

IN THE MATTER OF ARBITRATION BETWEEN

SUPERVALU, INC.,)	
)	ARBITRATION
Employer,)	AWARD
)	
and)	
)	DAVIS DISCHARGE
)	GRIEVANCE
INTERNATIONAL BROTHERHOOD)	
OF TEAMSTERS, LOCAL NO. 120)	
)	
Union.)	BMS CASE NO. 09-PA-0546

Arbitrator: Stephen F. Befort

Hearing Date: February 16, 2010

Post-hearing briefs received: April 2, 2010

Date of decision: April 23, 2010

APPEARANCES

For the Union: Martin J. Costello

For the Employer: Jonathan O. Levine

INTRODUCTION

Teamsters Local No. 120 (Union) is the exclusive representative of a unit of warehouse workers, maintenance engineers, and drivers employed by SuperValu, Inc. (Employer) at its warehouse facility in Hopkins, Minnesota. The Union brings this grievance contending that the Employer violated the parties' collective bargaining agreement by discharging Curtis Davis from employment without establishing a clear violation of the last chance agreement applicable to his continued employment. The

grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUE

Did the Employer have cause to discharge the grievant pursuant to the terms of the parties' last chance agreement? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 13

DISCHARGE

13.01 Drunkenness, dishonesty, insubordination or repeated negligence in the performance of duty; unauthorized use or tampering with Employer's equipment; unauthorized carrying of passengers; violations of Employer's rules which are not in conflict with this agreement; falsification of any records; or violation of the terms of this agreement shall be grounds for immediate discharge.

RELEVANT WORK RULES

GROUP 1 OFFENSES

SUPERVALU Minneapolis Distribution Center considers the violation of work rules as misconduct. When misconduct is of a serious nature, an employee may be immediately terminated. Examples of serious misconduct, which may result in immediate termination, include the following Group 1 list of offenses. It is the employee's responsibility to be familiar with this list. It should be noted that this list is not intended to be all-inclusive.

* * *

17. Directed use of vulgar, profane, slanderous or racially derogatory statements both verbal and written while on company property.

FACTUAL BACKGROUND

The Employer is a large food distribution company that sells food products on both a wholesale and a retail basis. Curtis Davis, the grievant, has been employed by the Employer as a warehouse worker in the Hopkins fresh produce building since 2003. At all relevant periods, the grievant was a member of the warehouse, maintenance, and drivers unit represented by the Union.

In 2008, the Employer discharged Mr. Davis for the alleged misuse of working time. Following the filing of a grievance by the Union challenging that action, the parties entered into a return to work or last chance agreement dated September 4, 2008. This agreement provided as follows:

As a result of a settlement agreement between Teamsters Local # 120, Curtis Davis and SUPERVALU Minneapolis Distribution Center on March 16, 2008, it was agreed Mr. Curtis Davis would be allow[ed] to return to work with time served, no back pay and given a final written warning.

It is further agreed any violation of a Group 1 or Group 2 SUPERVALU Minneapolis Distribution Center's Work Rule will result in his immediate termination of employment. Normal disciplinary progression associated with Group 2 Work Rules & Regulations or Safety Violations are not applicable to this agreement and will be waived in the event there is a violation.

The events giving rise to this dispute took place on October 2, 2008. At that time, Mr. Davis worked as a warehouse order filler in the fresh produce facility under the supervision of Stephen Yochim and Joe McDonald. Mr. Davis was scheduled to work a 2:00 p.m. to 10:00 p.m. shift on that day.

In performing his job, Mr. Davis uses a Vocollect Talkman, a computer device that assists with order selection and other tasks in the warehouse. On most days, employees simply proceed to the office after checking in and help themselves to one of

the Vocollect machines stored on an office shelf. Mr. Davis attempted to begin his work day on October 2 in this manner, but he encountered a change in procedures.

According to the testimony of Mr. Yochim, Superintendent of the fresh produce operation, the Employer had scheduled a weekend software upgrade for the Vocollect units. In order to ensure that all units were returned to the office for the upgrade, warehouse employees were required to exchange their employee identification/time cards for the Vocollect units at the beginning of their shifts. When Mr. Davis attempted to pick up a Vocollect unit on October 2, Operation Assistants Lisa Gohla and Matt Geiger, informed Mr. Davis that he needed to present his identification card in order to obtain a machine. Mr. Davis, who had left his identification card in his locker, questioned the requirement, called it “stupid,” and became increasingly agitated.

Ms. Gohla eventually told Mr. Davis that he needed to talk with Mr. Yochim. Yochim explained the rationale for the new protocol and directed Davis to go to his locker and obtain his employee identification card. Mr. Davis requested a “20 minute delay” under the Employer’s productivity policy, but Mr. Yochim declined the request, stating that a locker trip would not take 20 minutes. As Mr. Davis left the office to retrieve his identification card, he stated something to the effect that “you’re all a bunch of stupid mother fuckers.”

The testimony on this last point differs in some respects. Mr. Yochim testified that as Mr. Davis reached the exit door of the office he turned and stated, “you’re all a bunch of stupid mother fuckers.” Ms. Gohla testified to a similar statement, while Joe McDonald, who also was present, heard Mr. Davis say, “they are all a bunch of dumb mother fuckers.” Mr. Davis, in his testimony, acknowledged that he could have uttered

something of the sort, but he claimed that his back was to the others as he made the statement and left the room.

When Mr. Davis returned from his locker, Mr. Yochim directed him to the superintendent's office. In the meantime, Mr. Yochim had paged Union steward Troy Gustafson to join them. Mr. Yochim testified that he asked Mr. Davis what he had said as left the office, and Mr. Davis denied saying anything. According to Mr. Davis' testimony, Yochim asked, "what did you say to me," and Davis replied that he did not say anything to *him*. At the close of this meeting, Mr. Yochim advised Mr. Davis that he was suspended pending further investigation.

The Employer terminated Mr. Davis on October 10, 2008. The termination letter explained the basis for the Employer's action as follows:

On 10/02/08 you engaged in behavior that was in violation of SUPERVALU's Minneapolis Distribution Center WORK RULES AND REGULATIONS. Specifically Group 1 Section 17 which states and prohibits: Directed use of vulgar, profane, slanderous or racially derogatory statements both verbal and written while on company property. As a result of previous policy violations a non-precedent setting final agreement was agreed to and issued on April 24, 2008. You reviewed and signed this final warning agreement which clearly stated any violations of Group 1, Group 2, or Safety Policies will result in immediate termination. As such your employment is being terminated due to your inappropriate behavior on October 2, 2008

The union filed a grievance challenging the Employer's action. That grievance proceeded through the steps of the contract grievance procedure and is now ripe for resolution in arbitration.

POSITIONS OF THE PARTIES

Employer:

The Employer contends that its decision to discharge Mr. Davis was warranted in that he violated the terms of the last chance agreement negotiated by the parties. In this regard, the Employer maintains that its work rules clearly prohibit employees from directing profanity at their supervisor or co-workers. Nonetheless, the evidence shows that Mr. Davis engaged in an outburst that directed profanity both toward a supervisor and toward several co-workers. In addition, the Employer argues that Mr. Davis was not engaged in mere shop talk when he made such remarks. According to the Employer, the invectives that he uttered went beyond that generally tolerated in the workplace and legitimately triggered the final progressive discipline step envisioned by the last chance agreement.

Union:

The Union asserts that Mr. Davis' comments on October 2, 2008, do not provide just cause for discharge for two reasons. First, the Union argues that Mr. Davis did not offend Work Rule 17 because his comments were not "directed" at anyone in particular, but instead were uttered only as an expression of exasperation over the situation in general. Second, the Union contends that Mr. Davis' comments constituted mere shop talk when considered in the environment of the Employer's facility. In support of this contention, the Union submitted evidence showing that the use of foul language and insulting comments were common in the context of this particular workplace.

DISCUSSION AND OPINION

In the usual discipline and discharge case, an arbitral determination of just cause involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See Elkouri & Elkouri, HOW ARBITRATION WORKS 948 (6th ed. 2003).* In this case, however, the terms of the parties' last chance agreement limits the scope of arbitral authority. In this regard, the last chance agreement states:

It is further agreed any violation of a Group 1 or Group 2 SUPERVALU Minneapolis Distribution Center's Work Rule will result in his immediate termination of employment. Normal disciplinary progression associated with Group 2 Work Rules & Regulations or Safety Violations are not applicable to this agreement and will be waived in the event there is a violation.

This language, accordingly, removes the typical second step remedial issue from arbitral jurisdiction, and the only question at issue in this matter is whether the grievant's conduct amounted to a violation of the terms of the last chance agreement.

The Employer claims that Mr. Davis violated the terms of the last chance agreement by engaging in conduct that runs afoul of Work Rule # 17 which makes it a Group 1 offense for an employee to engage in the "directed use of vulgar, profane, slanderous or racially derogatory statements both verbal and written while on company property." The Employer relies on the testimony of three employees all of whom heard Mr. Davis say something to the effect that "you're all a bunch of stupid mother fuckers."

The Union does not deny that Mr. Davis uttered something similar to that alleged by the Employer. The Union, however, argues that this utterance does not transgress Work Rule # 17 for two reasons, both of which are discussed below.

Profanity Directed at Other Employees

The Union first contends that Mr. Davis' comments did not offend Work Rule # 17 because it was not "directed" at any particular employee or group of employees. In this regard, the Union relies on the testimony of Mr. Davis who stated that he uttered the comments in question while exiting the office with his back to the other employees. According to Mr. Davis, his comments amounted only to a general expression of frustration and were not directed specifically at anyone in the room. Such comments, the Union argues, are less threatening or abusive than those not directed at any specific person. *See JBM, Inc. and Nat'l Prod. Workers Union, Local 707*, 120 LA (BNA) 1688, 1699 (Rosen, 2005) (finding no just cause to discharge an employee who uttered obscenities because they were not directed toward the employee's manager).

The Employer takes issue with this description of the relevant events. First, Superintendent Yochim testified that he saw Mr. Davis turn and speak his comments to those in the room before departing the office. In addition, the Employer points out that the profane comments uttered by Mr. Davis followed immediately after an exchange that left the grievant visibly agitated with his management colleagues.

Under the circumstances, it seems clear that Mr. Davis' comments were directed at some or all of the individuals who were in the office at the time of his remarks. Mr. Yochim testified that he thought Mr. Davis' comments were directed at him because of his supervisory directives. Ms. Gohla testified that she thought that Mr. Davis was

directing his comments to all of the co-workers in the office. In either event, Mr. Davis' comments that "you" or "they" "are a bunch of motherfuckers" certainly were directed at someone in the office. As such, the comments fall within the prohibition of Work Rule # 17.

Shop Talk

The Union additionally argues that Mr. Davis' comments were simply "shop talk" common to this particular workplace. In this regard, Mr. Davis testified that the use of foul language and insulting comments are commonplace in this facility. As such, the Union urges that Mr. Davis' use of similar language should not be viewed as offensive under the circumstances.

While the Union's argument is not without some merit, there is a recognized difference between generalized profanity tolerated on a shop floor and profanity leveled at management officials in an insubordinate manner. As one arbitrator has stated:

The language of the shop may very well be the language of the gods, and perhaps even of the home, and as such, acceptable shop talk. But, when invective profanities are leveled at supervision in a loud, coarse, rude, intimidating and threatening style in the presence of others, it is no longer pardonable everyday shop talk. It becomes what it is really meant to be insulting, demeaning, and insubordinate, a situation totally at odds with, and inimical to, recognized, orderly requirement processes of optimal operational efficaciousness.

Michigan Bell Tel. Co., 78 LA 896, 899 (Dyke, 1982).

Such was the nature of Mr. Davis' comments in this instance. His remarks were not the everyday vernacular of his workplace, but instead took the form of an invective directed at those with responsibility for overseeing his workplace activities. His diatribe went beyond mere shop talk and constitutes a cognizable violation of Work Rule # 17.

Conclusion

Mr. Davis' intemperate comments violate a Group 1 work rule. In the context of this grievance, the pertinent issue is not whether this comment, standing by itself, amounts to just cause for discharge. Instead, given Mr. Davis' prior workplace difficulties and his agreement to the terms of a last chance agreement as a means of continuing his employment, the sole question is whether Mr. Davis has engaged in conduct that runs afoul of that agreement. Since that agreement provides for discharge upon the commission of a Group 1 violation, that question must be answered in the affirmative.

AWARD

The grievance is denied.

Dated: April 23, 2010

Stephen F. Befort
Arbitrator