

IN RE ARBITRATION BETWEEN:

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 789

and

ROSEN INDUSTRIES/LONG PRAIRIE PACKING COMPANY

DECISION AND AWARD OF ARBITRATOR

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March 23, 2010

IN RE ARBITRATION BETWEEN:

UFCW Local #789

and

DECISION AND AWARD OF ARBITRATOR
Jose Juarez Lopez Grievance matter

Rosen Industries/Long Prairie Packing Co.

APPEARANCES:

FOR THE UNION:

Roger Jensen, attorney for the Union
Jose Juarez Lopez, grievant
Rafael Espinosa, Business Representative

FOR THE EMPLOYER:

Paul Zech, attorney for the Employer
Gary Lovell, HR Manager
Alice Hanson, Fabrication Superintendent
Joe Kaspari, Supervisor

PRELIMINARY STATEMENT

The hearing in the matter was held on February 8, 2010 at 10:00 a.m. at the City Hall in Long Prairie, MN. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on March 8, 2009.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement from March 5, 2008 through March 11, 2011. The grievance procedure is contained at Article 15. The arbitrator was selected from a permanent list maintained by the parties. The parties stipulated that there were no procedural issues and that the matter was properly before the arbitrator.

ISSUES

The parties consolidated two separate disciplinary matters, a 3-day suspension and the termination. The issues are thus as follows: Did the Employer have just cause to suspend the grievant for his conduct on October 9, 2009? Did the Employer have just cause to terminate the grievant? If not what shall the remedy be?

EMPLOYER'S POSITION

The Employer took the position that the grievant's suspension and his termination were justified due to his conduct on October 9, 2009 and November 4, 2009. In support of this position the Employer made the following contentions:

1. With regard to the suspension the Employer pointed out that there is no dispute that the grievant left the work site to go to an appointment on October 9, 2009 without punching out. The Employer pointed to the time card, Employer Exhibit 5, which shows that the grievant actually left twice that day, once to go to get his driver's license and again to attend a medical appointment. He should have punched out and then back in when he returned from the first appointment. He then should have punched out and then back in when he left and returned from the second. He was well aware of this requirement yet he failed to follow that procedure. His time card showed that there should have been an even number of punches yet there was an odd number of punches; demonstrating that he failed to punch in or out.

2. The Employer pointed to a prior warning given to the grievant only a few weeks before the October 9, 2009 incident. See Employer Exhibit 4, September 2, 2009 warning notice. This too was for the failure to punch out when leaving company property. In addition, the Employer asserted that the grievant's supervisor told him on October 9, 2009 not to forget to punch out when he left.

3. Further, the Employer pointed to its plant rules and asserted that these were clearly explained to the grievant, in Spanish, which is his native language, and that he understood the requirements of those regulations. There are two sets of these – one for absenteeism and one setting forth more general plant rules. The disciplinary history is essentially kept separate and discipline is done on separate tracks. The Employer however asserted that while some of the grievant's disciplinary warnings etc. were on the absentee track, the infractions here were on the general plant rules track, discussed below, and that the grievant was on the progressive discipline track for a 3-day suspension when he failed to punch out on October 9, 2009.

4. Those rules disseminated in English and Spanish provide in relevant part as follows:

The following Minor Infractions may result in discipline action up to and including discharge. Discharge for these infractions generally follows previous verbal or written warning.

5. Rule #19 of those general plant rules provides that “failure to obtain permission from a supervisor, and failure to punch out on time cards when leaving the plant during work hours” is such a minor infraction. The Employer asserted that the grievant's infraction is thus clearly a part of the general rules and was not on the “absentee track” as asserted by the Union.

6. The Employer argued that the grievant was appropriately given a 3-day suspension due to his prior warnings and counseling on rule infractions, see Employer Exhibit 4. While some of these are not formal disciplinary notices they were clearly notice to the grievant of the need to adhere to plant rules and that his employment was at risk if he did not. Further, the Employer pointed to the progressive disciplinary rules, Employer Exhibit 3, that provide for a warning letter for a first violation of any plant rule, a second warning letter for a second violation, a 3-day suspension for a third and discharge for a fourth. The Employer pointed out that the grievant was at that third violation level given his history and that a 3-day suspension was clearly called for under the policy.

7. Regarding the termination, the Employer first noted that the grievant committed a fourth violation even while the grievance over the suspension was pending. The Employer further pointed out that the grievant is not a long-term employee, having been with the company since March 2008, and that his work history was riddled with warnings and violations of policy.

8. The Employer asserted that Ms. Hanson observed the grievant place his hand in the sanitizer on November 4, 2009. This is a clear violation of safety rules and could result in a severe burn to the employee's hand. She had a clear field of vision and saw him place his hand directly in the sanitizer, not merely over the top of it to check the temperature as he alleged. She indicated that the grievant placed his hand into the sanitizer up to his knuckles and that he had a green colored rubber glove on that hand.

9. The Employer noted that the safety rule is in place for a reason – the water is 180 degrees or even hotter and that this can easily cause a severe burn or scald injury even if the employees are wearing a rubber glove. If the glove has a small hole in it the hot water will enter and can cause severe burns. Further, the Employer noted that this rule stems from the fact that the plant is cold and that employees sometimes dip their hands in the sanitizer to warm them. All employees are told not to do this and when they are caught discipline is always meted out.

10. The Employer argued that the employees are given specific training and told not to place their hands in the sanitizer as they sometimes do to warm their hands since it is cold in the plant. See page 10 of Employer Exhibit 3, which the Employer alleged showed that the grievant had been given clear direction not to place his hands in the sanitizer.

11. The Employer further argued that Ms. Hanson immediately went to the grievant's immediate supervisor, Mr. Kaspari, to report this. When he confronted the grievant he asked him in both English and Spanish whether he placed his hand in the sanitizer and that the grievant admitted he did and asked if there were "problems" with that to which Mr. Kaspari responded that there might be, or words to that effect.

12. The grievant was then taken to the HR manager's office and asked if he placed his hand in the sanitizer. It was only then; after he had been told that there might be problems with this infraction and he had been hauled to the HR office, and presumably knew at that point that he could well be in some trouble, that he asserted he had only placed his hand over the sanitizer. The grievant asked to have the glove brought up from the floor and Mr. Kaspari retrieved the grievant's glove as directed. It was wet, clearly indicating that the glove had been placed in the water of the hand sanitizer. The Employer asserted too that the grievant raised for the very first time at the hearing that it was the wrong glove; he did not raise that issue at the time the glove was examined or at any of the subsequent grievance steps.

13. The Employer further acknowledged that the grievant's version of the events of November 4, 2009 are not credible and that many parts of his story do not hold together. The Grievant claimed that he had been told to turn on the sanitizer yet no one other than he testified to that. His immediate supervisor clearly did not tell him to do that and the Union did not subpoena anyone to verify or corroborate the grievant's story. Further, the grievant was on one-handed light duty that day due to a work injury and was merely pulling small pieces of meat off a conveyor belt. He therefore had no reason to use tools or knives and therefore no reason to use the sanitizer. These facts, coupled with the last minute change in his story about which hand he placed in the sanitizer severely undercuts the grievant's credibility here, according to the Employer.

14. The Employer pointed to the grievant's history and asserted that he was issued a verbal warning in December 2008 for an unauthorized break, a written warning in April 2009 for a safety violation, a verbal warning in August 2009 for a sanitation violation, a second written warning in August 2009 for a safety violation, the oral warning in September 2009 referenced above for failing to punch out when leaving company premises, and another verbal warning in October 2009 for yet another safety violation. He was then issued the 3-day suspension for the time card violation referenced above and finally was terminated for the safety violation for placing his hand in the sanitizer in November 2009.

15. The Employer indicated that the grievant violated a clear rule and that his record and length of service mandate termination even though the Employer acknowledged that the grievant was a competent worker. The Employer noted that it takes its safety rules very seriously and that the validity of these rules requires that they be enforced here even though the grievant was good at his position.

The Employer seeks an award of the arbitrator denying the grievance in its entirety.

UNION'S POSITION:

The Union took the position that there was not just cause for either the suspension or the discharge. In support of this the Union made the following contentions:

1. With regard to the suspension, the Union argued that the grievant simply forgot to punch out when he left and that this was at worst an inadvertent lapse. It was not designed to cheat the Company of any time or to alter his time card to obtain time he was not entitled to.

2. The grievant was given permission to leave; once to get his driver's license and once to attend a medical appointment. The Union pointed to the time card and noted that the grievant left for the driver's license appointment and returned with only 10 minutes or so until he had to leave for the doctor's appointment. Under these circumstances, he could well have gone directly to the doctor's office without returning to work but that the grievant is dedicated to his job and so returned to work for a few minutes until he had to leave. The grievant simply forgot to properly punch the clock that day.

3. The Union further asserted that this whole scenario should more properly have been categorized as an attendance violation, even if it is considered to be a policy violation at all. Accordingly, the Employer should thus have placed the October 9, 2009 incident under the attendance policy "silo" of progressive discipline rather than under the general plant rules. Further, the Union asserted, and the Employer acknowledged, that the absenteeism violations are kept separate from the general plant rules even though "excessive absenteeism or tardiness" is in the general plant rules.

4. The Union pointed out that the grievant speaks virtually no English and has to have the rules explained in Spanish. In the Employer's rules, there is a difference between the English and Spanish versions, since one has 21 separate paragraphs and the other has 22. There are thus some discrepancies in these two versions and the grievant may well not have understood where the violation even went or where such a violation would be "placed" for purposes of progressive discipline.

5. Further, the Union asserted that the grievant's history did not justify a 3-day suspension. Many of the so-called warnings were not considered discipline but were merely oral reminders to the grievant and should thus not have placed him on the progressive discipline track in Employer Exhibit 3. The Union argued that the circumstances of this matter show no intentional violation of the rule and that the violation if there was one should have been placed in another track for progressive discipline.

6. With regard to the termination, the Union referred back to the suspension argument and asserted that if the 3-day suspension is overturned, the grievant must be reinstated since he would thus not be at the “termination” stage of the progressive discipline matrix set forth on Employer Exhibit 3.

7. The Union asserted that the grievant did not place his hand in the sanitizer and argued that the Employer’s witnesses were mistaken. The Union claimed there could have been obstructions to the field of vision and that there were animal legs hanging from hooks that circulate around the plant that could well have been in the way. The Union alleged that what Ms. Hanson actually saw was the grievant placing his hand over the top of the sanitizer to check to see if it was warm.

8. The Union further noted that the water may not have been to the top of the sanitizer and that even if Ms. Hanson had seen the grievant stick his hand inside the sanitizer, that does not prove that he put his hand into the water itself since it may not go to the top. The Union asserted that the Employer bears the burden of proof and that they were unable to prove even by a preponderance of the evidence that the grievant placed his hand inside the sanitizer or that his hand touched the water.

9. The Union noted that the grievant had sustained a work related injury and that he was on light duty that day working with only one hand. He in fact held his left hand in his pocket as he was under medication restrictions not to use that hand due to a shoulder injury.

10. The grievant indicated that he had been told by a supervisor named Luis to turn on the sanitizer and make sure it was working properly. The Union pointed out that the sanitizer is a small stainless steel pot filled with hot water to sanitize and clean any utensils or knives that may fall on the ground during operations. The grievant further asserted that he placed his right hand over the sanitizer to see if it was warm yet and that he did not at any time place his hand into the water.

11. The Union asserted that the grievant was not asked in Spanish if he had placed his hand in the water and that he did not understand what his supervisor had asked him. He further asserted that he immediately told Ms. Hanson and Mr. Kaspari that he had only put his hand over it to check to see if it was warm and that he has not “changed his story” as asserted by the Employer.

12. Further, he maintained his innocence while in the HR office and that he was completely certain of it and asked to have the glove brought up. The fact that it was damp proved nothing. The steam would of course have made the glove wet on both sides as it swirled around the glove. The Union further asserted that there was no effort to locate the cotton under-glove the grievant was wearing to see if that was wet.

13. The essence of the Union's case is that the grievant did not place his hand in the sanitizer as alleged and that the Employer witnesses are mistaken as to what they saw. In fact, they brought the wrong glove – the grievant was not wearing a rubber glove on his left hand since he was under doctor's orders not to use that hand anyway. He had it in his pocket and used only his right hand to do his work that day. Further, the grievant never admitted to this and that he was not even asked in Spanish about what he did and does not understand English. Any answer he might have given to a question posed to him in English has no validity since he speaks only Spanish. Further, the fact that the rubber glove he was wearing was wet was the result of the steam rising from the sanitizer and not from him placing his hand in the water. The Union asserted strenuously that there was inadequate proof of any rule violation here and that the grievant was good at his job and wants to be reinstated.

The Union seeks an award sustaining the grievance and overturning the 3-day suspension herein and reinstating the grievant with a suspension as deemed appropriate by the arbitrator.

MEMORANDUM AND DISCUSSION

The Employer is a meatpacking and processing facility located near Long Prairie, Minnesota employing some 450 workers. The grievant has been with the Employer since March of 2008. As will be discussed more below, his disciplinary record has not been exemplary and reveals a long history of warning notices, disciplinary warnings and coachings for a variety of rule violations and infractions.

The evidence showed that the grievant has a series of disciplinary warnings and notices in his file related to a variety of rule infractions. The evidence showed that the grievant was issued a verbal warning in December 2008 for an unauthorized break, a written warning in April 2009 for a safety violation, a verbal warning in August 2009 for a sanitation violation, a second written warning in August 2009 for a safety violation, the oral warning in September 2009 referenced above for failing to punch out when leaving company premises, and another verbal warning in October 2009 for yet another safety violation.

The evidence further showed that the Employer has a progressive disciplinary process in place. Employer Exhibit 3, entitled General policy and Work Rules provides for a warning letter for a first violation of any plant rule, a second warning letter for a second violation, a 3-day suspension for a third and discharge for a fourth. The evidence showed too that there is a list of so-called minor infractions that can result in the progressive discipline steps set forth above that is written in English and Spanish.¹ The evidence further showed that absentee violations, i.e. for tardies and late arrivals or no-call no-shows, are kept separately from the general rules set forth on the minor infraction list for purposes of progressive discipline.² There was some dispute about whether the grievant's record was somehow skewed due to this. The Union claimed that the "real" violation for the failure to punch in or out on October 9, 2009 should have been listed as an absentee violation and therefore should not have been placed on the progressive discipline steps for the other minor infractions.

¹ There was some dispute about why the list in English is slightly different from the list written in Spanish. Indeed the English version has 22 listed paragraphs while the Spanish version has 21. The record reveals that the last paragraph was for some reason not on the Spanish version. This however was not involved in this case since the applicable rules for the violations at issue here are on the Spanish version of that list.

² The evidence showed that despite the fact that the minor infraction list contains the violation entitled "excessive absenteeism or tardiness," this is in fact kept on a separate list for purposes of the progressive discipline steps set forth above. The issue here involves only the progressive steps meted out for the grievant's alleged violations of the minor infraction list only.

Paragraph 19 of the minor infraction list however shows that there is a very specific entry for “failure to punch out on time cards when leaving the plant during work hours.” This entry is also on the Spanish version of the list as well. On this record it is determined that the Employer appropriately listed the infraction for failure to punch out on the same list it maintains for the progressive discipline for minor infraction.

As noted above, this matter encompasses two separate disciplinary matters. The first is a 3-day suspension given to him for failure to properly punch in and out on October 9, 2009. That will be dealt with first. There were few if any disputes about the facts of that matter. The grievant appeared for work that day and was given time off to attend to two separate appointments that day. One was to deal with a driver’s license issue and the other was to attend a medical appointment for a work related shoulder injury he sustained while working for this Employer.

Employer Exhibit 5 shows the time card punches for that day. The grievant punched in at approximately 6: 28 a.m.³ He then punched out at 8:22 a.m. The next entries are at 9:89, 12:50 and 15:05. There are five entries clearly indicating that he neglected to punch out or in that day.

The Union acknowledged that the grievant failed to punch the clock as he was supposed to but argued that this was simply inadvertent. The Union further pointed out that the grievant’s appointments were close in time that day and that he returned from the driver’s license appointment only a few minutes before he had to leave to go to the doctor. He could well have simply gone from one appointment to the other that day but decided to go back to work and put in some time rather than waiting the additional time between appointments.

³ The Exhibit was a photocopy of the time card and the numbers were frankly difficult to read accurately. The Employer had the original card at the hearing but that was not placed in evidence. While the actual times were somewhat hard to read the exact times were not strictly at issue. What was at issue and what was clear from the card was that there were only 5 entries made on that time card showing definitively that the grievant failed to either punch in or to punch on the time clock that day. It should also be noted that the times are shown in 100ths of hours.

This argument might well have had some cogency and found some sympathy but for the specific warning he received in September of 2009. Further, there was some evidence that the grievant was again specifically told not to forget to punch out on October 4, 2009. Thus, while the grievant's action that day might well have been the result of simple distraction they were in clear violation of the rule and specific warnings given only a few weeks before and even that day.⁴

Further, there was no evidence of disparate treatment in this regard nor that the Employer had somehow incorrectly calculated the number of disciplinary notices the grievant had received. It was clear that he was at the 3-day suspension step of the progressive discipline scheme. Accordingly, the 3-day suspension grievance must be denied.

The next issue is the termination. There was a considerable factual dispute here. The evidence showed clearly that the grievant was working that day on a line where he was required to pull scraps of meat off the line. The bones were on a conveyor belt approximately 2 to 3 feet off the ground and no meat was supposed to be there. The grievant was also on a light duty assignment that day due to the work related shoulder injury and was restricted to working with his right hand only. He placed his left hand in the pocket and was not using it.

From there the facts diverge greatly. The Employer's witness indicated that she was in charge of the floor that day and was simply watching the grievant working when she saw him place his hand into the hand sanitizer. She was quite clear about this and the evidence showed that she had an unobstructed view of the grievant and the sanitizer. This was shown despite some very vigorous cross-examination by Union counsel.

⁴ There was no evidence of any nefarious intent or scheme to defraud the Company. The evidence showed that for whatever reason the grievant failed to punch out either because he forgot to do so or that he was somehow distracted. There was however no evidence that the Employer did anything to distract him nor was there any evidence that the Employer told him it was acceptable to not punch out when he left for the doctor's appointment. Thus it was clear that the grievant simply failed to follow the clear directive to punch out when leaving. Moreover, the rule appears to be in place and properly enforced for this very reason – so people do not forget to punch the clock as appropriate in order to accurately reflect the time at work.

The sanitizer is a small pot of water heated to approximately 180 degrees that is to be used to sanitize knives and other tools that may fall on the ground or become contaminated. The water is of course quite capable of inducing a serious burn if it comes into contact with the skin. The evidence showed that employees are trained not to place their hands into the water due to the potential for burning; even if they are wearing gloves. The safety personnel train the employees that a small hole in the glove will allow the hot water inside and that could cause a burn injury. The Employer indicated that safety is a major concern and that they go to great lengths to provide a safe work environment for all their employees. See also Employer Exhibit 3 at pages 6 – 10. It was thus clear that the grievant had been told not to place his hands into the water and that he was aware of the plant rule against it.

The evidence showed that the manager who saw the grievant place his hand into the sanitizer immediately went to the grievant's immediate supervisor to report this. He then went to the grievant and asked if he had placed his hand into the sanitizer. This was done in both English and Spanish. There was considerable dispute about this and the Employer indicated that the grievant had indicated that he had and then asked if there was a “problem” with that. He was then escorted to the office and would certainly have known by then that he was in trouble for something.

At the HR office the grievant claimed that he had not placed his hand into the sanitizer but rather placed his hand over the water to check to see if it was hot. He asked that the glove be brought up from the floor to check to see if it was wet. The supervisor retrieved the glove and brought it up to the office. After an examination of it, the evidence showed that it was wet on both sides and from that the Employer concluded that the grievant had in fact placed his hand in the water in violation of the rule.

One of the hardest tasks facing any arbitrator is the resolution of a factual dispute of this nature. The grievant claimed that he was told to turn the sanitizer on by another supervisor and that he simply placed his hand over it to see if it was working. He further claimed that the steam would certainly have enveloped his hand making the glove wet on the front and back side of it, such that the fact that it was wet proved nothing and may have even corroborated his story.

The grievant further claimed that he never admitted placing his hand in the sanitizer and that if the supervisor had asked him in English he would not have understood the question anyway, thus any answer he might have given is of no probative value.

Several things about the grievant's story do not add up however. First, there was no evidence that the Employer's witnesses were lying or even mistaken. There was a clear view of the work station and the witness was quite certain of what she saw. Further, there was no evidence that the Employer wanted to trump up a reason to terminate this employee. On the contrary, his work performance appeared to be generally good; it was his unfortunate history of rule infractions that was the issue.

Further, there was no evidence that any supervisor asked the grievant to turn the sanitizer on nor was there any reason for him to have done that on the day in question. He was working light duty picking meat scraps off the line and was not required to use any tools or knives. On this record, it simply does not make much sense for him to have been working with the sanitizer.

Moreover, while there is some possibility that the glove would have been wet even if he had placed his hand over the sanitizer on this record the evidence shows that the grievant was likely trying to warm his hands; as apparently some employee's do. Further, if there was that much steam coming off the sanitizer there was little reason for him to have checked to see if there was steam – he could easily have seen the steam rising; as it no doubt would be if it were hot and the plant is in fact 40 degrees or so inside.

Finally there was the question of whether the grievant admitted placing his hand in the sanitizer. Again, the preponderance of the evidence supports the Employer on this record. The grievant's supervisor testified credibly that he asked the grievant in Spanish and English if he had done so and that the grievant at first said that he had. It was only later after being taken from the floor to the office that he indicated he had not. Further, it appeared to have been at the hearing that he first indicated that he had not even been wearing his rubber glove on the left hand that day. He said nothing about that when in the office and this appears to be a claim brought up for the first time at the hearing. As such it was not given great probative value given the overall record.

The Union did not assail the validity of the progressive disciplinary process or of the validity of the rule itself. The Union's claim was that the grievant did not violate it and that if the 3-day suspension were not shown to be valid the grievant would not be at the discharge step of the process. Here however, the record showed that the progressive discipline steps were followed and that there is no evidence of disparate treatment. As determined above, the suspension was proper due to the grievant's failure to punch out so that he was at the termination step given his record. Given the grievant's relatively short tenure and his discipline history, the record supports termination in this matter.

AWARD

The Grievance is DENIED.

Dated: March 23, 2010

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Jeffrey W. Jacobs, arbitrator