

IN RE ARBITRATION BETWEEN:

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 120

and

GOPHER RESOURCES

DECISION AND AWARD OF ARBITRATOR

FMCS CASE # 0780807-58475-3

JEFFREY W. JACOBS

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June 2, 2009

IN RE ARBITRATION BETWEEN:

IBT #120,

and

DECISION AND AWARD OF ARBITRATOR
FMCS CASE # 0780807-58475-3
Reynolds Grievance matter

Gopher Resources.

APPEARANCES:

FOR THE UNION:

Martin Costello, Hughes and Costello
Tyrone Reynolds, grievant
Tom Erickson, Business Representative

FOR THE EMPLOYER:

Richard Pins, Leonard, Street & Dienard
Robert Oberle, Production Manager
Cassie Sober, HR Director
Nicole Cable, Payroll Administrator
Cara Cottrell, HR Generalist
Gary Dishaw, Supervisor

PRELIMINARY STATEMENT

The hearing in the matter was held on February 24, 2009 at 9:30 a.m. at the offices of Gopher Resources in Eagan, MN. The parties presented oral and documentary evidence at that time at which point the evidentiary record was closed. The Employer submitted a Post-hearing Brief dated April 17, 2009. Due to an emergency, and with the consent of the Employer, the Union submitted its post hearing Brief dated May 15, 2009 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement dated December 1, 2007 through November 30, 2012. The grievance procedure is contained at Article 6. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES

Did the Company have just cause for the termination of the grievant? If not what is the appropriate remedy?

COMPANY'S POSITION

The Company took the position that there was just cause for the termination on two separate grounds. In support of this position the Company made the following contentions:

1. The grievant violated not one but two work rules that called for termination if violated.

The Company asserted that this is a very straightforward case and that the grievant and the Union have acknowledged all the salient facts that support the case against the grievant.

2. The Company pointed to the relevant contract provision as follows:

Article 7 – DISCHARGE: The Employer shall not discharge an employee without just cause, and shall give at least one (1) warning notice of the complaint against such employee, in writing, and a copy of same to the Union, except that no warning notice need be given to an employee before he is discharged, if the cause of such discharge is dishonesty, drunkenness or recklessness which may result in serious accident while on duty, or major violation of Employer's Rules which do not conflict with the terms of this Agreement.

3. The Company pointed to the provisions of Article 7 and argued that the grievant's conduct, as described below, was a major violation of the Employer's Rules.

4. The Company further pointed to its Work Rules as follows:

SERIOUS INFRACTIONS

Serious infractions of the Company's rules may call for immediate termination of employment. Those that do not call for termination as a first step will remain in effect for a period of three (3) years from the date of issue.

7. Knowingly punching the timecard of another employee or unauthorized altering of a timecard, resulting in the timecard showing more time than actually time worked.

First Offense: Termination of Employment

8. Walking off the job or leaving the plant area during your shift without Management approval

First Offense: Termination of Employment

5. The Company asserted that these rules have been in place for a long time and that the employees all are made aware of the serious consequences of violating them. The Company asserted that the grievant violated both of these rules on April 10, 2008 and that either violation would be enough to warrant termination for the first offense. The Company further asserted that these rules have been applied even-handedly and without discrimination.

6. The grievant acknowledged during the hearing that he was aware of the rules and that the Rules were reasonable. In fact, the Grievant admitted during his testimony that the appropriate discipline for a violation of either rule was discharge.

7. The Company noted that there were very few relevant acts in dispute in this matter. On the date in question, April 10, 2008, the grievant appeared for work at 3:00 a.m. and punched in at 2:58 a.m. The grievant's normal shift was from 7:00 a.m. to 3:00 p.m. The Company acknowledged that On April 4, 2008, Grievant submitted an Employee Time and Attendance Exception Report, by and through which he sought eight (8) hours of vacation starting on April 10, 2008 and ending on April 11, 2008. The Company's HR representative, thinking that this meant he wanted April 11th off put him down as having requested vacation for April 11, 2008 and posted the schedule with that on it.

8. Thus, despite the vacation request for April 10, 2008, the grievant appeared for work that day and even showed up early. The grievant never objected or sought to change this vacation day until April 10, 2008 when he was actually at work.

9. The Company asserted that it was undisputed that he then worked until approximately 1:10 that afternoon. He then took all of his breaks at the same time and punched out at the break clock at 1:49 p.m. The grievant spoke with Ms. Cottrell during this time and the Company submitted still photos and a CD showing the grievant's activities that day. He spoke with Ms. Cottrell initially about whether there were any lunches left over from a meeting since he had not brought a lunch with him that day. Later he told her about the vacation mix-up so she corrected the vacation day. See, Employer exhibit 10, showing the vacation day cancelled.

10. It is undisputed that the grievant left well prior to his scheduled end time. The video shows him leaving at approximately 2:00 p.m. even though it is undisputed that the shift ended at 3:00 p.m. The video further shows him filling out the Employee Time and Attendance Exception Report but never actually punching out. It was undisputed that he did not punch out but rather simply left.

11. In fact the Union stipulated that “There is no dispute that the grievant did not inform a manager that he was leaving early on April 10, 2008, nor did he seek prior approval to do so.” The Company argued that this alone was sufficient to warrant termination based on the Rule cited above. There was no dispute that he left early and without prior approval. He did not inform a supervisor that he was leaving. He claimed that he told Ms. Cottrell during the conversation he had with her but she adamantly denied that and had no reason to fabricate her story in this regard.

12. Further, and more importantly, informing her, even if he did was insufficient under the rule since she was not a supervisor. Moreover, the supervisors were in a meeting and the grievant is seen on the video even peering into the room yet he left without telling anyone.

13. The reason for the rule is primarily based on safety. In the event of an emergency, management must know who is in the building and where they are in case of a fire or other emergency. This again is well publicized and the employees are well aware of why the rule is in place.

14. The grievant gave no excuse for failing to inform his supervisor and claimed that he did not believe he had to since April 10, 2008 was not a “normal day” for him. The Company asserted that this is simply not credible. The grievant acknowledged that he was aware of the need to inform a supervisor when he left and that he was subject to that rule every other shift at every other time in his career; there was simply no reason why he would not have been subject to that on April 10, 2008. The Company asserted that leaving without informing a supervisor, even though the grievant knew where they were and even looked at them, was inexcusable. Despite his long tenure, he must be terminated.

15. The Company's second main argument was based on the claim that he falsified his time record to show more time than he actually worked. The Company pointed to Exhibit 7, the original Employee Time and Attendance Exception Report and Exhibit, the photocopy of it. It is undisputed that the grievant filled this out, not earlier in the day as he claimed during the investigatory meeting the following day, but rather, when he was standing around in the time clock area on April 10, 2008. The video shows him doing it.

16. More to the point, the Company argued, the grievant filled it out with a "time ended" entry of 3:00 p.m. Even though he incorrectly filled it out with a "time started" of 7:00 a.m. (He actually started at approximately 3:00 a.m.) since he did not punch out the only time record the Company had was the so-called Exception Report. That of course shows a time ended of 3:00 p.m. It is undisputed that he left at 2:00 p.m. Thus had the Company not checked the time records and video, they would have paid him an extra hour since they had a punch in time of 2:58 a.m. and no punch out time on the time clock.

17. Further, the grievant's claim that he somehow forgot is countered by the fact that the video shows him staring at the actual time clock as he was filling out the exception report. There was no rational reason for his failure to punch out when he was literally standing in front of the time clock.

18. The Company countered the Union's claim that the Exception report did not result "in the timecard showing more time than actually time worked," by arguing as above, that the evidence as a whole demonstrates an intent to claim one more hour than actually worked. Moreover, the Exception report also contains an entry in "total hours" of "12." This later fact makes it clear, according to the Company that the grievant fully intended to claim 12 hours, not 11, and that his actions in peering into the meeting room where the supervisors were, failing to punch out and leaving early without telling anyone all show that he fully intended to attempt to defraud the Company.

19. The Company pointed to its rule as set forth above but also to arbitral precedent that holds that such acts warrant discharge even for long-term employees with clean records. Here the Union agreed at the outset that it would not claim that the grievant's record was "clean." While the parties did not get into the grievant's prior record it can be assumed by the arbitrator that the grievant's work record is not free of prior discipline and should take that into account in determining the appropriate outcome in this matter.

20. The grievant's claim that he was tired does not create an exception to the clear rule here. He was looking at the punch clock yet did not punch out. He filled out a form that he knew would be used to calculate his pay for the day and while understating the time at one portion of it, clearly indicated he worked 12 hours on another portion of it. He also presumably knew that he punched in at 2:58 yet made a decision not to punch out again presumably knowing that the Company would then have to use the Exception report to figure his pay.

21. The Company argued finally that the grievant has made inconsistent statements all along here. He lied to Company investigators the following day when he claimed he filled out the Exception Report earlier in the day yet the tape shows him filling it out shortly before he left at 2:00. He made a statement to the Minnesota Department of Human Rights which again is a different story than he told at the hearing. Further, his statements are in many material respects inconsistent with those of his supervisor and Ms. Cottrell, neither of whom have any incentive to fabricate anything.

22. The essence of the Company's claims here is that the grievant simply got caught and told several different versions of the story that should not be accepted by the arbitrator. The Company further asserted that given the totality of the circumstances, the appropriate remedy is termination.

The Company seeks an award denying the grievance in its entirety

UNION'S POSITION:

The Union took the position that there was no just cause for the discharge of the grievant for his actions on April 10, 2008. In support of this the Union made the following contentions:

1. The Union noted that the grievant has been with the Company since 1998 working in the bag house. The Company is a lead recycling facility located in Eagan, Minnesota. The bag house is where the facility contains the various contaminants as part of the Company's lead-recovery operation. See, Union exhibit 6. The Union asserted that on occasion the bag house needs to be cleaned, which is a very demanding and sometimes dangerous job. The Union argued that the grievant's normal shift is from 7:00 a.m. to 3:00 p.m.

2. The Union pointed to the very same contractual provisions and work rules as the Company noted but argued that the grievant had not violated either the letter or the spirit of those rules.

3. The Union further noted that the grievant had a Court date set for April 10, 2008 at 2:30 p.m. and that he accordingly requested a vacation day on April 4, 2008. The Company mistakenly thought he wanted April 11, 2008 off but he in fact needed April 10, 2008.

4. The grievant's supervisor, Mr. Greg Dishaw, had asked the grievant and another employee to clean the bag house sometime on or around April 6, 2008. The grievant began this time consuming and labor-intensive process. When asked him about the progress of the work on April 9th the grievant advised him of the progress to date. Because he wanted the work done soon, Mr. Dishaw asked the grievant to come in early on the 10th to finish the work.

5. He had thought he would be working with another employee, a Mr. Togar, that day and believed he could complete the task of cleaning the bag house and still get to his Court appointment that day. When he arrived however he learned that Mr. Togar could not help him because of a health condition so he had to do the work himself. This took much longer than he had at first anticipated.

6. The grievant further alleged that due to the long hours and the stressful and physically demanding work, the Court date simply slipped his mind that day. He went on break around 1:00 p.m. and spoke to Ms. Cottrell about the vacation day and asked her to change it. She did so, thus correcting the Company's earlier mistake. He also asked her if there were any lunches left as he did not bring a lunch with him nor any lunch money, as he had thought he would be done early enough to get a lunch somewhere else.

7. The grievant started work at 2:58 a.m. on the morning of April 10, 2008 and worked straight through without any breaks until just after 1:00 p.m. While on break he called his wife who then reminded him of the Court appointment. He then punched back in and started cleaning up. He completed that and went to the HR department to straighten out the vacation issue. HR then cancelled the vacation day that had been on the schedule for April 10, 2008 since he had by then worked the entire day and then some.

8. Knowing that he had worked significant overtime, he completed the Employee Time and Attendance Exception Report and checked "overtime," which was appropriate since he had worked well over 8 hours that day. He further wrote in 7:00 a.m. as his start time, which was incorrect but understated his time by 4 hours, since he in fact punched in at around 3:00 a.m. that day.

9. The grievant, presumably due to fatigue, at first wrote in 7:00 p.m. as the end time but changed it to 3:00 p.m. as the end time. The Union claimed that he did not total the hours on the form.

10. The Union acknowledged that he left the plant at approximately 2:00 p.m. to get to his Court appointment. He alleged that he informed Ms. Cottrell that he was leaving since he had seen that his supervisors, indeed all of the supervisors were in a meeting and did not want to disturb them. He was in a time rush to leave to get to the Court date and believed that he had adequately notified the Company through Ms. Cottrell that he would be gone.

11. Further, the grievant alleged that due to the unusual nature of the special task he had been assigned that day he did not need to inform the supervisor. He believed that he had a vacation day that day so he was not on a “normal shift.” Indeed, he had punched in 4 hours early that day at the specific request of this supervisor to complete the special assignment of cleaning the bag house.

12. The Union pointed out that the extreme penalty of discharge should be meted out only in the most extreme and outrageous circumstances. It asserted that such factors are not present here. While the grievant did leave early, he believed he had notified a representative of management that he was going. He further believed that since he knew he had the day off anyway, and that he was told he could leave whenever the job was finished, he could simply leave without going through the normal routine of notifying a supervisor. He did the work without any of the help he had been promised.

13. The Company, rather than completing a full and fair investigation simply “shot from the hip” and discharged him without a full knowledge of the facts. Indeed, the Company at first fired him for the alleged violation of Rule 8, against leaving without authorization. They later added the Rule 7 charge of falsification of a time card; thus making it apparent that they had not fully investigated the incident before deciding to discharge the grievant.

14. The Union asserted that the grievant could not have “abandoned” a shift in violation of the rule since he was never supposed to be working that shift in the first place. He was originally scheduled to be on vacation and was thus never on the schedule to begin with. It was because of the Company’s error that he was ever there but he understood that he was to be on vacation that day. It was only because of the grievant's dedication to his job that he agreed to come in that day. Even then the help promised did not materialize thus causing him to have to stay far longer than he anticipated.

15. The Union further raised some technical defenses to the notice of discharge and point out that the Company’s termination letter came in the form of a so-called COBRA letter to him. The Union asserted that this was not the proper way to notify someone of their discharge and the basis for the Company’s action.

16. With regard to the time card issue, the Union argued that there was inadequate proof that the grievant violated any part of the Rule against falsification of time cards. The Union pointed to Rule 7 and noted that the precise language prohibits “knowingly punching the timecard of another employee or unauthorized altering of timecard, resulting in the timecard showing more time than actually time worked.” The Union asserted that this Rule requires proof of intent, since it uses the word “knowingly,” and asserted that the grievant did not knowingly alter any document, including a timecard.

17. Further, the document he filled out is not a time card but even if it were to be construed as such, the grievant filled it out to *understate*, not overstate the hours he worked. He indicated that he started work at 7:00 a.m. yet it was clear that he started at 3:00 a.m. Thus his actions, while inaccurate, did not violate the Rule at all.

18. The Union argued that the strict terms of the Rule itself must be followed, especially where a person’s job and career are on the line. The Rule requires that the time card must result in a time card showing more hours than actually worked – here the time document, even if it is considered a “timecard” under these circumstances, does just the opposite.

19. The grievant was clearly exhausted and under stress when he filled this out since he had been working since 3:00 a.m. without help for over 10 hours straight. The minor discrepancy, which did not overstate his time at all, should not result in the loss of a job he has had since 1998.

20. The Union claims that the form claims 8 hours, see Union exhibit 9, 3 hours less than he had actually worked. The Union asserted that if the grievant had wanted to obtain additional time he would certainly not have shorted himself some 3 hours.

21. Finally, the Union asserted that even if the arbitrator finds just cause discharge is simply too severe for the proven offense. The grievant came in to perform a special project of indefinite duration on what should have been a day off for him, worked 10 hours without a break with no help and did a very demanding and dirty job.

22. He should be congratulated for his commitment to the work rather than punished for a minor inaccuracy on a form. Moreover, he had no way of knowing that anybody would be looking for him between 2:00 and 3:00 p.m. that day. Arbitrators have discretion to determine the penalty and even though the rules involved in this matter seem to suggest that termination is the appropriate penalty for a first offense it should be remembered that these are not negotiated rules but rather unilaterally implemented rules.

23. Moreover, the rules themselves do not by their own terms require termination. The preamble of the rules in question provides that “serious infractions of the Company’s rules *may* call for immediate termination of employment” but does not require termination. (Emphasis added). At most the grievant’s action involved a mere mistake in filling out a form and a minor lapse in judgment in leaving without talking to a supervisor before leaving but these things happened on a very unique day with a unique set of circumstances. The grievant’s overall record should not be judged based on this one bad day and the arbitrator should exercise the inherent discretion arbitrator’s have to mitigate and reduce the penalty to some form of admonition.

The Union seeks an award reinstating the grievant to his former position with full back pay and accrued contractual benefits.

MEMORANDUM AND DISCUSSION

Many of the relevant facts of the matter are undisputed. The Company is a lead recycling facility located in Eagan, Minnesota. There was evidence to suggest that there is a need to make certain who is in the facility and where they are in the event of an emergency necessitating the evacuation of the building. This will be discussed below but the evidence showed that this was in large measure the policy reason behind the rule against leaving without telling a supervisor.

The grievant has been with the Company since 1998 and worked in the bag house. The bag house contains the various contaminants as the result of the lead recycling operations. The parties agreed that they would not submit all of the grievant's entire work record with the Company but they also agreed that the Union would not argue that his record was "clean." Thus while it was unknown what infractions may have been levied against the grievant in the past it was agreed that his record was not perfect or without prior discipline.

The parties further agreed that the Rules involved in this matter were Rule 7 and Rule 8 of the Company's Personnel and Policy Handbook, See Joint Exhibit 5. The Union acknowledged that the grievant received a copy of these Rules. See Union Exhibit 5. It was clear from the evidence that he was familiar with them and understood his responsibilities under these Rules. The operative Rules provided as follows:

SERIOUS INFRACTIONS

Serious infractions of the Company's rules may call for immediate termination of employment. Those that do not call for termination as a first step will remain in effect for a period of three (3) years from the date of issue.

7. Knowingly punching the timecard of another employee or unauthorized altering of a timecard, resulting in the timecard showing more time than actually time worked.

First Offense: Termination of Employment

8. Walking off the job or leaving the plant area during your shift without Management approval

Initially, it should be noted that the evidence showed that each of these Rules has been interpreted and applied to result in termination for a first offense. The evidence also showed that the grievant understood this and acknowledged during the hearing that if he violated either of these rules that discharge would be appropriate.

The evidence further showed that the rationale behind Rule 8 was twofold – one was of course to prohibit job abandonment and would prevent an employee from leaving without telling a supervisor so the Company could know if necessary work was going to be completed or not. The other reason, somewhat unique to this operation, was related to safety. The plant is a hazardous waste facility and the evidence showed in general that great care must be taken in dealing with the materials involved in the plant. There are elaborate safety regulations in place, although the parties did not submit the details of that, which could necessitate the evacuation of the facility under some dire circumstances. Rule 8 is thus also based on the need to know who is in the facility and where they are in the event of a fire or other emergency. The Rules was clearly reasonable and well understood and communicated to the grievant.

Rule 7 was also shown to be reasonable since it simply codifies a well-known rule in the American workplace against altering one's time card or punching in for someone else. This of course is designed to prevent fraud or the overstatement of time in order to receive greater pay than the employee has worked.

The evidence and undisputed facts showed that on April 4, 2008 the grievant requested vacation. The form was a bit unclear in that he requested 8 hours vacation with a start date of April 10, 2008 and an end date of April 11, 2008. What he apparently meant was that he wanted 8 hours vacation on April 10, 2008 but since his shift started and ended that same day, i.e. 7:00 a.m. to 3:00 p.m., the person in the HR department thought he wanted April 11, 2008 off. At that time he did not make his wishes known clearly nor did he advise the Company of the Court date on the 10th for which he apparently sought the day off to begin with. The schedule was posted with the date of April 11, 2008 listed as the grievant's vacation. The grievant did not make the Company aware of this error though until April 10th.

On April 6, 2008 the grievant's supervisor asked him to clean the bag house along with Mr. Togar, another Company employee. This was apparently a time consuming and dirty job. Suffice it to say that by April 9, 2008 the job was not completed and the supervisor asked the grievant to come in early on April 10, 2008 to finish the work. Significantly, the evidence did not establish that the grievant mentioned to the supervisor that he supposedly was to be on vacation the following day. The grievant at some points in this matter claimed that he had pre-arranged the day off with his supervisor but the totality of the evidence did not support that claim. Mr. Dishaw testified credibly that he had no such conversation and thought the grievant was to be off on the 11th, as the schedule said he was. He further testified that the grievant made no mention that he was going to be off work the following day when he asked him on the 9th to work extra time cleaning the bag house. While the question of whether the grievant did or did not pre-arrange the vacation with his supervisor, these facts certainly taint the grievant's testimony on more weighty matters.

The grievant punched in at 2:58 a.m. on the morning of the 10th and began cleaning the bag house. Mr. Togar was not able to assist him due to health concerns. The grievant worked until approximately 1:00 p.m. without a break apparently and then took his first break of the day. He punched out at 1:03. Several things occurred between the time the grievant took his break and the time he left at 2:00 p.m. He spoke to his wife who apparently reminded him of a Court date. The grievant testified that he had forgotten about this during the day so he started cleaning up to leave.

He further spoke with Ms. Cottrell about a lunch as he had not brought one or money for one. There had been a meeting earlier in the day and lunches had been brought for those individuals. The grievant simply asked if there were extras but was told there were none. He also spoke to Ms Cottrell about the mistaken vacation day. It was not entirely clear when he noticed that the schedule had him off that day but it was clear that Ms. Cottrell cancelled the vacation day as he had already worked the entire day.

It was undisputed that the grievant did not punch out when he left. It was further stipulated as noted above that he left without prior approval from the supervisor nor did he advise a supervisor he was leaving. The grievant claimed that he advised Ms. Cottrell that he was leaving. She however testified credibly that he made no such statement to her despite talking to her several times and that if he had she would have advised him to follow proper procedure and notify a supervisor. On balance her testimony is given greater weight on this record.

The grievant was also seen on the video made a part of the record looking into a room where the supervisors were having a meeting yet he did not knock on the door or enter the room to advise Mr. Dishaw he was leaving.

Clearly, on a “normal” shift there would have been no question that the grievant’s actions would have been in violation of the rule against leaving without notifying a supervisor. The question here is whether on these facts there was something about the shift he did work on April 10th that somehow obviated the responsibility of notifying the supervisor he would be leaving before the end of his regular shift.

First, it was clear that the grievant felt his shift ended at 3:00 p.m. He filled out the Exception Report that day and indicated the shift ended at 3:00 p.m. He can hardly say now that the shift ended whenever he wanted it to or whenever the work was done.

Further, Mr. Dishaw testified credibly that he never gave the grievant license to leave whenever he pleased that day or to “leave when the work was done.” Even if he had there was no evidence to suggest that leaving early without notifying a supervisor as the Rule clearly requires was suspended for the grievant that day.

While the circumstances of the day may well have justified the grievant to leave early, that is not the question; the question is whether those facts and circumstances justified him leaving early *without notifying the supervisors*. There was nothing on this record to support the claim that he had.

The Rule is aimed at both job abandonment and safety. The grievant claimed that he had no way of knowing anyone would be looking for him between 2:00 p.m. and 3:00 p.m. This claim flies in the face of some other clear facts though. First, one never knows when an emergency might occur; there could always be a time when someone could be looking for you in this situation. Moreover, since the grievant had not advised his supervisor he was leaving, the supervisor would not have known that the work was done. Finally, if there had been any questions or concerns about the work, the supervisor would certainly have been looking for him. There was simply nothing to suggest that the normal rules in place had been suspended here.

The Union claimed with some degree of merit that the grievant had been very tired that day and that his judgment may have been clouded a bit due to the very early start, the long hours, the hard work and the sudden recollection of an important Court date. Under these very unique circumstances his actions that day might be explainable and even excusable given the confusion about the vacation day, the special nature of the project and the requirement that the grievant show up 4 hours earlier than his normal shift and the natural fatigue he must have felt by the time he left and his reticence in disturbing the supervisors' meeting. Had this been the only violation, frankly, given the discretion an arbitrator necessarily has in matter such as these, termination might well not have been the result. There was however another matter involved here.

The second basis for the termination is the more serious issue of falsification of a time record. The evidence was fairly clear on this issue. The grievant punched in at 2:58 a.m. on his regular time card. He then apparently worked for approximately 10 hours and took a break at around 1:00 p.m. As discussed above, he spoke to Ms. Cottrell about lunches and the vacation day mix-up during this time. The preponderance of the evidence did not support the claim that he told he was leaving and it is further clear that he did not tell the supervisors either. That set of facts becomes relevant in this issue as well.

He spoke with his wife and was reminded of the Court date. This is somewhat inconsistent with other statements the grievant has made in this matter. Some of these inconsistencies are explainable due to the fact that he did not fill out the form to the Department of Human Rights, but was rather interviewed over the phone. Further, he may well have thought he had arranged to have the day off and may have told his supervisor of his Court date, but that this fact did not register as significant and so was forgotten by the time April 10th rolled around.

What is clear though is that he did not punch out on the normal time clock despite being in front of it while filling out the Exception form that day. The reason for this lapse was never made clear. It seems unlikely that fatigue would have caused this issue as the grievant is seen looking at the clock. He certainly had the presence of mind to fill out the report; why not simply punch out, as was the normal routine? That too was never fully explained.

More to the point, the Exception Report itself is the real issue here. The original report, Company exhibit 7, shows the start time as 7:00 a.m., which as noted was not accurate – he started at 3:00 a.m. The Union argued that the times on the form result in a payment of only 8 hours – not 12 and argued that the grievant’s actions did not result in more time being paid than was actually worked.

The Union also argued that the grievant filled out “8 hours” on the form submitted as Union exhibit 9. The problem here is that Union exhibit 9 was the form he filled out on April 4, 2008 for the vacation request. The form he filled out on April 10, 2008, which formed the basis for the claimed pay that day, is different. That form shows an end time of 3:00 p.m., which was stipulated not to be accurate – he left at 2:00 and the Union acknowledged that and the video clearly shows him leaving at that time. When viewed in the light of the other facts that day, this fact alone supports the Company’s claim that the grievant violated Rule 7 against altering a time record to show more time than was actually worked.

Further, and most significantly, the Exception Report form the grievant filled out on April 10, 2008 shows “12” hours in the space for “total hours.” The Union claimed that he did not total the hours but the report form shows that he did and put 12 in the space listed for total ours. The Union further claimed repeatedly in its Brief that the Exception Report makes reference to 8 hours worked since he filled out the form with a start time of 7:00 a.m. but as noted, the end time is also wrong and the 12 in the “total hours” space undercuts the validity of that claim. The grievant acknowledged that he filled this form out and never made any claim that someone else had altered it. The handwriting also appears to be his and is similar to the parts of the form he admitted filling out.

Moreover, as noted above, the fact that the grievant did not punch out that day would result in the Exception report being the only time record upon which the Company could calculate his pay. It is more likely than not that the grievant would certainly have known this since it appeared he made a deliberate and conscious decision not to punch out but rather submit the Exception Report as a substitute for the time card.

As in many cases, certain inferences must be drawn from the facts that are known. Here, the Exception report filled out on April 10, 2008 shows inaccurate start and end times and if those were the only times the grievant would still likely have known that he was going to be paid an extra hour since he presumably knew when he had punched in and that he did not punch out on the normal time clock. This alone casts serious doubts on the grievant’s actions but when coupled with the entry of “12” hours on that form, the result becomes clearer still. Under these circumstances, the preponderance of evidence supports the claim by the Company that the grievant was attempting to claim more time than he worked.

The Union also asserted that to sustain a discharge the arbitrator should apply a very strict reading of any Rule allegedly violated and that here the grievant's actions did not technically violate the Rule. However, the Rule covers this case almost directly, if not in its letter certainly by its spirit. The Rule is designed to prevent employees from filling out time reports inaccurately where those inaccuracies result in more time being paid and prevent fraudulent submission of time by employees.

Here the Company provided credible testimony that the grievant's time record that day would have resulted in additional time being paid had they not caught this based solely on the times placed on the form. Thus, the 7:00 a.m. start time would have been overridden by the actual punch in time on the time clock. The lack of a punch out time would thus have resulted in an extra hour of pay. Moreover, the "12 hours" entry further undercuts the claim that the only inaccuracy was the 3:00 p.m. entry.

The Union claimed that the grievant was somehow confused when he filled the form out and simply put 3:00 p.m. down since that was the end of his normal shift. The totality of the evidence does not support this claim either though. While it is true that 3:00 p.m. was the end of the normal shift, the grievant acknowledged that he was filling out an Exception Report because he had not worked a normal shift. It is also more likely than not that the grievant, an 11 year employee, understood what the form was and that it was to report hours other than the normal shift.

In turning to the penalty to be imposed, the Union argued that the arbitrator has considerable discretion to fashion a remedy and that the Rules themselves do not require termination. The Union first made the argument that the preamble to the list of serious infractions set forth on page 59 of the Plant Operations handbook, Joint exhibit 3, indicates as follows: Serious infractions of the Company's rules may call for immediate termination of employment. Those that do not call for termination as a first step will remain in effect for a period of three (3) years from the date of issue. The Union asserted that such infractions *may* require termination but does not require it. The Union argued that the Company was not required by these rules to discharge the grievant and neither is the arbitrator.

A review of the language though calls for termination on a first for 7 of the listed 11 infractions. The preamble thus is referencing those other rules for which a suspension is called for on a first offense. It is clear that the word “may” as used in this language applies to those rules for which termination is not required on a first offense. It does not alter the penalty called for in Rules 7 and 8 for example. Those infractions do call for termination on a first offense and the grievant acknowledged at the hearing that violations of Rules 7 and 8 do call for discharge.

Finally, the Union argued that the penalty is too severe even if the arbitrator finds just cause for some discipline and determines there have been technical violations of either of the Rules at issue here. It is certainly true that arbitrators have wide discretion to fashion remedies in appropriate cases. As discussed above, the grievant violated both of the Rules involved and while the violation of only the one rule against leaving without advising his supervisor may have been excusable under these circumstances and would have resulted in something less than discharge, the grievant’s actions in the time card/exception report issue were very serious and violated a rule that itself calls for termination for a first offense.

As noted above, the parties did not submit the entirety of the grievant's past record but simply agreed that the Union would not claim it was perfect. The Company argued that the integrity of its Rules requires adherence to them per their terms and that the grievant must be fired despite his 11-year length of service. There was no claim of disparate treatment here nor any claim that the Company has not applied its rules consistently.

The Union correctly asserts that the penalty of discharge is punitive whereas a suspension is corrective. The Union argued on the grievant's behalf that correction is possible and appropriate and that a lesser form of discipline should be assessed given the grievant’s clear commitment to his job. Here though, the Rules are clear and the arbitrator does not under these circumstances have the discretion to simply substitute his judgment for the clearly enunciated and understood consequences of these listed serious offenses.

Based on the totality of the evidence the level of discretion here is more limited. Further, the infractions were indeed serious and the evidence supported the Employer's assertion that discharge is the appropriate penalty given those infractions and the grievant's overall record and conduct. Accordingly, based on the evidence as a whole, the grievance must be denied and the discharge sustained.

AWARD

The Grievance is DENIED.

Dated: June 2, 2009

Jeffrey W. Jacobs, arbitrator

IBT 120 and Gopher Resources