IN THE MATTER OF THE ARBITRATION BETWEEN

THE UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 653,	)	MINNESOTA BUREAU OF MEDIATION SERVICES CASE NO. 10-RA-0056
Union,	)	
and	)	
RAINBOW FOODS, INC.,	)	DECISION AND AWARD OF ARBITRATOR
Employer.	)	

APPEARANCES

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On October 30, 2009, in Plymouth, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by discharging the grievant, Robert M. Poppler. Post-hearing briefs were received by the arbitrator on December 4, 2009.

FACTS

The Employer (sometimes, "Rainbow Foods") operates thirty-two retail grocery stores in the metropolitan area that includes Minneapolis and St. Paul, Minnesota. The Employer is wholly owned by Roundy's Supermarkets, Inc. ("Roundy's"), which has its administrative offices in Milwaukee, Wisconsin.

The Union is the collective bargaining representative of many of the non-supervisory employees of the Employer who work in the Employer's stores located in Minneapolis and its suburbs, including those who work in such classifications as Retail Specialist, Food Handler and Journeyman Meat Cutter.

The grievant was hired by the Employer on May 9, 1984, and he was discharged on June 23, 2009. At the time of his discharge, he was classified as a Journeyman Meat Cutter, and he worked at the Employer's East Lake Street store in Minneapolis. Section 5.8 of the parties' labor agreement describes the job duties of a Journeyman Meat Cutter as including "all production work commencing with the initial reduction of primal, sub-primal and/or supplemental cuts of all fresh or frozen meat department products including fish (whether by use of saw, grinder, cuber, tenderizer, slicer, knife or other tools of the trade) . . . ."

On June 23, 2009, the Employer issued the following notice to the grievant, discharging him:

> Date of Incident: May 28th 2009
>
> After completing the Company's investigation, it has been confirmed that you violated the ground meat preparation standard policy, by grinding pork after grinding beef

> without cleaning the grinder or plates first.* This violation is enough to terminate your employment on its own but in the course of our investigation we discovered that you [chose] to compound the situation by engaging in [an] offensive act of insubordination by cursing at the Meat Merchandiser that witnessed the violation of ground meat preparation. Rob, you further compounded the situation again by engaging the Store Director in [an] offensive and insubordinate way. Each and every count is a terminable offense. Rob, you are held fully accountable for adhering to our official operational criteria. Mixing Pork and Beef while grinding, engaging and cursing a Meat Merchandiser and engaging and speaking offensively to a Store Director will not be tolerated. These violations are of such a serious nature that termination is required.

On Thursday, May 28, 2009, the grievant began his shift at 6:00 a.m., the usual starting time for the day shift. He testified that the East Lake Street store employs six or seven Meat Cutters, but that the store's staffing of Meat Cutters was low because one was on vacation and another was off because of an injury. The grievant was the only Meat Cutter on duty that morning. He testified that, because of the short staffing, the meat display counter that morning was a "disaster" -- especially so because the store expected substantial business for the forthcoming holiday weekend.

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* The notice of discharge, as I have accurately reproduced it above, alleges that the meat-grinding policy violation for which the grievant is being discharged was a "grinding [of] pork after grinding beef without cleaning the grinder or plates first." The evidence shows, however, that the reason for the grievant's discharge was an alleged grinding of <u>beef after grinding pork</u> without cleaning the meat grinder. I treat the incorrect statement in the notice of discharge as unintended, and, consistent with the evidence and the arguments of the parties, I recognize that the Employer intended to allege that the grievant violated the meat-grinding policy by grinding beef after grinding pork without cleaning the grinder.

The parties agree that, on December 19, 2007, the grievant received a copy of the Employer's Ground Meat Preparation Standards and that he acknowledged receiving the copy and understanding the standards by signing the statement at the foot of the copy he received, which I have included in the relevant excerpts set out below:

> The following procedures are to be utilized in the production of ground meat to ensure quality and safety.
>
> 2. Visually inspect grinding equipment for cleanliness before reassembling cleaned parts. Clean again if necessary. Sanitize all grinding equipment with approved sanitizing solution after every cleaning.
>
> 8. Trimmings are to be stored covered and dated in clean, sanitized lugs and clean lug racks. Lugs are not to be nested or overfilled. 7-01 Amendment: Hold pork trimmings in a red lug and beef trimmings in a gray lug and store separately in the cooler.
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> 10. While it is strongly recommended to use a separate grinder for non-beef species, if it is necessary to grind pork or poultry in the main grinder, the grinder is to be properly dismantled (head, plate, blade, worm and rear seal), scrubbed with hot detergent solution, inspected for cleanliness (recleaned as necessary), and sanitized using an authorized sanitizing solution mixed and tested (using test strips) to proper strength.
>
> 13. Prepare ground pork for bulk (pizza topping, hot italian and breakfast) in cleaned grinder. . .
>
> I understand the importance of the Ground Meat Preparation Standards. I have been trained on the procedures. I further understand violation of the policy will be cause for disciplinary action up to and including termination.
>
> [signed] Robert Poppler

Roundy's employs Meat Merchandisers, whose job it is to visit its stores for the purpose of improving the organization and appearance of each store's Meat Department. Several weeks

before May 28, 2009, employees of the Meat Department at the East Lake Street store learned that a Meat Merchandiser from Roundy's administrative offices in Milwaukee would be at the store on May 28. Accordingly, at about 6:30 a.m. on May 28, Alex A. Mulkey, a Meat Merchandiser for Roundy's arrived at the East Lake Street store.

The following is a summary of the evidence concerning the that morning's events that led to the grievant's discharge. Though that evidence includes testimony given by James R. Walker, Senior Director of Operations for the thirty-two Rainbow Foods stores in Minnesota, most of it consists of the testimony of Mulkey and the grievant describing what occurred after Mulkey arrived at the store that morning.

Mulkey testified that he has had about twenty-five years experience in the operation of meat departments for Roundy's -- experience that includes serving as a Journeyman Meat Cutter and as an Assistant Manager and Manager of meat departments. He has been a Meat Merchandiser for more than three years. As such, he visits stores to train meat department employees to improve the appearance of the department for the purpose of increasing sales.

A Meat Merchandiser has responsibilities that include determining that employees are following standard operating procedures, such as the Employer's Ground Meat Preparation Standards. A Meat Merchandiser has authority to direct meat department employees in such matters as maintaining a neat display counter with products suited to the demographics of the area served by the store and providing good customer service. A

Meat Merchandiser, however, has no authority to discipline employees. Mulkey usually works in Wisconsin as one of two Meat Merchandisers employed by Roundy's in that state, but in May of 2009 he had been assigned to work in Minnesota with a new Meat Merchandiser, Gordon Davis, who was to be assigned the Minnesota stores of Rainbow Foods.

Mulkey testified that he arrived at the East Lake Street Store between 6:30 a.m. and 7:00 a.m., on May 28, 2009, that he introduced himself to the acting Store Manager and then went to the Meat Department. There, he introduced himself to the grievant and asked if he was the Manager of the Meat Department. The grievant told him that he was not the Manager and that he had been working at the store for many years. Mulkey commented that the meat display counters were "really empty" and asked whether the department was "short-handed." Mulkey testified that the grievant seemed "defensive." Mulkey asked what sold well at the store so that he could plan what to put in the meat displays.

Mulkey testified that, after his initial conversation with the grievant, the grievant went to the cutting room in the back of the Meat Department, where meat is butchered and ground, and he continued to prepare meats. Mulkey began to stage the display cases in the front. As Mulkey was staging the meat displays, a customer asked him for some pork steaks, and he went to the cutting room and asked the grievant to cut them; the grievant did so.

Mulkey testified that, between 8:30 a.m. and 9:00 a.m., he was in the cutting room and noticed that the grievant was

grinding pork, doing so with the only meat grinder that the East Lake Street store is equipped with. Mulkey returned to his work staging the meat displays in the front. At about 9:00 a.m., Mulkey was paged for a telephone call from Davis, the Minnesota Meat Merchandiser, and he went to the wrapping room to take the call. The wrapping room is adjacent to the cutting room, and its telephone is on a wall near a door that provides a view of the cutting room.

Mulkey testified that, as he was talking on the telephone, he was able to see the grievant through a window to the cutting room and that the grievant was at the meat grinder, "running beef" round steak through the grinder. He could see that there was a pan on a rack near the grinder and that the pan held six to eight unwrapped styrofoam trays of ground beef. According to Mulkey, he put the telephone down, went into the cutting room and asked the grievant if he had cleaned the grinder. The grievant said "no." Mulkey testified that the time between his noticing that the grievant was grinding beef till he entered the cutting was "a couple of seconds." He told the grievant that he had broken standard operating procedures and that "people get fired for this." He told the grievant to throw away the ground beef he had prepared and to sanitize the grinder. The grievant did so. Mulkey testified that he did not remember what the grievant said in response, but that he did not argue or offer an explanation. Mulkey testified that he thought the grievant knew the beef-grind had been wrong, testimony that I interpret as meaning he thought the grievant knew so after Mulkey's entrance into the cutting room to stop him.

Mulkey went back to the telephone and told Davis what he had just seen, and Davis said that he would telephone Walker. Mulkey also told the Store Manager what he had seen and he asked the Manager to document the occurrence. Mulkey then returned to his staging work on the meat displays, and the grievant continued to work in the cutting room.

Just before the next shift, Mulkey had a conversation with the newly arrived Meat Department Manager, Larry Smerud. Mulkey and Smerud were in the cooler, which is near the cutting room, and Mulkey was telling Smerud that the grievant had failed that morning to sanitize the grinder after grinding pork before he used it to grind beef. Mulkey testified that, as he was talking to Smerud, the grievant "came blasting" into the cooler, "yelling and swearing," called Mulkey, "an arrogant mother-fucker" and said that he was trying to get the grievant fired. Mulkey testified that he told the grievant he did not have authority to discipline employees, that he had merely reported the violation of a standard operating procedure and that he succeeded in calming the grievant down.

On cross-examination, Mulkey conceded that he is "not squeamish about the use of profanity," but he testified that he does not use it on the job. He also testified that in the morning when he commented on the emptiness of the display cases, the grievant told him that he did not have help. Mulkey testified that he did not know if the grievant was working without help because of the absence of ordinarily scheduled Meat Cutters. He did testify, however, that the grievant told him he

was the only one working that morning and that he responded to the grievant that he had "done that before." Mulkey testified that he did not remember if a customer had asked him for some ground pork that morning, but he conceded that one may have. He testified that when he had seen the grievant grinding pork in the grinder, he could tell by sight that it was pork rather than beef because pork is lighter colored than beef. According to Mulkey, when he went into the cutting room to speak to the grievant, he was about twenty to thirty feet from the grievant when he asked if he had cleaned the grinder.

Mulkey explained that for health safety, pork should be cooked to 170 degrees, ten degrees higher than the cooking temperature for beef, though he conceded that there are now few cases of trichinosis in the United States. Mulkey testified that later in the morning of May 28, the grievant told him that a piece of beef had made contact with a table surface where he had been cutting pork and that the grievant asked him if he should throw the beef away. Mulkey told him to trim off the part of the beef that had been in contact with the table surface.

The grievant testified as follows. He has not been disciplined during his twenty-five years of employment by Rainbow Foods. Though Rainbow Foods has no formal evaluation process, he has been told by supervisors that he has been a productive employee whose work is of good quality.

The Union presented in evidence the grievant's testimony and a written statement, in which he described the events relating to his discharge. The following summary is taken from

those accounts of the events of May 28, 2009. As noted above, he began his shift at 6:00 a.m. He was the only Meat Cutter on duty that morning, and, because of short staffing, the meat display counter was a "disaster" that morning. He began to prepare product to re-stock the meat counter. Mulkey arrived at about 6:30 a.m. and was "pretty agitated" about the condition of the meat counter. The grievant told him that he was doing what he could, but that he was only one person. Davis, the newly assigned Meat Merchandiser, had been in the store the week before, and he had "re-set" the meat counter, arranging it in a way that Davis thought would improve its appearance and, thus, improve sales. Mulkey told the grievant that he was going to re-set the counter again, and he began to move the hams into the dairy case. The grievant told him that he had no authority to change the dairy case without approval from the Dairy Manager, and he told Mulkey that "you guys are all the same." Nevertheless, Mulkey re-set the dairy case, and the grievant went to the cutting room to continue his preparation of product to re-stock the meat counter.

The grievant testified that he was grinding beef, starting with the leanest variety offered, 95% lean, and "grinding down" to the least lean offered, 75% lean, as is the usual practice. At times, Mulkey came back from the meat counter to the cutting room to inform the grievant of orders that customers had asked for -- once asking for pork steaks and once for pork neck bones. When the grievant was delivering the neck bones to the counter, another customer asked him for two

pounds of ground pork, and the grievant used the grinder to grind the pork, grinding eight extra pounds so that the additional amount would be available to restock the counter.

The grievant testified that he is aware of the Ground Meat Preparation Standards and that, because the East Lake Street store has only one meat grinder, it is necessary, before using it to grind beef, to sanitize it after it has been used to grind pork. He also testified that the usual practice in the store is to grind pork in the evening, sufficient for the next day, and then to break down the grinder and sanitize it for the next day's use. This practice results usually in having enough ground pork on hand so that it is not necessary to sanitize the grinder in mid-day because of a pork-grind that becomes necessary after running out of ground pork.

According to the grievant, when Mulkey came into the cutting room from the wrapping room where he had been talking to Davis on the telephone, 1) there was still some residual pork in the grinder itself, 2) in the confusion of the morning, he had forgotten that there was still pork in the grinder, 3) he had, in error, just loaded tubes of beef round steak in the grinder's hopper, in order to prepare beef ground round, a special sale item that day, and 4) he had just started the grinder and noticed that there was residual pork in it when Mulkey came into the cutting room and told him to stop. Further, the grievant related that, even without Mulkey's interruption, he would have noticed his mistake, stopped the grinder and thrown away any beef that had entered the grinder from the hopper and then

sanitized the grinder before proceeding to grind the beef round steak. As I understand the grievant's account, the six or eight styrofoam trays of unwrapped ground beef that Mulkey noticed on a pan as he looked into the cutting room while on the telephone were there from the grievant's morning beef-grind that he had started before he ground the pork.

The grievant also related that, later that morning, after store employees told him that they had seen emails from management indicating that he would be discharged, he became angry and went into the cooler as Mulkey was talking to Smerud. When Mulkey told him he was one of the slowest Meat Cutters he had ever seen, he told Mulkey he was an "arrogant prick," and Mulkey told him that he did not deserve his job.

Walker testified that, as Senior Director of Operations for the thirty-two Rainbow stores, he conducted the investigation that led to the grievant's discipline and that the decision to discharge the grievant was made jointly by him and Roundy's Human Resources Department in Milwaukee. He testified that the grievant was discharged for a "critical health and safety violation" of the Ground Meat Preparation Standards -- specifically of Standard 10, which requires that a meat grinder that has been used to grind pork not be used to grind beef until it has been "properly dismantled (head, plate, blade, worm and rear seal), scrubbed with hot detergent solution, inspected for cleanliness (recleaned as necessary), and sanitized using an authorized sanitizing solution mixed and tested (using test strips) to proper strength."

Walker described three primary reasons for the existence of this standard. First, for safety, the minimum cooking temperature for pork products is 170 degrees, ten degrees higher than the 160 degree minimum cooking temperature for beef products. Pork is susceptible to contamination by trichinosis and beef is not, but a 170 degree cooking temperature will kill any trichinosis that may have affected pork products. Second, state labeling regulations, which require the accurate labeling of meat products, prohibit mixing of meats without labeling that shows such mixing. Third, many Islamic and Jewish people have religious prohibitions against eating pork. The East Lake Street store serves many Islamic Somali people.

Walker testified that, during his investigation, he recognized that the grievant was a long-term employee, but he thought that his conduct jeopardized the reputation of the store, that it could damage future sales and that it could affect the health of customers. Walker testified that the decision was made to discharge the grievant because he was aware of the Ground Meat Preparation Standards and, nevertheless, violated them. Walker acknowledged that any beef the grievant ground with the unsanitized grinder never reached the sales floor, but he testified that discharge was the proper level of discipline because the Employer can have no tolerance for food safety violations, and because, after this violation of policy, the Employer could not be sure that the grievant would not repeat it. He testified that the Employer must be able to trust its Meat Cutters, many of whom sometimes work alone.

On cross-examination, Walker conceded that the grievant, except for the incident that led to his discharge, has had no record of any discipline during his twenty-five years with Rainbow Foods, and that, except for his grinding of beef without cleaning the grinder, he would not be "uncomfortable" having him as an employee.

The Union presented in evidence the Rainbow Foods Guidelines for Discipline (the "Guidelines"), a policy that Walker testified was in effect at the time of the conduct that led to the grievant's discharge. The Guidelines list in columns fifty kinds of conduct, described as "offenses" and six stages of progressive discipline, ranging from reprimand through termination. For the following twenty-two offenses, termination is listed as the appropriate discipline for the first occurrence of that conduct:

Alcohol sold to minor
Alcohol sold to customer without ID (any age)
Destruction of company property
Destruction of customer property
Disclosing confidential information
Falsifying records
Fighting/misconduct
Gambling on company premises
Giving or receiving discounts
Immoral conduct on company premises
Intentional horseplay which leads to injury
Misredemption of coupons (intentional)
Performing an illegal act on company property
"Pirating of company software or other form of dishonesty
Possession or under the influence of alcohol or illegal drugs on company premises
Possession of weapons/firearms on company property
[Theft]
Tainting/alteration of product which leads to injury
Threats or intimidation on company premises
Time theft
Tobacco sold to minor
Tobacco sold to customer without ID (any age)

For the first occurrence of two other offenses -- "Abusive, profane or racially charged language on company premises" and "Harassment" -- the Guidelines list the appropriate discipline as "subject to termination."

At the foot of the list of offenses, the following explanation appears:

> The guidelines for discipline or discharge set forth above are illustrations only, are not limited by enumeration, and do not limit in any way the judgment of management regarding discipline or discharge from employment.

The Union argues that the grievant's failure to sanitize the grinder, at worst, fits the offense listed in the Guidelines as "Failure to follow instructions." Walker conceded that a reprimand is the discipline listed for the first two occurrences of that offense, that the third such offense calls for a two-day suspension, that the fourth calls for a three-day suspension and that only at the fifth occurrence is termination listed as the appropriate discipline. Walker testified, however, that the grievant's conduct could be included in the offenses listed as "Performing an illegal act on company property" or "Tainting/ alteration of product which leads to injury." Although he conceded that no injury resulted from the grievant's conduct, he noted that an injury -- sickness -- could have resulted if pork-tainted beef had been sold to a customer. Walker noted that the Guidelines are just that -- guidelines for discipline -- and he described the grievant's violation of the Ground Meat Preparation Standards as so serious that it required his discharge for a first offense.

DECISION

Article VI of the parties' labor agreement is set out below:

> No employee shall be discharged without good and sufficient cause. Dishonesty, drunkenness, gross inefficiency and use of illegal [controlled] substance(s) (drugs) will be considered as causes for dismissal. Dismissed drug offenders who provide the Employer with a certificate of rehabilitation will be reinstated.

The parties agree that the contractual standard for discharge, "good and sufficient cause," is the equivalent of "just cause," and they agree that the issue to be decided is whether the Employer had just cause to discharge the grievant.

First. The grievant's use of abusive language toward Mulkey while they were in the cooler, whether he called him an "arrogant prick" or an "arrogant mother-fucker" was insubordination, but clearly not a basis upon which to discharge him. The progressive discipline policy established in the Employer's Guidelines suggests that this conduct by a twenty-five year employee who has no history of previous misconduct should be corrected by nothing more than a reprimand

Second. The evidence shows that the grievant knew he was required to follow the Ground Meat Preparation Standards, and it shows that he failed to sanitize the grinder after grinding pork and before starting to grind beef, in contravention of the tenth such standard.

Such conduct may constitute just cause for discharging even a long-term employee with an excellent record if the conduct was a deliberate violation of the policy. In the present case,

the grievant's violation should be considered deliberate if his use of the unsanitized grinder was done with an immediate awareness and disregard that he had used it to grind pork without cleaning it. Alternatively, if the conduct resulted from confusion and a failure to remember that he had used the grinder to grind pork, as he related, corrective discipline less than discharge is appropriate. Thus, I must decide an issue of fact -- whether the grievant's violation of the Ground Meat Preparation Standards was deliberate or was the result of an error.

I rule that the evidence is not sufficient to determine that the grievant's violation of the Ground Meat Preparation Standards was deliberate. I accept Mulkey's testimony that, at the time he entered the cutting room from the wrapping room, he saw six to eight styrofoam trays of unwrapped ground beef in a pan on a rack near the grinder, and I accept his testimony that he entered the cutting room within a few seconds of the time he first saw the grievant operating the grinder with beef in the hopper. Mulkey's observations, however, are not inconsistent with the grievant's explanation 1) that the six to eight trays of ground beef were from the previous beef-grind, and 2) that, in the confusion of the morning, he loaded the hopper with round steak and had just started to grind it when he noticed his error, just as Mulkey came into the cutting room. Without clear evidence showing that the grievant's violation of the Ground Meat Preparation Standards was deliberate -- that, before Mulkey entered the cutting room and told him to stop grinding, he was aware that he had used the grinder to grind pork without

sanitizing it -- I accept the grievant's explanation that the violation resulted from his error.

As the Employer has argued, the risk that the grievant might repeat the violation of the Ground Meat Preparation Standards would be substantial if his conduct was deliberate, but it appears from the grievant's work record that the risk of his repeating a violation resulting from error is not great. Accordingly, I conclude that, though there was cause to discipline the grievant for his error, there was not just cause to discharge him.

I attribute to the Employer most of the responsibility for the economic loss the grievant sustained, but, because the grievant's error began the events that led to his discharge, he should bear some of that responsibility. Accordingly, I award his reinstatement without loss of seniority and with partial back pay and benefits.

AWARD

The grievance is sustained in part. The Employer shall reduce the grievant's discipline to a thirty calendar-day suspension without pay, measured from May 30, 2009, the date he was suspended from work without pay while the Employer conducted its disciplinary investigation. The Employer shall reinstate the grievant to his position without loss of seniority. The parties shall 1) determine the amount of pay and benefits the grievant would have received from the Employer during the period between the expiration of the thirty calendar-day suspension and his reinstatement and 2) reduce that amount by whatever he

received as unemployment compensation or earned from other employment or should have earned in performance of his duty to mitigate his damages. The Employer shall pay the grievant 75% of the amount thus determined as an award of partial back. The parties shall make a similar determination of the benefits the grievant would have received, had he not been discharged, and the Employer shall provide him with those benefits. I retain jurisdiction to determine, if the parties cannot agree, the amount of back pay and benefits the grievant is entitled to receive.

March 1, 2010

Thomas P. Gallagher, Arbitrator