

IN THE MATTER OF ARBITRATION BETWEEN

Supervalu, Inc.)	BMS Case No. 09-RA-0714
)	
“Company”)	Issue: Termination
)	
and)	Hearing Site: Hopkins, MN
)	
)	Hearing Date: 06-23-10
)	
International Brotherhood of Teamsters, Local #120)	Briefing Date: 08-27-10
)	
)	Award Date: 09-06-10
)	
“Union”)	Mario F. Bognanno,
)	Labor Arbitrator
)	

JURISDICTION

The Company, Supervalu, Inc., is a grocery warehouse, wholesale and distribution business and the Union, Teamsters, Local #120, represents its warehouse workers, maintenance engineers and drivers. The Company and Union are parties to a Collective Bargaining Agreement (“CBA”) with effective dates of June 1, 2005 through May 31, 2010. (Joint Exhibit 1 & Union Exhibit 1)

Pursuant to Article 16 in the CBA, the above-captioned matter was heard in Hopkins, MN on June 23, 2010. Appearing through their designated representatives, the parties were afforded a full and fair opportunity to present their respective case. The parties stipulated that the instant matter was properly before the undersigned for a final and binding determination. A verbatim transcription of the hearing was made; witnesses were sworn and their testimonies were subject to cross-examination; and exhibits were accepted into

the record. Post-hearing briefs were exchanged on or about August 27, 2010.

Last, at the Union's behest, herein the Grievant is referred to by the initials M.M.

APPEARANCES

For the Company:

Jonathan O. Levine	Attorney-at-Law
Aaron Restemayer	Shift Manager (formerly) & Risk Control Manager (presently)

For the Union:

Martin J. Costello, Esquire	Attorney-at-Law
Tom Erickson	Business Agent, Teamsters, Local #120
Brad Jenkins	Steward & Trustee, Teamsters, Local #120
M.M.	Grievant

I. RELEVANT CBA PROVISIONS & WORK RULES

CBA - Article 13

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 this Agreement shall be grounds for immediate discharge.

(Joint Exhibit 1 & Union Exhibit 1)

Work Rules & Regulations, Group 2 Offenses

Group 2 violations are less serious and supervisors are encouraged to follow the normal corrective discipline procedure of a verbal warning, a second verbal warning, written warning, 1-day suspension, 3-days suspension, and discharge when appropriate, however, the exact sequence may not always be followed

depending on the circumstances of the situation. Even a violation of a Group 2 offense may result in immediate termination depending on the facts of the case.

* * *

14. Failure to be at the appropriate work area ready to work, properly dressed, at the regular starting time, or not remaining at the assigned work area excluding break times and until quitting time.

* * *

(Union Exhibit 4)

II. ISSUE STATEMENT

The parties stipulated to the following statement of the issue:

Whether the Grievant was discharged for just cause? If not, what is an appropriate remedy?

III. BACKGROUND AND FINDINGS OF FACT

The Grievant was initially hired by the Company on June 25, 2000, as a warehouse worker.¹ (Union Exhibit 3) In uncontested testimony, Aaron Restemayer, then Shift Manager, stated that the Grievant and other bargaining unit employees are required to be in their appointed work areas during paid work times, except that they are allowed two 15-minute breaks per day plus two and one-half minutes of “travel time” affixed to the beginning and end of each break. He further testified that employees are periodically reminded of the break time policy and that break time schedules are posted near each break room. (Tr. 14) Nevertheless, in late 2007 the Company observed that employees were increasingly abusing the break time rule. As a consequence, Mr. Restemayer testified that the Company advised the Union and its employees that subsequent to a two week adjustment period, the break time policy would be strictly enforced.

¹The Grievant’s precise date of hire is open to question. M.M. testified that he was hired on April 19, 2000. (Tr. 43)

(Tr. 15) Thereafter, however, the Grievant was variously disciplined for violating the break time rule on the following occasions:

<u>Date</u>	<u>Infraction</u>	<u>Discipline</u>
04/25/08	Unauthorized Break	Verbal Warning
05/08/08	Unauthorized Break	2 nd Verbal Warning
05/24/08	Extended Break	Written Warning
08/11/08	Left Work Early	1-day Suspension
09/02/08	Unauthorized Break	3-day Suspension

(Tr. 18-21; 56; 71-72; Company Exhibits 1 & 2) Only the 1-day suspension was grieved and that grievance was later withdrawn. (Tr. 20-21; 80)

On November 20, 2008, the Grievant was working the day shift (6:00 a.m. to 2:00 p.m.). (Tr. 45) He took his first break at 8:30 a.m., returning at 8:45 a.m. (Tr. 47) The Grievant's second break was to have been taken at 11:00 a.m. or 11:30 a.m. (Tr. 23) However, pictures from the Company's surveillance system show that the Grievant began his second break at 11:22 a.m. and ended it shortly after 11:52 a.m.² More precisely, Mr. Restemayer testified that the Grievant told him that he actually returned to his work area at about 11:55 a.m. (Tr. 25; Company Exhibits 3 & 4) Accordingly, the Grievant's afternoon break lasted from 30 to 33 minutes, meaning that it was 10 to 13 minutes longer than permitted by the break time policy. As the Grievant explained at the time, his extended and unauthorized break resulted from a belated realization that he may have had to

²Dated and time-stamped still pictures from the Company's surveillance system show the Grievant leaving his work area at 11:22 a.m. and leaving the rest room en route back to his work area at 11:52 a.m. (Company Exhibit 5, pictures 1 and 5) The Company's "Vocollect" system and related testimony generally corroborate the surveillance-based evidence. (Tr. 31-35; Company Exhibit 6)

appear in court that afternoon. Consequently, he called to his girlfriend, asking her to help locate paperwork on which was the courthouse's phone number. She could not locate the paperwork. Thus, M.M. testified, as he explained to Mr. Restemayer on November 20, 2010, that he left the lunch room and exited the building en route to the Company's parking lot hopefully to retrieve from his car the misplaced phone number. He found the paperwork and while walking back to his work area he called the courthouse, learning his court date was in the following week. Fearing that the missed court date would result in his arrest is what prompted him to act as he did and, in doing so, to lose track of time, the Grievant explained. (Tr. 24-25; 48-50; Company Exhibit 4) Subsequent to the Company's investigation of the matter and effective November 21, 2008, the Grievant's employment was terminated. (Company Exhibit 3 & Union Exhibits 8 and 11)

On that same date, the Union grieved M.M.'s discharge. (Union Exhibit 9) The parties were unable to resolve the grievance and, on May 7, 2009, the undersigned was notified that he had been selected to determine the grievance. (Union Exhibits 12, 13 14 &15).

IV. THE COMPANY'S POSITION

Initially, the Company argues that the Grievant knew and understood the break time rule, a point that is not contested in the record evidence. Indeed, the Company observes, the Grievant admitted on November 20, 2008 and at the hearing that he overstayed his afternoon break.

Next, the Company urges that the Grievant was not discharged merely

because he overstayed the break by from 10 to 13 minutes on November 20, 2009; rather, he was discharged because this was the sixth occurrence in six months that the Grievant violated some aspect of the break time policy. Moreover, the Company points out that to encourage the Grievant to follow the break policy it pursued a strategy of corrective discipline. That is, before discharging the Grievant, the Company had issued to him two verbal warnings, one written warning, a one-day suspension and a three-day suspension. The break time policy is a necessary and reasonable business policy in every respect and, rhetorically, the Company asks: "When is enough, enough?"

Further, the Company argues that the offense in question is not a "minor" offense, as the Union would have it. The instant offense is "major," the Company maintains, because the Grievant repeatedly violated the break time policy in the face of repeated and sequentially elevated sanction levels. Further, the Grievant did so knowing that absent behavioral modification, his job would be in jeopardy. Still further, the Grievant, nevertheless, repeatedly disregarded for the break time rule, while offering self-serving explanations at each step along way rather than accepting responsibility for his chronic misconduct.

Finally, the Company observes that the Grievant work record is not otherwise clean. It points out that in 2006, the Company initially discharged and later suspended the Grievant for falsification of Company records. (Company Exhibit 7) The Company concludes, for the reasons discussed above, that the Grievant is not a good candidate for rehabilitation and, therefore, that he does not warrant a second chance.

V. THE UNION'S POSITION

Initially, the Union concedes that the Grievant is guilty of the misconduct alleged. Nevertheless, the Union continues, the Company's decision to discharge the Grievant was both unjust and unwarranted—unjust because the Company failed to consider all mitigating factors and unwarranted because the Grievant is contrite and prospectively willing to conform to the break time rule.

With respect to mitigating factors, the Union argues that the Grievant was a long-term employee at the time of his discharge and that although his November 20, 2010 afternoon break was extended by 10 to 13 minutes, its context was that of an “emergency.” That is, the Union argues, for the Grievant to have missed a court date could have resulted in his arrest, impoundment of his car and loss of wages during the interim, damaging his welfare and that of his dependent children.

The Union maintains that discharge was unwarranted in this case because the proven offense—returning 10 to 13 minutes late from a break—is hardly the type of offense that invites summary termination. Moreover, the Union argues that the Grievant is ready, willing and able to return to his former position

Finally, for the reasons discussed above, the Union requests that the undersigned sustain the grievance and return the Grievant to his former position on a last chance basis.

VI. DISCUSSION AND OPINION

The essential facts of this case are not in dispute. First, the Grievant was approximately an eight-year employee at the time of his November 21, 2008

discharge. Second, within a six month period in 2008, the Grievant was shown to have violated the break time rule on five separate occasions before the sixth, November 20, 2008, occasion that resulted in his discharge. Third, the discipline the Company meted out in response to the Grievant's break time rule violations was corrective/progressive in nature. Fourth, the Grievant's disciplinary record goes beyond his break time rule missteps. Article 13 in CBA states:

13.05 Warning notices will be disregarded after an eleven (11) month period for disciplinary purposes.

(Joint Exhibit 1) Interpreting this language is straightforward. That is, prior disciplinary "warning notices" that are eleven months old or older (i.e., stale) are not to be considered by the Company when reaching subsequent disciplinary determinations. Accordingly, stale "warning notices" are not a part of the instant record. However, the undersigned distinguishes between suspension/termination notices and "warning notices." Thus, the record shows that on September 28, 2006, the Company terminated the Grievant for falsifying Company documents and later reduced its termination decision to a suspension. (Tr. 61; Company Exhibit 7) Last, the uncontroverted record includes the Grievant's "court date" account of the circumstances that resulted in his extended break on November 20, 2008.

The Company argues that the Grievant was put through all of the steps of progressive discipline; and, following his September 2, 2008 3-day suspension, he knew that any further break time rule violations would result in discharge. Moreover, the Company considers the Grievant's explanation for the November 20, 2008 event as being disingenuous, having previously heard similar

explanations. Finally, the Company maintains that the Grievant's length of employment and overall disciplinary record are not mitigating and that there is nothing in the record to support the conclusion that the Grievant would respond affirmatively to a second chance reinstatement. The Union demurs, arguing that the Grievant warrants a second chance.

Ultimately, the undersigned agrees with the Union. The Grievant was a long-term, eight year employee—a period of Company service that should mitigate discipline. This conclusion is furthered by the fact that the Grievant's eight year disciplinary record, while blemished, is nevertheless unremarkable. In addition, the undersigned cannot put aside the fact that the infraction in question is rather low-level in nature, namely: spending a few minutes of paid unauthorized break time away from the work area. However, it is also the case, as the Company persuasively argues, that a low-level offense like this has a compounding and adverse effect on labor relations and legitimate business operations when repeated time after time and, as such, the offense is transformed into a higher-level offense, warranting stern discipline.

The Company does not believe that the Grievant's break time misconduct will improve, if he is returned to work. On the other hand, the Union argues that the Grievant now sees the error in his ways and, if returned to work, will never again violate the break time rule. Indeed, as remedy, the Union is not requesting that the Grievant be reinstated with full or partial back pay and benefits. Rather, as if to prove that the Grievant has genuinely learned his lesson, the Union requests that the Grievant's discharge be reduced to a nearly two year

suspension without back pay and benefits; and that he be reinstated on a “last chance” basis.

This is a close case. Ultimately, however, the undersigned concludes that the Grievant warrants a second chance. Unlike the Company, the undersigned gives mitigating and determining weight to the Grievant’s “court date” explanation for returning to his work area late on the afternoon of November 20, 2008. While this explanation is credible, it does not take the Grievant off the disciplinary hook all together. He should have reported his “emergency” situation to his supervisor and requested additional break time minutes but he did not. Stern discipline short of discharge is warranted in this case given all of its facts and circumstances.

VII. AWARD AND ORDER

For the reasons discussed above, M.M. violated the break time rule on November 20, 2008, as charged. However, said breach and its accumulated effect do not justify the Grievant’s termination.

The Grievant is ordered to be reinstated, provided he clears all of the Company’s ordinary and usual fitness for duty requirements. Further, the Grievant’s reinstatement is without back pay and benefits. Still further, the Grievant’s reinstatement is conditional on his expressed willingness to return to work with the understanding that the Company may subsequently discharge him for any future violation of the break time rule and that, if the rule violation is proven, that he is also barred from challenging said discharge in arbitration, as otherwise provided for in Article 16 of the CBA.

For the sole purpose of seeing to the enforcement of this Award and Order,

the undersigned retains jurisdiction over the case until the end of the business day on November 8, 2010.

Issued and ordered from Tucson, Arizona on this 6th day of September 2010.

Mario F. Bognanno, Labor Arbitrator