily be given greater credibility. It has been suggested that neither the disciplined employee, the steward, nor the supervisor who made the discipline decision is inherently more credible. Elkouri & Elkouri, pp. 8-96 to 8-98.

Here are some things I consider in evaluating witness testimony. (A) Was the witness able to clearly see or hear the events in question? Sometimes even an honest witness may not have been able to see or hear what was happening, and may have an incorrect recollection. (B) How good the witness's memory [*1729] seemed to be. Did the witness seem able to accurately remember what happened? (C) Was there anything else that may have interfered with the witness's ability to perceive or remember the events? (D) How did the witness act while testifying? Did the witness appear honest? Or did the witness appear to be mistaken? (E) Did the witness have any relationship with any party, or anything to gain or lose from the case that might influence the witness's testimony? Did the witness have any bias, prejudice, or reason for testifying that might cause the witness to testify incorrectly or to slant the testimony in favor of one side or the other? (F) Did the witness testify inconsistently while on the witness stand, or did the witness say or do something or fail to say or do something at any other time that is inconsistent with what the witness said while testifying? If I believe the witness was inconsistent, I ask myself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. I consider whether the inconsistency was about something important, or about some unimportant detail. I ask myself if it seemed like an innocent mistake or if it seemed deliberate. (G) How believable was the witness's testimony in light of the other evidence? Was the witness's testimony supported or contradicted by other evidence that I found believable? If I believe a witness's testimony was contradicted by other evidence, I realize people sometimes forget things, and even two honest people who witness the same event may not describe it exactly the same way.

These are some of the things I consider in deciding how believable each witness was. I consider other things that I think shed light on the witness's believability. I use my common sense and my everyday experience in dealing with other people. Then I decide what testimony I believe and how much weight I think it deserves. Abrams, pp. 189-192; See generally WD Mi Civ JI 2.07.

I consider all the circumstances of all the witnesses when I am assessing which testimony is the most credible.

I consider the totality of the circumstances.

The Employer argues that the Grievant was not credible. To a certain degree, an analysis of this case can be made on the documentation. [1 ____]'s signed written statement indicates that [1 ____] went to the Grievant's work station. "[The Grievant] was talking to [3 ____], I [1 ____] went over to where they were standing." Emphasis supplied. It does not say the Grievant came to [1 ____]'s work station. The official written discharge notice to the Grievant does not allege "assaulting a co-worker." The letter the Employer sent to the Grievant concerning her discharge does not allege "assaulting a co-worker."

If the Grievant had been pointing at or called [1 ____] a bitch, and had been inciting [1 ____], [1 ____] would probably have mentioned it to [4 ____] during the investigatory interview and included it in [1 ____]'s written statement. [1 ____] during her interview, and in her statement, did not say that the Grievant called [1 ____] a bitch or pointed at her. This was even though [1 ____] was being suspended and ultimately terminated for assault. [1 ____]'s signed statement says "Today, ____ was talking to ____, I went over to where they were standing." Emphasis supplied.

It is undisputed that [3 ____] went from the hallway to the Grievant's workstation. There was no business reason for him to do this other than to continue the hallway conversation. This was after his shift was over. There are those who might think he should have been either leaving the plant or coordinating with the incoming supervisor on the next shift. It is undisputed that he did not go to the Grievant's work location to pay off the debt.

There is a dispute of what the employee witnesses said to [4 ____] during the investigatory interviews. [7 ____] testified that [10 ____] and [3 ____] said [1 ____] placed her hands on the Grievant. They did not say the Grievant put her hands on [1 ____]. Tr. 64 and 75. [7 ____] also testified that [10 ____] and [1 ____] both stated that the Grievant did not go to [1 ____]'s work station but that [1 ____] went to the Grievant's work station. Tr. 76.

I have considered all the circumstances of all the witnesses when assessing testimony. I have considered the totality of the circumstances. Abrams, pp. 189-192; Elkouri & Elkouri, pp. 8-93 to 8-98. See generally WD Mi Civ JI 2.07.

Furthermore:

The arbitrator's decision in discharge and discipline cases must reflect the parties' values and interests, not the arbitrator's personal conception of how the workplace should be run." Abrams, p. 202.
[*1730]

Inconsistency of reasons for discharge

The discharge notice to [1 ____] included the allegation of assault. The discharge notice to the Grievant did not include the allegation of assault. This absence of an assault allegation was consistent with the signed statement from [1 ____] which did not include an allegation of assault on [1 ____] by the Grievant. [7 ____] testified that, during the investigatory interview by [4 ____], [1 ____] did not allege an assault by the Grievant. Tr. 75. Given the contents of [1 ____]'s signed statement, the wording of the discharge letter and notice to the Grievant, and the testimony of [7 ____], the Employer has not proven by a preponderance of the evidence that the Grievant assaulted [1 ____].

It has been indicated that:

Just cause for discharge must be evaluated on the basis of the grounds asserted by management for its action at the time it took action. It cannot change its grounds later." Abrams, p. 209.

Employer's arguments

The Employer makes several serious arguments concerning the situation. I have seriously considered all of them.

The Employer argues that the Employer instructed the Grievant and [1 ____] to stay away from one another. This argument does not control. The Grievant stayed away from [1 ____] and [1 ____] did not stay away from the Grievant on the day in question. This is verified by the signed statement that [1 ____] gave on the same day as the incident. [1 ____] said "I went over to where they were standing." Emphasis supplied. [1 ____] did not say "The Grievant came over to where I was standing." [1 ____]'s statement does not allege that anyone called [1 ____] a bitch. Instead, the statement says "That's when ____ said, 'I know she didn't she call me a bitch?' I then said, 'What if I did?'" Instead of accusing the Grievant of calling [1 ____] a bitch, [1 ____]'s statement states that the Grievant accused [1 ____] of calling the Grievant a bitch. In short, in her almost contemporaneous written statement, [1 ____] does not accuse the Grievant of calling her a bitch or the Grievant coming towards [1 ____]'s work station.

The Employer argues that it had just cause to discharge the Grievant for her altercation with [1 ____]. This argument does not control. The Grievant was discharged for allegedly violating Rule 16. The Grievant did not violate Rule 16. Rule 16 says "Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor.

Threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.” The Grievant did not violate Rule 16 by having a conversation in the hallway and walking to her work station for the start of her shift. There is no allegation in the discharge paperwork that went to the Grievant that the Grievant was guilty of any kind of assault or making contact. [1 ____]'s written statement does not accuse the Grievant of any violation of Rule 16. I agree with the Employer that the photographs shed no light on what happened.

The Employer argues that I must not substitute my judgment for the Employer's decision that discharge was the appropriate penalty. Based on the evidence, and especially [1 ____]'s written statement, I am finding that there was no just cause for the discharge of the Grievant. Based on the record, the Grievant did not violate Rule 16. Hence discipline was not warranted. See generally ConAgra Foods, **137 LA 169** (Ross, 2017) (reinstatement without back pay in verbal threat and insults case); Walker Processing Equip., **137 LA 320** (Smith, 2017) (reinstatement with full back pay in threat case); 205186-AAA, **137 LA 641** (Humphries, 2016) (three-week suspension reduced to one-day suspension in assault case); and US Foods, **137 LA 913** (Latsch, 2017) (reinstatement with full back pay in momentary scuffle case).

The Employer cites Employer [Redacted], 2016 LA Supp. 205283 at p. 4 (Nadelbach, 2016), for the proposition that “employer had just cause to discharge employee who verbally cursed and threatened a coworker.” In Employer [Redacted], two employees cursed and lobbed physical threats of harm to the other. In the case before me, there is no allegation that the Grievant made any threats of harm. [1 ____]'s statement does not allege that the Grievant cursed. This is not a question of credibility between [1 ____] and the Grievant. There is nothing alleged in [1 ____]'s written statement that would constitute a violation of Rule 16 by the Grievant.

The Employer cites United Parcel Service, 2010 BNA LA Supp. 119367 (Paolucci), for the proposition that “[i]f violent conduct is not responded to with serious action, it is reasonable to expect that escalation will occur [*1731] and that its business will be affected.” In United Parcel Service there was a fight between two employees, both of whom were discharged. The arbitrator denied the grievance based on his finding that the grievant intentionally engaged in workplace violence. He concluded that “actual violence” had occurred and that both employees had engaged in “fighting.” Based on the signed statement from [1 ____], there was no fighting or violence from the Grievant. The United Parcel Service fighting and violence case decision is consistent with my decision in the case before me where the other employee does not allege any fighting or violence by the Grievant.

The Employer argues that the difference in the wording of the termination letter has little probative value and which employee grabbed the other employee first is irrelevant where both employees actively participated in the altercation. This argument does not control. The September 2017 documents were written almost contemporaneously with the September 25, 2017, incident and approximately 17 months before the arbitration hearing. The discharge notice and the discharge letter to [1 ____] allege that she “assaulted” the Grievant. The discharge notice and the discharge letter to the Grievant are almost identical to the documents to [1 ____] except they do not allege that the Grievant assaulted anyone. This is consistent with the statements given by [1 ____] and the Grievant on September 25, 2017. [1 ____]'s statement does not allege that the Grievant assaulted anyone. The Grievant's statement alleges that [1 ____] assaulted the Grievant. It is reasonable to conclude that recollections and conclusions concerning the September 2017, situation were more accurate in September 2017 than in March 2019.

The Employer argues that it “would send an unacceptable message to bargaining unit employees: engaging in an altercation with a coworker despite a management directive to stay away from that co-worker is an acceptable risk, because even if the employer discharges the employee, an arbitrator may reinstate the employee.” This is an appropriate serious argument to which I have given high consideration. The Employer raises legitimate policy considerations. But I am deciding the case in front of me, not some other case. In the case in front of me, management employee [3 ____] borrows money from the Grievant, an hourly employee, to get change to buy something from another employee. Eventually the Grievant talks with the management employee in the hallway about being paid back. This conversation is not on the workroom floor. When this brief conversation is over, the Grievant goes to her work station. For reasons not connected with Employer business, the management employee goes to the Grievant's work station to continue the personal debt discussion. At this moment in time, the management employee is supposed to be leaving the plant. His shift is over. The hourly employee is supposed to be doing her job, not responding to a non-business related conversation from the off-duty management employee who is not even her supervisor. The management employee's hourly employee wife sees this latter conversation. According to the wife's signed statement, she then goes towards the Grievant's work station. Dialogue ensues between the management employee's wife and the Grievant. There is an investigation. The wife's signed statement does not allege that (1) the Grievant came to the wife's work station, (2) the Grievant called the wife a bitch, or (3) the Grievant did anything physical towards the wife. See generally Elkouri & Elkouri, pp. 16-30 to 16-33; and Abrams, p. 279.

The Employer argues that it did not treat the Grievant differently than similarly situated employees. Disparate treatment is an affirmative defense that the Union has the burden of proving. Based on the facts in the record concerning the other situations, I do not find disparate treatment. Elkouri & Elkouri, pp. 15-83 to 15-86.

Conclusion

The crucial points in this case include:

1. The Employer has the burden of proof;
2. The Grievant in a one-on-one conversation in the hall way discussed with [3 ____] the repayment by [3 ____] of a previously made loan by the Grievant to [3 ____], Tr. 27 and 83;
3. After this short discussion was over, the Grievant walked to her work station for the start of her shift, Tr. 83-84;
4. [3 ____], whose shift had just ended and was not the supervisor of the Grievant, went to the Grievant's work station, Tr. 28-29, 76, and 85;
5. There was no Employer business reason for [3 ____] to be at the Grievant's [*1732] work station;
6. After [3 ____] arrived at the Grievant's work station and started talking with her about his non-business related personal debt, [1 ____] [3 ____]'s wife] started approaching the Grievant's work station, Tr. 31-32 and 85;
7. [1 ____] ended up at the Grievant's work station, not *vice versa*;
8. In conjunction with [3 ____] being at the Grievant's work station and [1 ____] entering the situation, one way or another, things deteriorated, Tr. 32, 35, 86, and 130;
9. If [1 ____] had not gone, without a business reason, to the Grievant's work station, the situation would not have occurred;
10. If [1 ____] had not gone to the Grievant's work station, the situation would not have occurred;
11. The signed [1 ____] statement does not allege that the Grievant said the word bitch or touched or assaulted anyone;
12. The totality of the circumstances; and
13. The CBA.

This decision neither addresses nor decides issues not raised by the parties.

The Employer did not have just cause when it terminated the Grievant. The Employer violated the CBA when it discharged the Grievant.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I grant the grievance.

The Employer did not have just cause to terminate the Grievant. The Employer shall remove the discipline, reinstate the Grievant and make her whole.

I retain jurisdiction over this matter for sixty days from the date of this Award for the sole purpose of resolving any issue(s) pertaining to the order of rights and privileges contained in this Award.

Dated: May 20, 2019, Traverse City, Michigan.



