

IN THE MATTER OF ARBITRATION BETWEEN

SUPERVALU, INC.)	BMS. CASE NO. 10-RA-0513
)	
“EMPLOYER”)	
)	
And)	DECISION AND AWARD
)	
GENERAL DRIVERS, HELPERS AND TRUCK)	
TERMINAL DRIVERS EMPLOYEES LOCAL)	RICHARD R. ANDERSON
UNION NO. 120 a/w INTERNATIONAL)	ARBITRATOR
BROTHERHOOD OF TEAMSTERS, JOINT)	
COUNCIL 32)	
)	
“UNION”)	JULY 12, 2010
)	

APPEARANCES

FOR THE EMPLOYER:

Reid Carron, Attorney
Aaron Restemayer, Risk Control Manager
Scott Nelson, Investigator

FOR THE UNION:

Martin J. Costello, Attorney
Thomas Erickson, Business Agent
John Bjork, Grievant and former Sanitation Worker
Brad Jenkins, Warehouse Worker, Union Steward and Union Trustee

JURISDICTION

The hearing in the above matter was conducted before Arbitrator Richard R. Anderson on May 12, 2010 in the 101 South Jefferson Building at the Employer’s Hopkins, Minnesota facility. The parties were afforded a full and fair opportunity to

present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced and received into the record. The hearing closed on May 12, 2010. Post-hearing briefs were mailed by the parties on June 25, 2010 and received on June 26, 2010. This matter was then taken under advisement.

This matter is submitted to the undersigned pursuant to the terms of the parties' collective bargaining agreement, hereinafter the Agreement, that is effective from June 1, 2005 through May 31, 2010.¹ The language in Article 15 [GRIEVANCE PROCEDURE] provides for the filing and processing of grievances and Article 16 [ARBITRATION] provides for the arbitration of grievances including the final and binding authority of the Arbitrator. Pursuant to this authority, the parties stipulated that this matter is solely before the undersigned Arbitrator for final and binding decision. The parties further stipulated that this matter does not involve any procedural issues that warrant consideration.

BACKGROUND

SuperValu, Inc., hereinafter the Employer, operates a warehouse distribution center in Hopkins, Minnesota, the only facility involved in this proceeding. There are approximately 738 employees in a warehouse and driver unit that is represented by Teamsters Local 120, hereinafter the Union. The bargaining unit is set forth in Section 1.01 of Article I [RECOGNITION AND UNION SHOP] in the Agreement. The Union has represented these employees since 1956.

¹ Joint Exhibit No. 1 and Union Exhibit No. 1.

The Grievant John Bjork was employed as a sanitation employee from July 8, 2001 until he was indefinitely suspended on June 17, 2009 and subsequently terminated on July 9, 2009 for alleged theft of Employer's merchandise.² On June 18, 2009, the Union filed a grievance protesting the Grievant's suspension³, which the parties subsequently agreed would also include his termination. The parties held a Step 4 Joint Grievance Committee hearing on October 30, 2009 to discuss the termination at which time the Joint Committee deadlocked on the grievance.⁴ Thereafter, the Union moved the matter to arbitration by letter dated November 2, 2009 from Union Business Agent Tom Erickson to Employer Operations Manager Kari Banick.⁵ The undersigned Arbitrator was notified of being selected as the neutral Arbitrator by memorandum dated February 10, 2010 from Union Counsel Martin J. Costello.⁶

THE ISSUE

The parties did not stipulate to the Issue. The Union phrased the Issue as, "*Did the Employer have just cause to terminate the Grievant? If not, what is an appropriate remedy?*" The Employer phrased the Issue as, "*Did the Employer terminate the Grievant in violation of the collective bargaining agreement?*"

² Joint Exhibit No. 3 and Union Exhibit No. 7.

³ Joint Exhibit No. 4 and Union Exhibit No. 8.

⁴ Union Exhibit No. 10.

⁵ Union Exhibit No.11.

⁶ Union Exhibit No. 12.

RELEVANT CONTRACT PROVISIONS

ARTICLE 13 DISCHARGE

13.01 Drunkenness, dishonesty, insubordination, or repeated negligence in the performance of duty; unauthorized use of 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 & REGULATIONS

PERSONAL STANDARDS OF CONDUCT

In order for the SUPERVALU Minneapolis Distribution Center to operate in a safe and efficient manner and to ensure employees understand the company's expectations, personal standards of conduct have been established. Strict compliance with these standards will protect the health and safety of all employees, permit the company to provide the highest level of service to our customers, and to maintain the company's good will and prosperity.

It is reasoned that if employees understand these expectations, the vast majority will strive to meet or exceed these expectations; however, in instances of non-compliance with these or all other proper standards of conduct, the employee will be subject to disciplinary action. To convey an understanding of the seriousness of these expectations, these standards of conduct have been divided into two groups:

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.

5. *Engaging in criminal activity on company property or any act of dishonesty.*

FACTS

The Grievant was initially employed On July 18, 2001 as a sanitation worker in the “Freezer” warehouse where he worked for approximately five and one half years. He then accepted a bid to the “Perishable” or “Fresh” warehouse where he worked in the dock clean out area where he performed sanitation duties including picking up trash, cleaning up spills, operating the sweeper and otherwise maintaining a clean dock area until he was terminated on July 8, 2009.

The clean out dock is an area where trailers return from the stores with damaged empty pallets or outdated merchandise that goes to the reclamation center where each item is scanned for credit. Some of the merchandise goes back to the vendor while other merchandise is “dumped” pursuant to vendor instructions.

In February 2009 Risk Control Manager Aaron Restemayer testified that he received information from an anonymous employee source that theft was occurring in the dock clean out area of the Fresh warehouse. A review of video tapes of the area failed to disclose any theft activity. A week or two later, Manager Restemayer received more specific information from anonymous employee sources that certain employees, who the informant named, were exchanging Employer merchandise off site. This allowed him to focus in on a specific area, a specific shift and specific employees as the source of the thefts. Since the thefts involved off-site activity Cub Foods Lost Foods Prevention Division Investigator Scott Nelson was called in to assist in the investigation.⁷

⁷ Cub Foods is a wholly owned subsidiary of the Employer.

Hundreds of hours of video tapes were reviewed. During the course of the review unusual activity involving a fork-lift operator lowering supposedly empty watermelon bins from storage racks seven feet or more above the dock floor to the main floor level was observed.⁸ According to Manager Restemayer, an inspection of the watermelon bin On June 6, 2009 disclosed hundreds of dollars of sport drinks and candy/granola bars randomly scattered throughout the bin.⁹ A second watermelon bin containing similar merchandise was found and the contents photographed on June 24, 2009.¹⁰

The Grievant became involved in the investigation according to Manager Restemayer because his name was specifically mentioned by the informant as being in a group of employees that were involved in off-site exchange of Employer property. The clean out area has a highly visible video camera pointed at a hallway between storage areas that led to an exit. Adjacent to this hallway was a work table consisting of stacked pallets approximately three feet high.

On June 4, 2009, the Grievant was observed in a video tape that originated from this clean out area video camera. The Grievant is seen opening up a small “tote” container and reaching into it on two occasions. He then puts these items in his pocket and immediately exits the camera’s observation area.¹¹ The Grievant is observed in another video from the same camera on June 8, 2009 that discloses the fork lift driver placing a carton of bottled liquid, presumably water, on the work table and then motioning the

⁸ Watermelon bins are cardboard containers approximately 4x4x3 that contain watermelons when they are shipped to customers. When the empty bins are returned to the Employer’s facility, they are recycled.

⁹ Photographs were taken of the contents. Employer Exhibit No. 2, p.1.

¹⁰ Employer Exhibit No. 2, p.2.

¹¹ Union Exhibit No. 5

Grievant to come over to this area whereupon the Grievant retrieved one of the bottles and then exited the area.¹²

On June 17, 2009 the Grievant, accompanied by his Union Steward Brad Jenkins, was called into a meeting with Manager Restemayer and Investigator Nelson. The discussions that ensued during the meeting are contained in a memorandum that Manager Restemayer compiled after the meeting. Manager Restemayer and Investigator Nelson were queried by both parties' Counsel on the subject matter of the memorandum and each testified as to the veracity of its contents. The memorandum stated,¹³

On 06/17/09 at approximately 5:35am, John Bjork was interviewed by me (Aaron Restemayer- Risk Control Manager) and Scott Nelson (Cub Investigator) in the presence of Brad Jenkins, union steward. The focus of this interview was John Bjork's theft activities in the warehouse.

Scott Nelson advised John Bjork & Brad Jenkins that we are dealing with a long term, on-going investigation surrounding theft in the warehouse. Nelson stated that people's actions have been recorded on video and we already know the activities of those involved, including Bjork. Nelson told Bjork that he wanted to treat him fairly and document his side of the story concerning what he is stealing, eating, drinking, etc. Nelson asked Bjork if he was willing to talk to him and Bjork said, "Yes".

Jenkins interjected that everyone is aware of the buzz going through the campus about this issue, especially after _____¹⁴ was suspended and the watermelon bin was confiscated. Jenkins said that while he wants Bjork to help us and himself, he also wants to be sure he is aware of his Weingarten Rights and have his wits about him before he talks to us. Jenkins asked for a few minutes to conference alone with Bjork before we proceeded. As such, Nelson & I left them alone in the office for a few minutes. Upon return to the office, Nelson & I asked if they wished to proceed with the interview. Bjork & Jenkins both responded that they wished to do so.

Nelson explained that his job is to stop the theft and he told Bjork that he was looking for his cooperation. Nelson stated that he would rather deal with this issue

¹² Id.

¹³ Employer Exhibit No. 1.

¹⁴ Name withheld for privacy reasons.

within Supervalu and not involve the police. Nelson made it very clear that he was not threatening charges, rather he was just clarifying that this was a very serious matter that certainly could result in felony charges. Nelson reiterated that he would rather deal with this issue within the company and that we already know the activities of those involved, including Bjork. Nelson asked Bjork if he still wished to talk to him and Bjork said, "Yes, am I going to lose my job?" Nelson responded, "That's not up to me and we haven't gotten to that part yet. Jenkins asked (looking at me), "What does John have to do to keep his job?" I replied, "As you know, these kinds of decisions are made by the larger management group not me or any other single individual but the more honest someone is, the better." Jenkins said, "Obviously John is looking to not go across Excelsior (which I took to mean the Hopkins Police Dept), he's under a lot of pressure to save his job and he wants to help, but you still have all this stuff over his head." Jenkins then said, "I am advising John to only talk about himself, nobody else." Nelson asked Bjork, "Do you still want to talk to us?" Bjork replied, "Yes".

Nelson said that everyone makes mistakes. Bjork said, "I did, I won't deny it." Nelson asked what kind of stuff Bjork was stealing. Bjork replied, "Well, basically just eating candy and drinking Gatorade & sports drinks." Nelson asked if that was it, just eating & drinking stuff on the job. Bjork replied, "Yes". Nelson responded, "But you know that's stealing, right?" Bjork replied, "Yes". Nelson said, "And you know it's wrong, right?" Bjork replied, "Yes. I guess I never looked at it like that since it was happening for a long time". Nelson asked, "What's a long time?" Bjork said, "Since I was hired. I'm not taking anything home though, I just eat and drink it at work".

Nelson asked, "Where do you get the stuff from?" Bjork responded, "The clean out dock. Donnie put it out for us mostly." Nelson asked, "Have you ever taken stuff out of boxes?" Bjork said, "I have- just candy & drinks". Nelson asked, "Do you stash stuff too?" Bjork said, "Yep, we do. Not generally me though. Donnie usually did that. He'd put stuff in the watermelon bin and on pallets." Nelson asked, "What was in the bin?" Bjork replied, "Sports drinks, granola bars, candy mainly. Bins have been on the clean out dock since I started here. People used to eat and drink from them all the time." Nelson replied, "But it's wrong and it's stealing, right?" Bjork replied, "Right."

Jenkins asked Bjork to leave the room for a minute. Jenkins then stated to me & Nelson that in the past there has been supervisors also taking items from these bins. I asked Jenkins when the last time he heard of this happening was and he said, "Not recently, it's been a while." I asked, "Are we talking back to the World Wide days or in the last couple years?" Jenkins said, "I haven't seen it in a couple years I would guess." I told him that anyone involved in these activities would be investigated, regardless of their position. Bjork re-entered the room.

Nelson asked Bjork, "From your hire in 2001 to today, what would you estimate the value of everything you've stolen?" Bjork said, "A couple candy bars & drinks each night; a candy bar is what, a \$1.05? I suppose that adds up fast." Nelson asked, "Five days a week, every year?" Bjork said, "Yes, well actually since the clean out dock moved to the Fresh building. That was what, about 2 years ago? Year and a half?" Nelson asked if Bjork was willing to pay restitution for all he's stolen and Bjork said, "Sure I'd pay it back." Nelson asked, "What's the figure? It adds up over time since you were hired. Was it more than \$1,000?" Bjork said, "I mis-spoke earlier. I've only been doing this since the clean out dock has been in Fresh, not since I was hired." Aaron & Brad clarified for the record that the cleanout dock moved to Fresh approximately 1 1/2—2 years ago. Nelson asked, "So how much and how long, because your story has changed now?" Bjork said, "Two- three candy bars a week because I'm not much of a candy bar guy and a sports drink almost every night, except I cut back on those when they eliminated bottled water in the warehouse too. In the last 1 1/2 - 2 years, well even if it was \$10.00 a week times 1 1/2 years, that probably easily is over \$1,000. Jenkins interjected, "Just so I am clear, John, you are admitting to \$1,000?" Bjork said, "Yes."

Nelson asked, "So what do you take home?" Bjork replied, "Nothing. I eat and drink it all at work." Nelson stated that he was done with his questions and thanked Bjork for his cooperation. Nelson asked Bjork if he felt he had been treated fairly and Bjork replied, "Yes I was treated fairly." Nelson asked Jenkins, "How about you. Do you feel I treated you guys fairly? You don't feel you were coerced in any way or anything like that?" Jenkins replied, "You were fair and I don't think John was coerced. John, do you feel you were coerced?" Bjork replied, "No I don't." Nelson asked, "Just to clarify, two years was all you were stealing for?" Bjork replied, "Since the clean out dock was moved to Fresh." Jenkins & I again clarified that clean out dock move took place between 1 1/2—2 years ago.

I then suspended Bjork pending further investigation. He asked if he could contact me in the future. I advised him to work through Tom Erickson instead. I also told John that if he thinks of anything else he feels would be helpful that he should contact Erickson about that.

The Grievant generally agreed with the contents of the memorandum. He added that when he was first told about the investigation, Investigator Nelson informed him that he was going to ask him a series of questions that he already knew the answers to. If he lied he would be handcuffed and transported to jail and charged with a felony.¹⁵

¹⁵ Jenkins remembers handcuffs and going across the street being mentioned but could not remember the exact context. Both Manager Restemayer and Investigator Nelson denied that handcuffs were mentioned.

He was then taken out of the room and told by Union Steward Jenkins not to answer any questions. He informed Union Steward Jenkins that he had nothing to hide and was going to answer all the questions. He further testified that he readily admitted in the investigative interview that he had been consuming out-dated¹⁶ merchandise during the time that he was working in the clean out dock area; but did not admit that he was stealing the merchandise. He did not consider that he was doing anything wrong for a number of reasons when he consumed any out-dated merchandise.

The Grievant testified that he did not consider it stealing because it was common practice to consume out-dated merchandise. The Grievant testified that he informed Manager Restemayer and Investigator Nelson during the meeting when confronted about the stealing that he never looked at it that way. Manager Restemayer acknowledged this fact during cross-examination. According to the Grievant, other employees routinely engaged in this same activity and he personally observed and identified supervisors who were engaging in the same conduct, either in the break room, the office area or on the warehouse floor. He also was present when the office ordered the fork lift driver to bring merchandise to the office area for consumption by supervisors and employees working there. The Grievant also recited situations where the Employer made merchandise available in the break area or on the floor for employee consumption. The Grievant also testified that he never broke open boxes to take merchandise out or ever took any merchandise outside the Employer's facilities to be bartered with or consumed later. Finally, the Grievant testified that when he worked

¹⁶ Any reference to out-dated merchandise also includes returned merchandise.

in the Freezer warehouse employees including him routinely consumed out-dated merchandise.

Union Steward Jenkins, who had been employed since 1997, and Business Agent Tom Erickson, who had been employed for 22 years before assuming his current position with the Union, both testified that during their tenure, it was common practice for employees and supervisors to consume out-dated or residual merchandise from cases or cartons that were damaged. These observations took place on the floor including the clean out area and in the break room; however, neither individual had observed this practice in the last few years. During their testimony, each identified a number of supervisors who had engaged in this practice.

Manager Restemayer testified that it is the practice of the Human Resource Department to issue Crew Agendas based upon input from various departments to be discussed in departmental crew meetings. After the crew meetings are held a copy of the Crew Agenda is posted on bulletin boards throughout the Employer's facilities.

The Employer introduced four Crew Agendas through Manager Restemayer. The Crew Agenda dated August 17, 2006 states,¹⁷

Pilferage is stealing. We have received an increase in the number of reports of pilferage in the Minneapolis DC. Pilferage is considered stealing and it is a violation of company rules and regulations. Anyone who is identified engaging in pilfering will be subject to discipline, up to and including discharge."

The Crew Agenda dated August 2, 2007 states,¹⁸

*SUPERVALU Policy Reminder:
Pilferage, grazing and theft of any kind, in any amount, are strictly prohibited.
Anyone found stealing from anywhere on the company premise, will be discharged.*

¹⁷ Employer Exhibit No. 3.

¹⁸ Employer Exhibit No. 4.

This includes consuming merchandise from the BO area without prior management approval. Thank you for your cooperation!

The Crew Agenda dated August 3, 2008 states, Employer Exhibit No. 5.

We need to remind everyone that pilferage of product/merchandise from any of our warehouses is considered theft and will result in immediate termination when it is discovered. In addition, when appropriate, theft will be prosecuted to the full extent of the law. Do not risk your careers over items which can be easily purchased at any SUPERVALU supplied or corporate store.

The Crew Agenda dated August 10, 2008 states,¹⁹

As stated last week, we need to remind everyone that pilferage of product/merchandise from any of our warehouses is considered theft and will result in immediate termination when it is discovered. In addition, when appropriate, theft will be prosecuted to the full extent of the law. Do not risk your careers over items which can be easily purchased at any SUPER VALU supplied or corporate store.

Employer testimony adduced through Manager Restemayer established that in the Fall of 2008 the Employer changed its water consumption policy and required water to be only consumed from Employer furnished containers. Prior to this, Cub water bottles were placed on pallets at each warehouse for employee use.²⁰This policy was conveyed to employees through a Crew Agenda memorandum dated September 21, 2008 which stated,²¹

*Remember that **only** water in approved clear containers is allowed on the warehouse floor as of now. If you haven't received your approved container, please see your supervisor.*

This policy was reaffirmed in a September 28, 2008 memorandum which stated,²²

*The change to company supplied reusable water bottles has gone really well and we appreciate the effort. For those of you who remain unclear, please remember that **only** water in approved clear containers is allowed on the warehouse floor. If you haven't received your approved container, please see your supervisor.*

¹⁹ Employer Exhibit No. 7.

²⁰ The Employer for environmental reasons decided to eliminate the water bottles and go with the reusable containers.

²¹ Employer Exhibit No. 7.

²² Employer Exhibit No. 8.

Manager Restemayer testified that department meetings where Crew Agenda are discussed are not mandatory for employees; however, the Crew Agendas are thereafter posted on bulletin boards prominently displayed throughout all of the Employer's Hopkins facilities and employees are expected to read them.

The Grievant testified that he does not attend Crew Agenda meetings since the sanitation department does not have them. He also testified that he never looks at Crew Agenda notices on bulletin boards. Business Agent Erickson testified that Crew Agenda meetings are not mandatory and he never attended them. Also the "notices" were not posted in every building nor would he ever take the time to read them. The Grievant did admit that he was aware of the Employer's water consumption policy.

Business Agent Erickson also testified that after the Grievant and two other employees were discharged for alleged theft the Employer attached a notice dated April 17, 2010 to employees' checks entitled *Regarding Crew Agendas*. This notice stated,²³

*To: All Distribution Center Associates
From: Hopkins DC Management
Date: 4/7/10
Re: Personal Responsibility regarding Communications to Associates*

The Hopkins Distribution Center management team makes many efforts to communicate with our entire team regarding pertinent information which affects the team, including our Electronic Communication System, paycheck attachments, weekly crew meetings, and various other fliers and postings. While It has always been the expectation that associates be held responsible for knowing and abiding by our Company and business unit policies, this letter is to remind you that you are personally responsible for keeping abreast of any and all communication which is announced and/or posted on campus.

This includes, but is not limited to, Weekly Crew Meeting Notes, any postings related

²³ Union Exhibit No. 14.

to Weekly Crew Meetings such as Safety Reminders, and any other postings which are business related and posted on Company/DC bulletin boards in the buildings on campus.

In each building, bulletin boards are designated in or near break rooms and time clocks and have various headings related to Company notices. It is your responsibility to know where those bulletin boards are located in the buildings where you work and to check them on a regular basis for new or highlighted information.

If you don't happen to be working on a day that meetings are held, you are still accountable for seeking out the information covered in those meetings by reading the bulletins or postings.

Any questions should be addressed to your supervisor.

The Employer has work rules that are disseminated to all employees.²⁴ [The Grievant acknowledged that he was given a copy of the rules.] The work rules contain a section entitled Personal Standards of Conduct Evidence along with various levels of offenses with Category 1 being the most serious with a penalty of immediate discharge.²⁵ Section 13.02 also contains a provision allowing discharge for a violation of the work rules. The Grievant was terminated under Item No. 5 of Category 1 Offenses which states, "*Engaging in criminal activity on company property or any act of dishonesty.*" Evidence adduced at the hearing disclosed that two other employees, one being the fork lift driver referred to in the video discussion, were also terminated under Item No. 5 for alleged theft of the Employer's merchandise.

POSITION OF THE EMPLOYER

It is the Employer's position that it was justified in discharging the Grievant. The Grievant was discharged for misconduct (theft of the Employer's merchandise) that

²⁴ Company Rules and Regulations. Joint Exhibit No. 2.

²⁵ The Standards of Conduct and Category 1 Offenses are contained on page four of this Decision.

directly violated the Agreement and the Employer's work rules. The Grievant admitted engaging in the conduct for which he was discharged during the June 17, 2009 investigative interview. In support of this the Employer argues that:

- Contrary to the Union's assertions, the Employer treated the Grievant fairly during this interview. At the onset of the interview, Manager Restemayer informed the Grievant that the Employer was aware of his activities and others; and that the Employer wanted to treat him fairly and get his side of the story regarding his consumption of the Employer's merchandise. Further, to impress upon the Grievant of the seriousness of the conduct the Grievant was informed that his conduct could result in criminal charges; but they did not want to deal with it that way.
- At least twice the interviewers asked the Grievant if he wanted to continue, to which he replied affirmatively. It was after the aforementioned "warnings" that the Grievant acknowledged his consumption of merchandise, his awareness that his conduct had been wrong and that he had been stealing from the Employer.
- At the conclusion of the interview both the Grievant and Union Steward Jenkins answered affirmatively to the question of whether the Grievant had been treated fairly.

The Union's efforts to undermine the significance of the June 17, 2009 interview are an exercise in historical revisionism and are not credible. In support of this the Employer argues that:

- The Employer's interview of the Grievant did not come as a surprise to the Grievant or the Union. Although the Grievant expressed shock at being called into the interview during direct examination, he acknowledged during cross-examination that all the employees in the clean out area were well aware that their co-worker had been suspended and the watermelon bin where this co-worker stored the merchandise had been confiscated.
- The Union would have you believe that the Grievant cooperated in the interview because he had nothing to hide. The evidence, however, strongly suggests that the Grievant only cooperated in an effort to avoid discharge. The Grievant neither expressed outrage at being falsely accused nor disputed the facts put before him. The Grievant knew he was guilty and was hoping for the best if he acknowledged his guilt.

The conduct of the Grievant violated the Agreement, the Employer's work rules, and posted notices to employees. The Union cannot assert that the Grievant was not on notice that theft of the Employer's merchandise for personal consumption was grounds for discharge. In support of this the Employer argues that:

- The Agreement and the Employer's work rules plainly state that dishonesty is grounds for immediate discharge. The Grievant admitted that he was familiar with the Agreement for the most part, but disclaimed knowledge of the stated reasons for discharge in Article 13.01. The Grievant had a similar reaction to the work rules after first admitting that he had read them at some point in time. An

employee is responsible to know the employer's work rules and cannot avoid culpability by pretending not to know them.

The Employer posted notices on the bulletin boards throughout its facilities warning employees that theft of merchandise, including grazing, is grounds for immediate discharge.

- The Union cannot excuse the Grievant's conduct by asserting that he was not on notice that theft of the Employer's merchandise for personal consumption was grounds for discharge. While not all employees attend meetings where Crew Agendas are discussed, the Agendas are posted on the bulletin boards. Agendas posted on August 17, 2006, August 2, 2007 and August 3 and 10, 2008 clearly warn employees theft and pilferage of the Employer's merchandise will result in immediate discharge. The Grievant admitted that he sometimes read the Crew Agendas; but denied reading the Agendas regarding theft and pilferage, which is similar to his testimony regarding the Agreement and work rules wherein he denied specific knowledge of the provisions governing theft, dishonesty and discharge. The Grievant did, however, acknowledge that he read the Crew Agenda regarding the rule on water bottles, which was posted the same way as the Agendas discussing theft and pilferage.

The Grievant cannot avoid culpability by claiming that the Employer condoned or ratified the conduct or by claiming that others were equally guilty. The Union's claim that other employees and supervisors were also consuming merchandise in the same manner as the Grievant is unpersuasive. In support of this the Employer argues that:

- The Employer acknowledges that it often furnished water and coffee to employees in the break room and on the warehouse floor and that it occasionally provided damaged or broken-open merchandise for consumption by employees and supervisors. This was merchandise clearly provided by the Employer and does not excuse employees from taking it upon themselves to consume merchandise in the face of the clear rules prohibiting such conduct.
- Union Steward Jenkins and Business Agent Erickson testified that they saw supervisors and other employees consuming merchandise out of bins or other merchandise not provided by the Employer. If in fact this occurred, it occurred prior to the Crew Agenda memorandums that first appeared in August 2006. That Agenda and the subsequent Agendas of 2007-2008 clearly warn employees that engaging in such conduct is unacceptable and grounds for discharge.
- The Grievant was not discharged for consuming furnished merchandise. He along with two other employees were discharged for grazing and pilfering.
- The Grievant cannot avoid culpability by claiming that the merchandise that he consumed was without value. The Grievant admitted that he did not know whether the merchandise returned to the dock clean-out area had value to the Employer. Clearly, employee consumption of merchandise that was to be returned to the vendor had value.

Finally, the Grievant and the fork-lift driver show that they were fully aware that they were engaged in misconduct. The driver placing of merchandise on the table in the

clean-out area, his motioning to the Grievant, the Grievant's acts of rifling through bins and pocketing Gatorade, the storage of the watermelon bins containing the pilfered merchandise at a height that prevented passersby from looking in, and the tampering with the security camera by someone to aim it in a different direction, all suggest clear knowledge on the part of the participants, including the Grievant, that the Employer would find their conduct unacceptable

POSITION OF THE UNION

It is the Union's position that the Employer did not have just cause to terminate the Grievant. The Grievant was discharged for "*engaging in criminal activity on company property or any act of dishonesty*" According to the testimony of Manager Restemayer, the Grievant was discharged for theft because he knowingly took property belonging to the Employer; and that taking food and drink without management permission was equivalent to stealing. The Employer failed to establish that the Grievant committed misconduct that warranted discipline, much less termination. In support of this the Union argues that:

- The Grievant did not knowingly engage in theft. There was a longstanding practice that employees and supervisors in the Fresh Warehouse were permitted to consume out-dated and returned merchandise. The lack of knowledge completely undermines the Employer's argument that the Grievant was guilty of "*engaging in criminal activity on company property*" in violation of the Employer's work rules or in violation of Article 13.01 of the Agreement. The Grievant never admitted to theft. He only admitted to a set of facts, that he consumed Gatorade

and a granola bar on the days in question and had done so almost every day since he was in the Fresh Warehouse. He did this openly in full view of video cameras.

- The Grievant fully admitted to consuming the out-dated merchandise. He thought he had permission to consume this out-dated merchandise. This permission was granted through the Employer's practice of allowing consumption of out-dated merchandise. Thus, he did not have the knowledge that he was depriving the Employer of it's or a third-party's consent.
- Although the Employer now argues that this practice was eliminated, this change in policy was never communicated to the Grievant. During the last two years of the Grievant's employment, the Employer attempted to publicize a policy prohibiting theft in the warehouse. Since the Grievant works in the Sanitation Department under different supervision than the warehouse employees, he never received any such policy change nor did he attend any warehouse crew meetings where the claimed changes were discussed.

The Employer failed to establish just cause in terminating the Grievant. Arbitrators have generally determined whether just cause existed in particular circumstances by applying the Seven Tests first articulated by Arbitrator Carroll R. Daugherty in 1966.²⁶ These factors are Notice, Reasonable Rule or Order, Investigation, Fair Investigation, Proof, Equal Treatment, Penalty. If any one of these standards has not been satisfied,

²⁶ *Enterprise Wire Co.*, 46 LA 359 (1966)

then there was not just cause for the employer's imposed discipline. In support of this the Union argues that:

- A rule or order must be reasonably related to both the safe and efficient operation of the business and the performance that the employer could expect of employees. It is reasonable for any employer to prohibit employee theft. It is not reasonable, however, to equate violation of a company policy with theft. Theft is taking someone's property without the owner's permission; violation of the rule is removing gifted property without a supervisor's authorization. One is dishonest; the other is a technical infraction.
- The Employer failed to conduct a fair investigation. Viewing the video tape should have been the starting point in the investigation, not the end point. The Employer subjected the Grievant to a confrontational and abusive interrogation that included a threat to prefer felony charges against the Grievant and "to walk him across the street", a reference to the Hopkins Police Department. He was also forced to estimate the total value of the goods that he had consumed over the years.
- The Employer failed to prove that the Grievant engaged in criminal activity. It is clear that the Employer has failed to present evidence that the Grievant committed theft. It was required, at least by a standard of a preponderance of the evidence, if not by clear and convincing proof, to demonstrate that the Grievant knowingly and intentionally took property belonging to the Employer, and this it did not do.

- It is clear that the Employer failed to satisfy several of the Seven Tests for just cause. Moreover, the evidence shows that the Grievant did not steal customer merchandise, as alleged by the Employer. Upon gathering a small amount of indeterminate evidence, the Employer chose to rush to discipline and termination in this case, rather than perform even a minimal investigation.

Finally, the Union argues that even if the Grievant engaged in misconduct, the misconduct is insufficient to warrant termination. Arbitrators have broad authority to fashion remedies for inappropriate discipline. The Grievant's misconduct does not support what is recognized as the extreme industrial penalty. In support of this the Union argues that:

- The Employer had adequate and alternative remedies available to remedy the Grievant's negligent but not intentional misconduct. Alternative remedies include a reprimand or a warning.
- The Grievant can be readily absorbed back into the work place. The Employer presented no evidence that any co-worker, customer or other person actually objects to the Grievant being returned to work. Neither is there any evidence that this incident so permeates or contaminates the atmosphere at the Employer that employees would be any less productive or satisfied in their employment.
- Prior to this alleged misconduct, the Grievant had nearly nine years of tenure with the Employer without a single recorded incident of discipline or even a hint of prior misconduct. A single act, especially when it was not intentional or

egregious, is insufficient grounds to ignore the tenure, loyalty, and work of the Grievant.

OPINION

The parties could not agree on the wording of the issue. Although the Agreement does not have a specific “just cause” provision, it is the standard that other arbitrators as well this Arbitrator have used in the past.²⁷ I will, therefore, frame the issue as, *Did the Employer have just cause to discharge the Grievant, and if not, what is an appropriate remedy?*

This issue presents a well-settled two-step analysis: first, whether the Grievant engaged in activity which gave the Employer just and proper cause to discipline him; and second, whether the discipline imposed was appropriate under all the relevant circumstances. It is the Employer’s burden to show that the Grievant engaged in conduct warranting discipline and that the appropriate discipline was termination.

The facts are generally uncontroverted, except the Union would argue that the Grievant never admitted to stealing, but only to the facts surrounding his actions. The Employer’s policy and work rules regarding dishonesty and theft are clear as is the theft and dishonesty proscriptions contained in Article 13.01 of the Agreement. The Grievant admitted that he consumed unauthorized merchandise consisting of Gatorade and granola bars almost on a daily basis while employed for approximately a year and one half in the clean-out dock area of the Fresh Warehouse where returned out-dated and damaged vendor product is processed. Clearly, the Grievant’s actions violated the

²⁷ *SuperValu, Inc. and Teamsters Local 120, 07-RA-1073 (2007)*

dishonesty and theft policy that was communicated to employees with special emphasis beginning in August 17, 2006 during crew meetings where Crew Agendas were discussed and subsequently posted on bulletin boards located throughout the Employer's four Hopkins facilities, including the Fresh Warehouse. Based solely on this, the Employer has established prima facie evidence that the Grievant's actions violated the Employer's policy, its work rules as well as Article 13.01 of the Agreement; and, therefore, it had just cause to discipline him.

Although the Employer may have had just cause to discipline the Grievant, the question remains whether termination was the appropriate discipline under all of the circumstances herein. The Grievant contends that he did not view his actions in consuming out-dated or returned merchandise as theft since other employees including supervisors were engaging in similar conduct. Similarly, he did not overtly create a "stash" of this merchandise, rather, he helped himself to merchandise that other employee(s) had made available. He also did this openly in front of exposed surveillance video camera(s). This is hardly activity of someone who was knowingly engaging in "theft".

The Grievant, contrary to the advice of his Union Steward, cooperated fully in the investigative interview; and although there is a question whether his actions amounted to "stealing", he fully divulged his consumption activities even though he was never directed to do so. The Grievant even volunteered to reimburse the Employer for any unauthorized product that he had consumed. Although there was some evidence developed at the hearing that employees were removing merchandise from the

Employer's premises and evidence that an employee had tampered with the video camera in his work area, there was no evidence that the Grievant participated in said activities.

While the evidence established that other employees including supervisors were consuming Employer merchandise, much of the testimony appears to be merchandise that was furnished by the Employer; however, unauthorized "grazing" cannot be ruled out. Evidence also disclosed that consuming out-dated or returned merchandise may have diminished shortly after the Grievant transferred to the Fresh Warehouse. It also appears that it was uncommon by February 2009 as evidenced by the review of hundreds of hours of video tape that, according to the Employer, only incriminated three employees.

It also appears that unauthorized consumption of Employer merchandise lessened after the Employer initiated a campaign to eliminate that practice in crew meetings beginning in August 2006 which continued in August 2007 and August 2008. While the Grievant was never invited or required to attend these meetings where pilferage and grazing were discussed, the Crew Agendas that precipitated the meetings were widely disseminated to employees through their posting on bulletin boards throughout the Employer's facilities.

Although the Grievant denies that he ever saw the pilferage Crew Agendas, he acknowledged that he had seen the "water bottle" Agenda that stated "only water in approved clear containers is allowed on the warehouse floor". It is difficult to comprehend that he saw this memorandum but never saw the pilferage memorandums; however,

that possibility cannot be discounted.²⁸ In hindsight, the Employer may have been remiss by not ensuring that all employees got the pilferage warning messages, such as it did when it included the memorandum distributed to employees with their check on April 7, 2010 apprising employees of their responsibility to keep abreast of all communications including Crew Agendas posted on bulletin boards.

Finally, the work record of the Grievant prior to his termination has to be taken into account. He had an unblemished record during his approximate nine years of employment. In addition, there is no evidence that he cannot be successfully reabsorbed back into the work force.

Theft is a serious offense that normally justifies termination. According to the Employer's work rules "engaging in criminal activity" "may result in termination". There is no question that the Grievant's actions, whether they were intentional or unintentional, amounted to theft. However, based upon all of the evidence the theft, as the Union argues, appears to be technical rather than criminal. I conclude that the circumstances surrounding the Grievant's unauthorized consumption of merchandise justify a penalty short of the industrial capital punishment that the Employer levied.²⁹ Coupled with mitigating factors including his cooperation and acceptance of responsibility of his actions, his offer of restitution, the history of other employees including supervisors "grazing", the lack of definitive evidence that he ever saw the pilferage memorandums, the lack of the Employer's due diligence in promulgating the

²⁸ During his examination while on the witness stand, I did not detect any evidence that his testimony was other than truthful.

²⁹ The term "*may result in termination*" in the work rules implies that discipline less than discharge is an option.

memorandums, and his unblemished work record add support to invoking a penalty less than termination.

The Grievant's culpability; however, cannot be ignored, and he deserves more than a slap on the wrist. Therefore, I conclude that a 90-day suspension coupled with restitution for the unauthorized merchandise the Grievant consumed is an appropriate penalty under the all the circumstances herein.³⁰

AWARD

IT IS HEREBY ORDERED that the grievance in the above entitled matter be and is hereby sustained for the reasons set forth in this Decision.

IT IS FURTHER ORDERED that the discharge of John Bjork is to be converted to a 90-day suspension without pay and he is required to reimburse the Employer for his unauthorized consumption of merchandise. Further, any reference to his discharge is to be expunged from his personnel file.

IT IS FURTHER ORDERED that John Bjork be reinstated to his former position; and be made whole for any loss of wages, economic benefits, seniority, or any other benefits or rights or privileges suffered as a result of the Employer's action, less the 90-day unpaid suspension and any interim earnings.

The undersigned Arbitrator will retain jurisdiction in this matter for forty-five (45) days from the receipt of this Award to resolve any matters relative to implementation.

Dated: July 12, 2010

Richard R. Anderson
Arbitrator

³⁰ This amount was estimated to be \$1000.00 during the investigative interview.