

In the Matter of Arbitration)
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 between)
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 SuperValu, Employer)
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 and)
)
 International Brotherhood of Teamsters,)
 Local 120, Union)

OPINION AND AWARD

BMS Case no. 10-RA-0104

September 20, 2010

Appearances:

For the Employer—Reid Carron, Littler Mendelson, Minneapolis, MN

For the Union—Martin Costello, IBT Local 120, Blaine, MN

Procedures:

The undersigned was selected as Arbitrator in the present Matter through the procedures of the Minnesota Bureau of Mediation Services. A Hearing as held at the Union’s offices in Blaine, MN on June 4, 2010, commencing at 10 a.m. A court reporter was present and a full transcript was made. With the submission of post-hearing briefs on July 9, 2010, the record in this Matter was closed.

A word is in order on the substantial delay between submission of briefs and issuance of this Opinion and Award. As the Arbitrator was preparing to take the case “up north to the cabin at the lake” in mid-August, he attempted to view Employer Exhibit 1, which contains the surveillance tape of the incident for which the Grievant was terminated. The Arbitrator could not do so. The following day he took the disk to IT at the Carlson School, and three professional “geeks” could not convince the file to open, even with a variety of “will open anything” software.

Contact was established with the Employer's security officer, but the Arbitrator soon went "up north" and that contact was suspended for lack of telephone connectivity. The Arbitrator returned to the Twin Cities on Labor Day (September 6) and has subsequently been able to view—repeatedly—Employer Exhibit 1.

The Parties

The Employer is a supermarket chain, which runs a large distribution center in Hopkins, Minnesota which delivers products to its stores and to other companies' stores. The Union is a major Twin Cities local of the Teamsters. The Parties are signatories to a CBA running from June 1, 2005 through May 31, 2010.

The Issue

At the Hearing, the Union proposed that the issue be framed as: did the employer have just cause to discharge the Grievant. The employer asked whether the Grievant's behavior violated the CBA and Work rules. The Arbitrator noted that the preponderance of arbitral opinion was that, whether or not explicit, a just cause standard was implicit in any labor agreement.

The Disputed Incident

On the evening of May 11, 2009, the Grievant Scott Ramin was working as a truck loader at the Employer's Hopkins distribution Center, handling fresh (perishable) produce.. The loading Dock supervisor on duty was Amy Grenier. Testimony indicated that the Grievant was called off his work to report to the supervisors' office, where he was given a written warning for taking an excessively long break several days before. One of the supervisors who witnessed this

break was Amy Grenier. Testimony indicated as well that Supervisor Grenier had directed the Grievant to stop work loading later-to depart trucks and work on more immediate deliveries. As the Grievant finished loading a truck destined for a Kowalski's supermarket, he noticed that the "totes" were missing (a tote is a hand-carried container with smaller items such as candy bars); Grievant indicated to Grenier that the truck should go back and get the totes. Ms. Grenier indicated that Kowalski's did not want the truck, just loaded with perishables, to do that. All these events and incidents appear to have annoyed Mr. Ramin, expressing his irritation in plentiful use of the f-word. Testimony was advanced that both supervisors and supervised commonly used foul language as a matter of course.

At approximately 7:10:50 p.m., the Grievant can be seen in Employer Exhibit 1 exiting a trailer, carrying a pallet. He puts the pallet on a stack of them on the floor and turns to face Ms. Grenier. Then comes the crucial, disputed incident. To the Employer, the surveillance tape clearly shows the Grievant shoving his supervisor; the Grievant denies touching her at all.

What happened next is fairly interesting. The Grievant went back to work as did Ms. Grenier. The grievant evidently went to the Banana Room later, apparently slacking off (although this was not part of the discipline). Ms. Grenier's supervisor having already left for the day, she did not report the incident orally until the beginning of her next shift the following day. At that time, she was asked to write up the incident. Most significantly, she did not pull Mr. Ramin off the floor, either by herself or with another supervisor (two others, both men, were on duty at the time).

Aside from the Ms. Grenier's muted response to the incident, what else can be said of the surveillance evidence? Not much, unfortunately. The Arbitrator has played Employer Exhibit 1 many, many times to no clear result. All that can be said for sure is that at 7:10:57, the Grievant moves a little toward Ms. Grenier; at 7:10:58, he moves fairly substantially toward her; at 7:10:59, he moves a little more toward her. (These times correspond with the still frames contained in Employer Exhibits 3A, 3B and 3C.) The employer argues that Mr. Ramin's right arm is visible in 3B, but this arbitrator doesn't see it, especially since his left side is toward the camera and the backdrop below and beyond the two figures is dark (as is Mr. Ramin's jacket).

Two other employees are visible in Employer Exhibit 1; neither confirmed an "altercation" between Ramin and Grenier as part of the investigation into the incident. The very unclear surveillance tape was apparently the principal element of the investigation.

In any event, the Grievant was suspended pending investigation on May 13 and discharged on June 5 for two causes: (1) fighting and (2) failure to show respect and courtesy to another employee. It would appear that the charge of fighting must have driven the ultimate discipline. The Union grieved the suspension and, in due course, the termination.

The Union has argued strongly and convincingly that in a discharge for an offense to which some opprobrium is attached (fighting) the employer has an enhanced burden of proof. The evidence for the offense must be "clear and convincing." The evidence in Employer Exhibit 1 and Exhibits 3 is neither clear nor convincing.

AWARD

The Grievance is sustained. The Grievant is to be reinstated and made whole.

Given at St. Paul, Minnesota this twentieth day of September 2010.

James G. Scoville, Arbitrator.