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In Re the Arbitration between:

BMS File No. 10-RA-0512

SUPERVALU, INC.,

Employer,

and

**GRIEVANCE ARBITRATION  
OPINION AND AWARD**

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, Local 120,

Union.

Louis Anderson, Grievant.

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Pursuant to **Article 16** of the Collective Bargaining Agreement effective June 1, 2005 through January 31, 2010, the parties have submitted the above captioned matter to arbitration.

The parties selected James A. Lundberg as their neutral Arbitrator from a list of Arbitrators provided by the Minnesota Bureau of Mediation Services.

The parties raise no procedural issues and agree that the grievance is properly before the Arbitrator for a final and binding determination.

The grievance of Louis Anderson protesting a verbal indefinite suspension was submitted on July 7, 2009. Upon discharge of the grievant on July 9, 2009, the discharge and suspension grievances were merged.

The hearing was conducted on July 13, 2010 and July 26, 2010.

Briefs were posted on August 20, 2010 and a copy of the arbitration award issued by Arbitrator Richard R. Anderson in BMS File No. 10-RA-0513 was posted on August 21, 2010.

**APPEARANCES:**

**FOR THE EMPLOYER**

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**FOR THE UNION**

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**ISSUE:**

**The Employer submits the following statement of issue:**

*Did Supervalu violate the collective bargaining agreement by discharging the grievant?*

**The Union submits the following statement of issue:**

*Whether Supervalu had just cause to terminate the Grievant, if not, what is the appropriate remedy?*

**RELEVANT CONTRACT PROVISION:**

**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 AND 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.

#### **FACTUAL BACKGROUND:**

The grievant, Louis Anderson, was employed in the Sanitation Department at SuperValu, Inc., the Employer, from February 1992, until his discharge on July 9, 2009. His work station was in the "fresh warehouse". Mr. Anderson was never disciplined for misconduct prior to the incident that led to his discharge.

In February of 2009 management at SuperValu, Inc. received an anonymous tip that employees were stealing merchandise from the Company. In response, the Company began monitoring security videos taken from cameras mounted at various sites throughout the plant. During the review of videos, Mr. Anderson was seen reaching into some containers that were located outside of his normal work area. He was also seen taking what appeared to be product off of a table in his work area. Two other sanitation workers were seen on video consuming reclaimed merchandise, accumulating reclaimed merchandise in a container and concealing the container by using a forklift to place the container about twenty three (23) feet above the warehouse floor.

In a meeting on June 29, 2009 with the Cub Foods “Loss Prevention Officer,” Scott Nelson, SuperValu, Inc.’s “Risk Control Manager,” Aaron Rustemeyer, and “Union Steward,” Brad Jenkins, Mr. Anderson admitted the following:

- 1) He had consumed some Gatorade and candy bars that he believed to be out of date, expired product, while working.
- 2) The grievant said that the consumption of expired Gatorade and candy bars in the fresh warehouse was a practice engaged in by other employees, including supervisors but he declined to identify any other employees who engaged in the practice.
- 3) Mr. Anderson was asked if he knew that consuming the expired product was stealing and wrong and he said “yes.”
- 4) Mr. Anderson admitted that the product he consumed at the clean out dock did not belong to him.

5) Mr. Anderson said that he did not know if the “reclaimed merchandise” he consumed had any value.

In the course of the interview, Mr. Anderson was asked how long he had been consuming the out dated product, while on the job, whether he had taken any product out of the warehouse and the value of the product he had consumed. Mr. Anderson was unable to inform the investigator specifically how long he had been consuming the expired product while at work. He denied taking any product out of the warehouse. He was not able to specifically determine the value of product he had taken but he did indicate that it was not more that two hundred dollars (\$200.00). The investigator indicated that two hundred dollars (\$200.00) was an amount the Employer would accept as the value of the product consumed.

Reclaimed merchandise does have value to the Company. However, no evidence was given regarding the specific value of reclaimed merchandise nor was any evidence submitted other than Mr. Anderson’s rough estimate regarding the value of the expired merchandise he consumed. Presumably, the credit value of the product is much less than the retail price charged to consumers. When the grievant was asked about the value of the Gatorade and candy bars that he had consumed, he was not informed of the credit value of the reclaimed merchandise. There is no indication that the grievant was informed of any merchandise value other than the retail value of the product, when he estimated that he might have consumed two hundred dollars (\$200.00) of product.

Mr. Anderson was discharged on July 9, 2009 for violation of **Article 13** of the collective bargaining agreement and for violation of **Group One Work Rule Number Five**. The discharge letter that is dated July 9, 2009 says:

*During the course of an investigation interview on June 29, 2009, you admitted to theft of Company product which is supported by evidence found during the course of the investigation.*

*Your actions violate Article 13 of the Collective Bargaining Agreement as well as group one work rule #5 of the SuperValu Minneapolis Distribution Center Work Rules & Regulations, “Engaging in criminal activity on Company property or any act of dishonesty.”*

*As a result, your employment is hereby terminated effective immediately.*

The Union filed a grievance on July 7, 2009. The grievance was initially filed to protest the indefinite suspension of Mr. Anderson and later amended to challenge Mr. Anderson’s discharge.

The review of surveillance videos resulted in the discharge of two other employees. One of the employees was observed stocking and secreting a bin of expired drinks and snack food using a forklift to conceal the location of the bin mixed with product about twenty three (23) feet above the warehouse floor. The other employee, Mr. Bjork, admitted to engaging in conduct very similar to that for which Mr. Anderson was discharged. Mr. Bjork also admitted that he had some involvement with the accumulation and concealment of merchandise that was being pilfered. Mr. Bjork estimated that he had consumed about one thousand dollars (\$1,000.00) of reclaimed product. Mr. Bjork was also discharged and his discharge was grieved. Arbitrator Richard R. Anderson issued a decision in the grievance of John Bjork, **BMS Case No. 10-RA-0513**, on July 12, 2010.

## **SUMMARY OF EMPLOYER'S POSITION:**

The grievant engaged in the misconduct for which he was discharged. He was seen on surveillance video reaching into boxes outside his normal work area and taking product. He was observed on surveillance video taking product off of a table that was located in his work area.

When the grievant was interviewed on June 29, 2009, he admitted the following:

1. He had consumed candy bars and Gatorade belonging to the Company.
2. He was not sure how long he had been doing it.
3. He knew it was stealing.
4. He knew it was wrong.

Following the June 29, 2009 interview, the grievant acknowledged that he was comfortable with how he had been treated in the interview. Grievant said he told the truth during the interview. He also acknowledged that he had not been forced to say anything to investigators.

The grievant knew that his consumption of reclaimed product was theft. During the June 29, 2009 interview Mr. Anderson was asked whether he knew it was stealing and whether he knew it was wrong and he said "yes." The theft was admitted and the grievant's knowledge that his conduct was wrong was admitted. The grievant knew that he did not own the merchandise he consumed. The argument that grievant did not realize prior to June 29, 2009 that his conduct was theft is simply not credible.

The idea that consuming reclaimed merchandise was not stealing, because every body else was doing it, is not a credible defense.

Furthermore, Mr. Anderson knew that merchandise had been hidden in a watermelon bin by a co-worker. He cannot credibly claim that the merchandise he was consuming had been put out there by the Company. Similarly, he cannot credibly claim that the items he pulled out of banana boxes outside of his normal work area had been put out for his consumption by the Company.

The grievant's misconduct violated the collective bargaining agreement and the Company's work rules. The collective bargaining agreement at **Article 13.01** provides for immediate discharge for "dishonesty." The Company work rules also provide for discharge for "any act of dishonesty." Consuming merchandise that you know you do not own is dishonest.

The grievant knew that consuming reclaimed merchandise was considered by the Employer to be dishonest and could result in his discharge. The Employer posted crew agendas that addressed consumption of merchandise from the warehouse for employee review. The crew agendas make it very clear that consuming Company product while on the job is prohibited and can result in discharge. Crew agendas are posted every week for a one week and numerous crew agendas from as early as 2006 prohibited employees from pilfering merchandise and informed employees they could be discharged, if they pilfered merchandise.

The great weight of arbitrable authority holds that discharge is the appropriate penalty for workplace theft. Even small thefts of food and beverage have formed the basis for employee discharges. Whether the issue references "the collective bargaining agreement" or the "just cause standard", the conclusion that discharge is the proper remedy for theft is inescapable.

The Employer did not condone or ratify the consumption of reclaimed merchandise. There have been situations in the past where the Employer has allowed employees to consume spoiled or damaged product. Employee consumption of the contents of a broken ice cream container placed in the break room by management is an example of authorized merchandise consumption. In the case of a broken ice cream container the merchandise was, in fact, “put out” for employees. Mr. Anderson’s conduct in the warehouse does not remotely compare to the situation where employees were allowed to eat the contents of a broken ice cream container. The claim that supervisors were doing the same thing because the wrappers for various kinds of product were found in the break room is unsupported. The Employer contends that, if empty wrappers were found in the break room, the empty wrappers were probably from merchandise owned by the people who consumed the product. No direct evidence of supervisors consuming Company product was offered by the Union.

The grievance should be denied and the discharge upheld.

**SUMMARY OF UNION’S POSITION:**

The discharge of Mr. Anderson must be reviewed using the “just cause” standard. While the collective bargaining agreement does not include a “just cause” provision, the standard has been applied consistently in the past. The Union cited five arbitration discharge decisions between 2003 and 2010 wherein arbitrators ruled that “just cause” was the proper standard. There is no reason to deviate from the accepted standard in this case.

The Employer failed to prove that the grievant knowingly took property belonging to SuperValu, Inc. and his taking of food and drink without management’s

permission was theft. A significant amount of testimony established the existence of a historical practice of allowing workers and supervisors to consume out-of-date product. While management argued that it changed the policy, the change in policy was not communicated to the grievant.

A long standing practice exists in the SuperValu, Inc. warehouse of permitting employee's to consume out-of-date and returned merchandise, including beverages and snack food. In the past, the out-of-date product has been placed in bins and both workers and supervisors have helped themselves to the product, while on duty. Also, similar items have been set out in the break room for employee consumption.

Management has made efforts to halt the consumption of out-of-date and returned product. Management has publicized to warehouse workers and to supervisors that consumption of out-of-date and returned product is theft. At warehouse crew meetings the fact that "grazing" and consumption of out-of-date and returned product could result in discipline up to and including discharge was presented. Agendas from the crew meetings were posted on the Company bulletin board. Consequently, the Company contends that grievant knew or should have known about the policy prohibiting "grazing."

In fact, the grievant works in the Sanitation Department and was not a participant in any of the crew meetings where the change in policy was discussed. The Sanitation Department is under different supervision than other warehouse workers. Sanitation workers, including the grievant, were assigned to cleaning tasks within the warehouse, during crew meetings when the new policy was reviewed with warehouse employees. The Employer produced no acknowledgment of receipt of the policy notification by the

grievant. In fact, the Employer imputes knowledge of the policy change to the grievant based exclusively upon the posting of crew meeting documents posted on the Company bulletin board.

The grievant did not realize that the “grazing” he engaged in was a violation of Company policy at the time he consumed small amounts of Gatorade and some candy bars. His testimony rings true because he knew that surveillance cameras were mounted in the warehouse and directed toward his work area. He made no effort to conceal his actions. He simply walked past a table in the work area and picked up a drink or snack on occasion. Grievant simply believed he was enjoying a benefit that had long been available to employees.

There is no evidence that the grievant received notice that the Company considered “grazing” or consuming out-of-date or returned merchandise to be theft. Grievant never participated in a meeting where the policy statement was announced. He testified that he had not read the policy from any bulletin board posting and he was never given a copy of any policy statement. The Employer did not meet its burden of proving that the grievant was in fact aware of the new policy relating to consumption of out-of-date merchandise and returned merchandise in the warehouse.

In **Local 120 (Bjork) and SuperValu, BMS 10-RA-0513, (7/12/2010) at 26,** Richard R. Anderson, Arbitrator, said:

*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 6, 2010*

*apprising employees of their responsibility to keep abreast of all communication including Crew Agendas posted on bulletin boards.*

Mr. Bjork and Mr. Anderson were both discharged as a result of the same investigation. Arbitrator Anderson found that the Employer was remiss in the manner in which it notified Mr. Bjork about the pilferage policy. Similarly, the Employer was remiss in the manner in which it notified Mr. Anderson of the pilferage policy.

The Union contends that equating theft with a violation of Company policy is inappropriate. In this situation, Mr. Anderson did not know that he was causing the Employer any economic harm. He testified that he did not know that returned merchandise had value. Hence, he did not have the requisite knowledge that he was depriving his Employer of valuable property. "Theft is taking someone's property without the owner's permission; violation of the rule at issue here is consuming property without a supervisor's explicit authorization. One is dishonest; the other is a technical infraction." The Employer failed to prove that grievant knowingly engaged in theft because it failed to prove that grievant knew he was depriving the Employer of its property without permission or consent.

The grievant committed no offense and, therefore, should not have been terminated from his employment.

If the grievant is found to have engaged in misconduct, the misconduct is not serious enough to result in discharge. If the Arbitrator finds that the grievant should not have consumed out dated beverages and candy bars and/or he somehow should have learned of the change in policy prohibiting consumption of out-of-dated products, the penalty imposed on Mr. Anderson should be modified. Mr. Anderson was a sixteen (16)

year employee with a spotless work record. No attempt was made by the Employer to apply the principles of progressive discipline. In this instance, adequate alternative remedies are available. The grievant is willing and able to return to his old position and could readily be reabsorbed into the work force. There is no evidence that he lacks the skills to return to his former position. There is no evidence that grievant has any problem with co-workers or his supervisors. Furthermore, grievant is now aware of the policy under which he was discharged. There is no evidence that suggests the grievant is likely to engage in prohibited conduct in the future.

The grievant should be returned to his former position with full back pay and benefits or, at a minimum, Mr. Anderson should receive discipline comparable to what Mr. Bjork received. Mr. Bjork's discharge was reduced in arbitration to a ninety (90) day suspension. Both men lacked intent to deprive the Employer of a valuable asset and lacked awareness of the pilfering policy. Mr. Anderson should at a minimum be treated the same as Mr. Bjork. In this case, Mr. Anderson's sixteen (16) years of unblemished service should be given great weight and the discipline reversed.

**OPINION:**

The grievant "grazed" on some candy bars and drank some Gatorade while working in SuperValu's "fresh warehouse." His conduct was in violation of the Company's policy regarding "grazing". However, the Employer did not demonstrate by a preponderance of the evidence that Mr. Anderson received notice of the prohibition against "grazing" on reclaimed merchandise in the warehouse. He was not a participant in the crew meetings and there is no evidence that he read the crew agenda's that were posted on the Company bulletin board. The Employer did not establish whether it

communicated to employees that it was necessary to consult the Company bulletin board to obtain current information regarding changes in disciplinary policy.

The Company has a reasonable policy with regard to the consumption of reclaimed merchandise but it did not clearly disseminate the policy to Sanitation workers in the fresh warehouse. Forewarning is essential in this situation and the Employer failed to establish that Mr. Anderson was forewarned that he could lose his job, if he snacked on reclaimed merchandise. On the other hand, it is pretty obvious that in a grocery warehouse, an employee does not have license to eat the Employer's product.

In an Arbitration Award dated July 12, 2010, Arbitrator Richard R. Anderson wrestled with the tension between the obvious impropriety of an employee's unauthorized consumption of merchandise in a food warehouse and the Employer's failure to effectively notify Sanitation workers of the prohibition against "grazing." The Arbitrator determined that grievant, John Bjork's, consumption of reclaimed merchandise was misconduct but discharge was inappropriate. Arbitrator Anderson converted the discharge of grievant, John Bjork, to a 90 day suspension without pay and required that Mr. Bjork reimburse the Employer for his unauthorized consumption of merchandise. Any reference to Mr. Bjork's discharge was to be expunged from his record. Also, Mr. Bjork was to be reinstated to his former position, 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. Mr. Bjork was a co-worker of Mr. Anderson, who engaged in similar consumption of reclaimed merchandise in the SuperValue warehouse, during the same period of time that Mr. Anderson was accused of the unauthorized consumption of

reclaimed merchandise in the SuperValu warehouse. The Award of Arbitrator Richard R. Anderson is a part of the law of this shop. The decision in this grievance must be consistent with the decision by Arbitrator Richard R. Anderson in the Bjork grievance.

Mr. Anderson's conduct was similar to Mr. Bjork's but Mr. Anderson's situation may be distinguished from Mr. Bjork's in a number of ways. Mr. Anderson was employed by SuperValu for sixteen (16) years and had no disciplinary history. Mr. Bjork had worked for SuperValu for only eight (8) years. Mr. Bjork estimated that he had consumed roughly a thousand dollars (\$1,000.00) of reclaimed merchandise. Mr. Anderson estimated that perhaps he had consumed \$200.00 of reclaimed merchandise. Also, Mr. Bjork admitted that he had some amount of participation in accumulating reclaimed product and concealing it in a bin above the work floor. There is no evidence that Mr. Anderson was involved in the accumulation and concealment of reclaimed product. Mr. Anderson's involvement was limited to a small amount of "grazing" and appears to have been less extensive than Mr. Bjork's.

In order to treat Mr. Anderson fairly and even handedly, his discharge must be reversed and a lesser degree of discipline imposed. Another employee's discharge under similar circumstances was reversed and a 90 day suspension was imposed. Mr. Anderson was a loyal and capable employee for twice as long as the other employee, Mr. Bjork. The misconduct Mr. Anderson engaged in appears to have been less egregious than the other employee both in scope and in the actual amount of merchandise consumed.

After considering the serious nature of the misconduct, Mr. Anderson's long service to the Company and the limited extent to which Mr. Anderson was involved in improperly consuming reclaimed merchandise, the discharge should be reduced to a

suspension without pay for a period of time less than that of Mr. Bjork. In this instance, reducing the penalty to a thirty (30) day suspension would be consistent with the penalty imposed upon Mr. Bjork after taking into consideration Mr. Anderson's long service to the Company and the narrower scope of his misconduct.

**AWARD:**

- 1. The Employer had just cause to discipline the grievant, Louis Anderson, but did not have just cause to discharge the grievant.*
- 2. The discharge of Louis Anderson should be reduced to a thirty (30) day suspension, without pay. Any reference to his discharge shall be expunged from his personnel file.*
- 3. Louis Anderson shall be reinstated to his former position with full back pay and benefits less thirty (30) days of wages.*
- 4. No interest is awarded.*
- 5. The Arbitrator shall retain jurisdiction over the remedy in the above matter for a period of forty five (45) days from the date of this Award.*

**Dated: September 17, 2010**

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**James A. Lundberg, Arbitrator**

