

**IN THE MATTER OF ARBITRATION
BETWEEN**

Cargill Salt Division

Employer,

and

**International Chemical Workers Union
Council/UFCW Local 188C**

Union.

**OPINION AND AWARD
(D. H. Discharge)**

FMCS Case No. 10-53132-8

November 16, 2010

**A. Ray McCoy
Arbitrator**

Appearances

For the Employer

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For the Union

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Jurisdiction

The arbitrator has jurisdiction to resolve this matter pursuant to the Agreement between Cargill, Incorporated and International Chemical Workers Council Local #188C of the United Food and Commercial Workers Union, Hutchinson, Kansas, May1, 2009 through April 30, 2014. Article 11 of the Agreement states:

“The Arbitrator shall meet and conduct hearings as soon as possible after his appointment. A decision shall be rendered within a reasonable time after the hearing, such decision being final and binding upon the Union and the Company...Arbitration shall be limited to one issue at any one time, and the Arbitrator shall have no power to add to or subtract from, or modify any of the terms of this Agreement or any agreement made supplementary hereto, nor to establish or change any wage rates.” (Agreement at p. 17)

The Parties notified the arbitrator of his selection by letter dated April 27, 2010. The Parties selected July 8, 2010 for the hearing. The hearing was conducted on that date at the Hampton Inn located at 1401½ East 11th Street in Hutchinson, Kansas. The Parties agreed that the matter was properly before the arbitrator. The Parties had a full and fair opportunity to present their respective cases including the examination of witnesses and introduction of documents in support thereof. In addition, a court reporter was present to document the hearing. At the close of the hearing, the Parties elected to submit post-hearing briefs. The briefs were exchanged as agreed on August 25, 2010. However, due to delay by the U.S. Postal Service, the arbitrator did not receive the Employer’s brief until August 30, 2010. Therefore, the record was closed on August 30, 2010.

Issue

The Employer submitted two issues for determination. (A) Whether the Employer violated the Agreement by disciplining Grievant for his July 6, 2009 conduct. (B) Whether the Employer had cause to discharge the Grievant. The Union asks whether the Employer had just cause to discharge the Grievant.

Relevant Contractual Provisions/Work Rules

Article III

FUNCTIONS OF MANAGEMENT

All rights, functions, and authority of management not specifically modified, changed or relinquished by this Agreement shall remain exclusively with the Company. Such rights include, but are not limited to, the right to hire, transfer, promote, discipline, lay off for lack of work, or discharge for cause, and to maintain discipline and efficiency of employees. In addition, the products to be manufactured, the schedules of production, and the methods, processes, and means of manufacturing are wholly and exclusively the responsibility of the Company.

The Company shall have the exclusive right to make reasonable changes to its Absenteeism and Tardiness Policy one time per year provided it notifies the Union in writing. The Union shall have the right to grieve the reasonableness of any proposed change in accordance with the Grievance Procedure set forth in Article XI Article IV.

Section 10 Cargill Salt Plant Work Rules

Revised 2/12/98

Employees are expected to conduct themselves properly and to adhere to generally accepted customs of good taste in their relations with each other. However, there may be situations which arise when the conduct of employees requires Cargill to take disciplinary action for the welfare of everyone.

The following list of work rules refer to employee relations matters, it does not include other areas that may require separate rules, and it is not necessarily complete. These rules may be subject to change, but all warrant disciplinary action up to and including discharge.

1. Excessive absenteeism or tardiness.
2. Failure to properly notify supervisor of an absence, or failure to furnish proof of reason for absence when requested by supervisor.
3. Leaving the place of work without being excused by supervisor or replaced by another qualified employee.

4. Loafing or sleeping on the job.
5. Disregard or violation of Cargill safety rules or good manufacturing practices.
6. Any insubordination which includes failure to obey orders as well as any threats or swearing directed toward a supervisor, leadperson, or any member of management.
7. Any disorderly conduct which includes fighting threats, harassment, or intimidation directed toward any supervisor, fellow employee or member of the public on Cargill property.
8. Any dishonesty in employment which includes theft or misappropriation of any property of Cargill, fellow employees or members of the public.
9. Neglect, vandalism, or carelessness resulting in personal injury to other employees, the public, or Cargill property.
10. Gambling, carrying any firearm or weapon on Cargill property without permission.

Background

Cargill Salt is located in Hutchinson, Kansas. The plant produces over 400,000 tons of evaporative salt annually. The plant operates two lines. One line is used to package “food grade” salt. The other line is used to package salt in pellet form for use as a water softener. Separate conveyers move the products to an outside area. Before reaching the outside areas the packages run pass automatic ink jet sprayers that code the bags before they are stacked on pallets for shipping. The coding of the salt packages shows the date and time of packaging. This information allows the Employer to conduct a recall of product, if necessary. The federal government requires the coding of the “food grade” salt. The Employer installed new coders on both the food grade line and the pellet line in approximately May or June of 2009. Because of the mandatory requirement that all packages of food grade salt be coded, the Employer made sure that the coding process associated with the food grade line was always operative. This priority meant that when necessary the coding equipment used on the pellet line would be removed to keep the coding process on the food grade line operative.

The Grievant held the position of an outside operator on the second shift. Outside operators are primarily responsible for safely performing all labor necessary to operate packaging and palletizing equipment at or above operational standards and making routine adjustments as necessary to safely perform routine preventative maintenance on all packaging and palletizing equipment. On July 6, 2009, the Grievant, upon arrival to work, conducted his initial walk around to, among other things, make sure the equipment was working properly. The Grievant testified that he thought he noticed codes on the pellet bags. Later, the plant manager noticed that the codes were not on the pellet bags and asked the Grievant for an explanation. The Grievant told the plant manager that he thought the coder was working at the start of his shift. When the plant manager pressed the Grievant to explain when the coder had ceased to function properly, the Grievant responded again saying he thought the coder was working properly at the start of his shift. According to the plant manager, the Grievant appeared nervous in responding to questioning regarding the malfunction. The plant manager later discovered that the coder malfunctioned at least one hour before the first shift ended and therefore at least an hour before the Grievant arrived and conducted his walk around to determine whether the equipment was working properly. The Employer concluded that the Grievant lied. The Employer discharged the Grievant for dishonesty on July 8, 2009.

Positions of the Parties

Employer's Position

1. The Agreement does not prevent the Employer from issuing discipline it finds warranted.
2. Article III states that any right, function or authority of management not specifically modified, changed or relinquished by this Agreement shall remain exclusively with the Company. Exclusive management rights include the right to discharge for just cause, and to maintain discipline and efficiency of employees. The language in Article III differentiates "discipline" and the maintenance of "discipline and efficiency" from lay off for lack of work" and "discharge for cause." Therefore, the choice of an express standard for discharge and no standard for discipline confirms the contractual recognition of the Employer's

exclusive right to determine whether to discipline.

3. The Employer disciplined the Grievant for dishonesty in misleading the plant manager on July 6, 2009.

4. The Grievant knew or should have known that the Employer expected and demanded honesty.

5. Once the Employer determined that the Grievant lied, the decision to discipline was neither arbitrary nor capricious and did not violate the Agreement.

6. The Employer was entitled to rely on the Grievant's responses as truthful in search for the extent of the problem regarding the coder and misleading his manager was dishonest and warrants discipline.

7. The Grievant was discharged for cause. Discharge decisions are held to the higher standard of "just cause." The Employer's decision to discharge met the just cause standard because the Grievant's dishonesty warranted discharge and/or the next step in the disciplinary process, given the Grievant's disciplinary history warranted discharge.

8. Under the Employer's work rules all employees are put on notice that all violations of rules 1 through 10 warrant disciplinary action up to and including discharge. Dishonesty in employment is specifically enumerated. It is undeniable that in questioning the Grievant about the coder malfunction, the Employer was pursuing legitimate management goals. The Grievant misled the Employer and therefore deserved to be discharged.

9. The Grievant had reached the ultimate step in the progressive disciplinary process. Therefore, it was within the Employer's exclusive reserved rights to discharge the Grievant.

10. The Grievant's record does not earn him another chance. The Grievant's volunteer work and his performance reviews do not earn him another chance. The performance reviews show an increasingly downward trend in performance. The downward trend can be seen in the categories of productive work habits and total quality maintenance.

11. The Grievant amassed four separate documented disciplinary offenses within a nine month period prior to discharge. In addition, the Grievant earned a marginal rating and was required to undergo counseling for his absenteeism.

12. There is no evidence to support the Union's claim that the Employer discharged the

Grievant as a result of comments the Grievant made to visiting upper management about negotiations. It is the Grievant who is motivated to shade his story in order to keep his job.

13. The Agreement clearly and specifically gives management the right to discipline without meeting a “for cause” standard.

14. The Employer’s judgment to discharge was based on published rules and was not arbitrary or capricious.

15. The Union failed to prove that the Employer was improperly motivated or that the Grievant deserves another chance.

16. For these reasons the arbitrator should uphold the discharge.

Union’s Position

1. The grievance should be sustained and the Employer did not have just cause to discharge the Grievant because the Grievant did not tell a lie. The Grievant told the Employer that he “thought” the coder was working at the start of his shift and that was not a lie. Saying that he “thought” the coder was working does not violate Section 10 of the Cargill Plant Work Rules and specifically rule 8 that states: “Any dishonesty in employment which includes theft or misappropriation of any property of Cargill, fellow employee or members of the public.” Because the Grievant said he “thought” the coder was working and did not say he “knew” the coder was working, the Employer either misunderstood him or was on a “witch hunt” to terminate him.

2. Even if the Grievant lied, it was an insignificant lie not punishable by discharge. The coder was not required on the pellet line. The Employer often ran the line without the coder working. This was known by the Grievant and therefore, he had no reason to lie about something that he knew was not a serious problem.

3. The Employer expanded the definition of dishonesty as used in Section 10, rule 8 in order to facilitate discharge. The Employer’s dishonesty policy is very clear. In order for the rule against dishonesty to be violated, an employee would have to have committed an offense related to theft or misappropriation of any property of Cargill, a fellow employee or member

of the public. In order for a simple untruth to be punishable under this rule, the word “which” would have to be removed from the sentence. The Employer stretched the meaning of the rule in order to accommodate a discharge agenda.

4. The Employer did not conduct a proper investigation. The Grievant’s supervisor was the sole mover of this discipline. He did not but should have removed himself based on his biased feelings toward the Grievant in order for a proper investigation to take place.

5. Mr. Whitson was motivated to discharge the Grievant because of comments made by the Grievant to visiting Cargill officials.

OPINION AND AWARD

The only issue to be decided is whether the Employer had just cause to discharge the Grievant and if not, what should be the appropriate remedy. The arbitrator recognizes that the Employer submitted two issues for consideration. However, the two issues are inseparable. The Employer asked whether it violated the Agreement by disciplining the Grievant for his conduct on July 6, 2009. Of course, if the discipline was unwarranted so was the discharge. The Employer presented the two issues in support of its contention that it has the exclusive right to discipline and need not meet the “for cause” or “just cause” standard when it determines discipline is warranted.

The Parties Agreement includes a “just cause” standard. It specifically requires a “for cause” standard when the discipline is discharge. The Employer argues that even though discharge requires just cause that it nevertheless has the right to discipline “without meeting a “for cause” or “just cause” standard. (Employer Post-Hearing Brief at p. 9, hereinafter “Er. Br. at ___”) The Employer points to Article III to support its position.

“The Agreement does not prevent the Employer from issuing discipline it finds warranted. In Article III, the parties set forth their mutually agreed recognition that any right, function or authority of management “not specifically modified, changed or relinquished by this Agreement shall remain exclusively with the Company.” The next sentence defines those exclusive management rights as including “the right to hire, transfer, promote, discipline, lay off for lack of work or discharge for just cause, and to maintain discipline and efficiency of employees. This language differentiates “discipline” and the maintenance of

“discipline and efficiency” (listed without qualifiers) from “lay off for lack of work” and “discharge for cause” (listed with qualifiers). Thus the choice of an express standard for discharge and no standard for discipline confirms the contractual recognition of the Employer’s exclusive right to determine whether to discipline” (Er. Br. at pp. 5-6)

The arbitrator finds that the Employer position on this point cannot stand in an Agreement that requires just cause for discharge. It is the Employer’s exclusive right to discipline. However, the Employer’s discipline must meet the just cause standard whether or not it results in discharge. Just cause imposes a burden on the Employer to defend disciplinary decisions by demonstrating that they are supported by provable facts. The Employer cannot simply discipline a bargaining unit member as if it were operating in an “at will” employment environment.

Had the Grievant been suspended rather than fired, the Employer would still be required to prove “just cause.” The Grievant’s disciplinary record plays an important role in the Employer’s effort to show just cause to discharge. Issuing reprimands, suspensions and any other discipline short of discharge without having to demonstrate that those decisions satisfy the “just cause” standard would destroy the value of the standard in a subsequent discharge case. The Employer’s exclusive right to issue discipline is not challenged. However, that right was indeed modified when the Employer bargained and agreed to a “for cause” standard in this labor Agreement. Doing so means that the Employer’s right to discipline carries with it the burden to satisfy the just cause standard whether the discipline is a discharge, suspension or a written reprimand.

The significance of the “for cause” standing is made clear in this case, where both sides produced testimony regarding the Grievant’s work record in an effort to bolster their respective positions. The Employer made clear its position that discharge is warranted because the Grievant had received prior discipline in the form of a two day suspension for talking on his cell phone, a one day suspension for failing to change the product code at changeover, a written reprimand for mislabeling product with the wrong code and a verbal warning for failure to ensure that the lot coding was put on 4900 bags of product. (Jt. Ex. 4-7) As the Employer said the “Grievant had climbed the disciplinary ladder” prior to July 6, 2009. The Union, on the other hand, sought to prove that the Grievant was a valuable employee. The Union also tried to explain the Grievant’s

conduct that led to the prior discipline as minor. By doing so, both sides acknowledged the well-developed rule that the work record and the prior disciplinary record can be a mitigating factor in a discharge case or provide additional support for the decision to discharge.

In order to understand how that prior discipline affects the outcome of this discharge we need to revisit the events of July 6, 2009. On that date, the Grievant was asked by his supervisor, after discovering bags of non-food grade salt pellets without lot codes printed on them, when he last saw lot codes on the bags of pellet salt. The supervisor questioned the Grievant in an effort to determine just how long the coder had been inoperative. According to the supervisor, the Grievant said the coder was working at the start of his shift. The Employer said the Grievant repeated his claim that he saw lot codes on the bags at the beginning of his shift numerous times and did so with an obvious nervousness. The Grievant testified that he told his supervisor: "...I thought that there were codes on the bags at the beginning of the shift." (Tr. at p. 98, ln. 18-20) As a result of the exchange, the supervisor concluded that the Grievant was lying. On July 8, 2009, the supervisor terminated Grievant's employment and wrote the following for inclusion in his personnel file.

"You are hereby given a reprimand July 8, 2009 for the following: On July 6, 2009, you failed to ensure the product date and code was operational on the pellet line. After more than 2 hours into your shift, it was discovered the coder was not operating. When asked, you stated numerous times there were codes "at the start of the shift". Upon investigation, the coder had not been operational since prior to the start of your shift. Your dishonesty is a direct violation of policy. Due to previous performance issues, your employment with Cargill is terminated effective July 8, 2008." (Er. Ex. 3)

At the hearing of this matter, the supervisor explained in greater detail what happened on July 6, 2009. Below is an excerpt of his testimony.

A. Yep. I found an operator and it was
12 D.H. (The Grievant)
13 Q. And what happened?
14 A. I asked him to see if he could get the
15 lot coder going and he said it was working at
16 the start of the shift so, okay, we need to get
17 the lot coder working. So he went up to do that

18 and so while completing that, I asked him,
19 again, -- I didn't ask him, again, but I asked
20 him if the lot coder was working at the
21 beginning of the shift so as to get a window of
22 time when the product code was on the bag so I
23 could relay that to quality if we did have a
24 recall and I'd know kind of the time frame.
25 He commenced to go ahead and get the

1 lot coder working and get the bags. It takes a
2 little bit of time. Sometimes you have to purge
3 it and do different things but he got the lot
4 coder working.
5 So I asked him, again, you know, when
6 exactly did this happen, do you think, and how
7 many pallets and tried to dig in and get some
8 details on when the lot coder wasn't working,
9 why it wasn't working and my line of questioning
10 really was to root cause analysis a piece of
11 equipment that we spent money on. "When did it
12 stop working? I wonder what is going on in my
13 system." He said, well, I know I saw the bags
14 at the beginning of the shift with lot codes on
15 it." I could tell his nervousness and I started
16 to understand that nervousness, too, because the
17 history of lot coders and D. that he had this,
18 and we reviewed with some of the exhibits, at
19 that point didn't have any lot codes on the bag.
20 He got the coder fixed so I think I mentioned I
21 was going to go down and check to see how long
22 it was to verify that. You can see the time
23 stamp on the bag. It's pretty easy to go down
24 and check that out and so D., again, stated
25 that he had lot codes on the bags. There were

1 lot codes on the bags at the beginning of the
2 shift. So I remember four distinct times where
3 he confirmed that there was lot codes on the bag
4 at the beginning of the shift.

5 Q. Did you do any investigation?

6 A. Yes.

7 Q. What did you do?

8 A. We went down to the warehouse and I
9 asked the -- see, we have a person that takes
10 product off the line. I asked him if he had
11 known when the coder had stopped because we
12 needed to determine that. He said that he
13 thought that there was codes at the beginning of
14 the shift.

15 Q. Who was that?

16 A. M. S., a fairly new operator
17 at the time.

18 Q. And what happened with Mr. S.?

19 A. So we said, you know, "let's figure
20 this out." We started to investigate. We went
21 outside and I think D. was down there at that
22 time which I could tell he was nervous at the
23 time which I understand. So we started to
24 determine the bags and which ones had it and
25 which ones didn't. So M. showed me where

1 he stored the product and it didn't have any
2 codes. He had a couple different places he
3 stored products. One was actually a rail car
4 buried, so I ended up calling the place we
5 shipped it to later on to determine that it
6 didn't have codes on that product and then there
7 was some outside that had been made prior to
8 that that didn't have codes on it either and
9 that total product investigation went back --
10 actually the last code we had was back into the
11 first shift, over an hour.

12 Q. I'm sorry?

13 A. Over an hour back into the first shift.

14 Q. So you found no codes from an hour at
15 the end of the prior shift?

16 A. I think it was over an hour, if I
17 remember right.

18 Q. And then some period of time until you
19 were actually spoke with him?

20 A. Yeah, when he got it going after I saw
21 that it wasn't going.

22 Q. And you know that because there was no
23 code that showed that intervening time period on

24 any bag?

25 A. Right. We looked at most every pallet

1 from code to no code -- no code to fix, so
2 several hours.

3 Q. What did you do at that point?

4 A. Oh, well, at that point I explained to
5 both -- everyone that was around that, you know,
6 we've got to be able to determine this. If we
7 do have a customer issue, we have got to recall
8 things. We have to kind of know what to recall
9 so we need to have a window. That's what I'm
10 trying to establish. It could be significant
11 dollars if we have to recall a whole shift of
12 pallets. If we have to recall a pallet of
13 pellets, that's a lot less dollars so we kind of
14 we went through that.

15 And I knew that D. had issues in the
16 past so we discussed that a little bit about not
17 coding. It was a brief discussion and kind of
18 went through it with the operators that, yep, we
19 need to make sure the codes are on at all times
20 and reminded the operators of that.

21 Also, went back and asked M.

22 specifically, "Are you sure that there was codes
23 at the beginning of the shift?" And he said
24 that he couldn't be sure when I went back and
25 asked him.

1 Q. You disciplined Grievant as a result of
2 this event?

3 A. Uh-huh.

4 Q. Did you discipline anyone else?

5 A. We had verbal discussions with two
6 other operators that were involved.

7 Q. And why did you choose to do verbal
8 discussions with the two other involved
9 operators and to terminate Mr. H.?

10 A. Well, the issue with Mr. H. was
11 that it was an honesty issue where I had -- he
12 had repeatedly told me that he was sure that
13 there was codes on the bag. It was obvious

14 after investigation there wasn't codes on the
15 bag and he wasn't trying to get out of trouble
16 or trying to -- he didn't tell me the truth, so
17 that is a dishonesty, which I don't tolerate as
18 a manager. My company doesn't tolerate. We
19 have historically not tolerated it at Cargill.
20 The difference for the others is there
21 was a coding issues so we needed to make sure
22 the coding works. I asked one of the two and
23 they said, "I didn't check it at that time."
24 "Okay, well, we need to make sure to check it,"
25 so it was a verbal discussion.

1 The other one I mentioned, M.,
2 wasn't defensive on his answer that there was
3 lot codes on the bag, like I said, and I went
4 back to check to make sure of that with him and
5 so I had the discussion with him about codes on
6 the bag.
7 So the difference was a dishonesty
8 versus lot coding on pellet bags.
9 Q. So the dishonesty occurred in the
10 context of the lot coding, but it wasn't the lot
11 code that resulted in the termination?
12 A. No. It was an issue of honesty. (Transcript
pages 54-60)(Names have been changed to initials to
protect private data)

It is clear from the supervisor's testimony that he was most concerned with why the recently acquired inkjet coder machine was not working. His investigation was focused on the length of time the coder had been inoperative. During the course of that investigation he discovered that the Grievant and a probationary employee both thought the coder had been in proper working order at the beginning of their shift. The supervisor later discovered that the coder had been inoperative for at least the last hour of the prior shift. Therefore, the operator on the prior shift missed the malfunction as well. The supervisor testified that none of the others responsible for tracking the inkjet coder to make sure it was running properly were disciplined.

He said he had a discussion with them. However, the supervisor claims that his concern with the Grievant was with his dishonesty. The supervisor was sure that the Grievant lied in order to protect his job which he felt was in jeopardy because of prior performance problems. So, the supervisor concluded that the Grievant's repeated assurances that the coder had been functioning properly at the beginning of the shift were intentional lies deserving of discharge. It is unclear then why the supervisor found it necessary to both reprimand and terminate the Grievant. The termination letter states that the Grievant was being given a reprimand for his failure to ensure that the inkjet coder was properly working even though none of the others responsible were given any discipline, especially the operator on the prior shift who left work without bothering to check the equipment. The reprimand demonstrates that the Grievant was singled out for more harsh treatment than other bargaining unit members guilty of the same offense.

What makes the treatment of the Grievant in this case even more suspect is the testimony by the supervisor indicating that the Employer had not clearly informed bargaining unit members that the coding on the non-food salt line was of critical importance and failure to ensure its proper functioning could lead to discipline. For example, the supervisor testified:

Q. How did you, I assume you did it,
10 notify operators that coding is a requirement on
11 the pellet bags? Quite frankly there is a lot
12 of controversy on that.

13 A. I understand and we run the coder
14 sometimes without codes on it when we choose not
15 to and because on the granulated line, again,
16 the customer requires code on the bag so, again,
17 we continually try to get better on labeling
18 products, product quality over the years and
19 this is another step in that direction, so. . .

20 *Q. But my question was is how did you*
21 *communicate to the operators that it was*
22 *required?*

23 *A. I don't even know that we had that*
24 *communication at the time of the coder issue*
25 *with D.*

1 *Q. So it's possible that it wasn't*
2 *required?*

3 **A. Yeah.**

4 Q. And if the coder had gone down on
5 anyone's shift, you heard T.W. say that
6 he had to seek E's approval and even someone
7 higher than E.?

8 A. Usually quality gets involved with
9 that.

10 Q. But is that, in fact, after this
11 incident and wasn't required before?

12 A. You know, during the time of the coder
13 install as we always continue to get better, we
14 didn't have a specific requirement. This is a
15 Cargill requirement that we want coders on the
16 bag so we did training on the coder and it was,
17 if nothing else, insinuated that we needed the
18 coder running to have better product quality but
19 that's how we get better.

20 Q. If I heard you right, you said you
21 insinuated that you wanted the coder running?

22 A. I'd have to go back and see what exact
23 training was at the time on the coder for
24 requirements of putting codes on the bag, but
25 that's not what the discipline was about was

1 coding the pellet bags.

2 *Q. So if D. had told you when you asked*
3 *"I thought it was on there at the beginning of*
4 *the shift," then he would not even have gotten a*
5 *write-up?*

6 *A. If he would have been attentive and*
7 *told me the truth, he wouldn't have gotten*
8 *written up for dishonesty, no.*

9 *Q. Didn't you say that even without the*
10 *dishonesty thing you had enough on him to fire*
11 *him?*

12 *A. When did I say that?*

13 *Q. I'm asking you if you said it?*

14 *A. I seriously doubt that.*

15 *Q. Oh, okay.*

16 A. D. had a lot of issues as documented
17 on here with coder issues in the past and
18 inattentive work in general.

19 Q. V.H. was the operator on the
20 day shift?

21 A. Prior, yeah.

22 Q. And that product ran for an hour on his
23 shift?

24 A. Approximately, yes.

25 Q. And did you ask him about that?

1 A. I did.

2 Q. What was his response?

3 A. His response was that he had not
4 checked it towards the end of the shift and he
5 didn't know when it turned off.

6 Q. Did he get any kind of discipline at
7 all?

8 A. I talked to him about the coder but,
9 no, he did not get discipline other than verbal
10 discussion. Nothing documented.

11 Q. What was that verbal discussion?

12 A. It was a discussion of when we should
13 have the coder running, how important it is, why
14 we have a coder on product, recall, that sort of
15 similar conversation that I had had with the
16 shift in question after the investigation.

17 Q. Okay.

18 And M.S. was the -- what do
19 they call him? Loader?

20 A. Yeah, line loader.

21 Q. You had the same discussion with him?

22 A. Yeah. I asked him if he remembered, so
23 I had a little bit deeper discussion with him
24 around the time frame.

25 Q. Was he aware that the coder had to be

1 running as you claim everyone should have known?

2 A. Again, we continue to get better with
3 coding. We have very definitive rules on
4 granulated and we're moving that way on pellets
5 every week. We're still in that progression
6 but, yeah, I reiterated the importance with him. (Tr.

Pages 69-72)

The issuance of a reprimand for failure to ensure the proper functioning of a piece of equipment that the Employer often intentionally took off-line to support production on the food grade line and had yet to announce a formal policy regarding its use is proof enough that the reprimand issued to the Grievant on July 6, 2009 did not meet the “for cause” standard. When an Employer singles out one employee for discipline from among a group of employees guilty of the same offense the discipline cannot stand. This is especially true in this case because the Employer acknowledges that it did not actually require the coding but was working toward making certain that all non-food grade salt bags contained a lot code.

Moreover, the decision to discipline the Grievant under these facts raises questions about the Employer’s concern for honesty. The supervisor was not honest when he said that he was misled by the Grievant’s repeated claim that he saw lot codes on the bags at the start of his shift. If that were true, it must also be true that the supervisor was initially misled by the employee on the prior shift who left work without informing anyone of the malfunction. The Employer must also have been misled by the loader who like the Grievant, said he thought there were codes on the bags at the start of the second shift. Of course, none of these employees actually misled the Employer. The supervisor testified that it was really easy to determine how long the coder had been inoperative. He explained that all he had to do was to go to the location where the pallets were stored and check to see if codes were on the bags. The supervisor was able to determine how long the coder had been inoperative by checking all of the pallets that had been completed and stored that day to determine whether the bags contained lot codes. The codes provide a time and date stamp. In other words, he did not need to question the Grievant at all, if his concern was not about the Grievant’s conduct but about the length of time the coder had been inoperative. The supervisor testified:

24 I was doing that and noticed we didn't have a
25 lot code on the bags so I started looking for
1 the operator to figure out what was going on
2 with that because my focus was we just spent a
3 significant amount of money on a lot coding
4 system and it wasn't working so I was

5 disappointed in that and not necessarily an
6 individual, but I was disappointed that, hey,
7 we're getting better. We are putting money to
8 get better on product, quality, product safety
9 and it's not working. (Tr. Pages 53-54)

As the supervisor discovered, the equipment malfunctioned on the prior shift and had nothing to do with anything the Grievant had done. The Grievant simply did not catch the error just as the employee on the prior shift and the loader who worked the same shift as the Grievant, did not. In this case, it simply makes no sense that the supervisor cared one way or the other about the Grievant's repeated assertion that he saw coding on the bags. Contrary to the Employer's assertion, the Grievant did not mislead the supervisor by saying he saw coding on the bags at the beginning of his shift because the supervisor did not rely on the Grievant's statement and in fact thought it was suspect. The supervisor's repeated insistence that the Grievant answer a question that he already knew the answer to does not make sense unless he was in fact trying to create a situation in which the Grievant felt a need to protect himself from discipline by claiming to have seen lot codes on the bags. The supervisor's testimony demonstrates that he singled the Grievant out for greater scrutiny because he was well aware of the Grievant's prior disciplinary record and assumed that the Grievant might lie to try and protect himself. The Grievant clearly felt some apprehension as a result of his supervisor's repeated questioning. The arbitrator finds support for this view in the original grievance form. On that form, the Union in support of the Grievant wrote: "Believe not his intention to lie. But trying to protect Self & Job. (Jt. Ex. 2) The supervisor's insistence on asking the Grievant again and again when he last saw lot codes on the bags both before and after investigating the matter shows he was trying to elicit an unnecessary response. It also shows that he could not possibly have been misled by the Grievant's statements. In fact, no harm resulted from the Grievant repeating that he saw lot codes on the bags at the start of the shift. The only reasonable conclusion is that the supervisor was unreasonably focused on the Grievant and determined to find wrongdoing on his part, even though it was unnecessary to do so in order to get to the bottom of the malfunctioning coder.

The Employer maintains that the Grievant lied. In support of that claim, the supervisor testified that when asked when he last saw codes on the bag, the Grievant appeared to be nervous

and replied “at the beginning of the shift.” Under continued scrutiny, the Grievant repeated the same statement. Of course, the Grievant claims that he qualified his statement by saying he “thought” he saw codes on the bags at the start of his shift. At least one other employee made the same claim. While, that employee did not repeat the claim, it was clear that he too thought he saw coding on the bags at the beginning of the shift when there were in fact no codes because the equipment had failed well before their shift had even started. Given immersion in the plant environment, it is not uncommon that ones own eyes can be deceived. It is the routine and expectation of things being in their place that makes this so.

In other words, the Grievant and the other employee who thought they saw coding on the bags at the beginning of their shift might simply have taken their environment for granted and assumed without careful examination that the equipment was working properly. The loader who moved pallet after pallet clearly thought he saw codes on the bags that were not there. The Grievant testified that he did his walk around at the beginning of his shift to see that things were working properly but did not notice that the coder was not working properly. The arbitrator finds the Grievant’s testimony to be more credible than that of the supervisor in this instance. The supervisor undermined his own credibility in this case by demonstrating that he singled the Grievant out for discipline even though other employees committed the same offense. If his concern was only with the Grievant’s honesty, the reprimand for failure to notice the malfunctioning lot coder was unnecessary. The supervisor relied on the Employer policy regarding dishonesty to terminate the Grievant. However, that policy is not designed to address the Grievant’s statements in this case, even if they were untruthful.

The Employer issued work rules to all bargaining unit members and required them to sign acknowledging receipt of the same. The Grievant received and acknowledged receipt of the work rules. The rule relied upon by the Employer in this case reads as follows: “Any dishonesty in employment which includes theft or misappropriation of any property of Cargill, fellow employees, or members of the public.” (Jt. Ex. 9) Even a cursory examination of the Cargill Salt Plant Work Rules reveals the Employer’s goal of discouraging serious offenses in the workplace. Each of the ten (10) rules listed are very serious offenses. The list includes: excessive absenteeism, failure to notify the supervisor of an absence, leaving the workplace without being

excused, loafing or sleeping, disregard of safety rules, insubordination, fighting or other disorderly conduct, theft, neglect or vandalism, gambling or bringing a firearm into the workplace.

Accepting for a moment the Employer's position that the Grievant lied about seeing codes on the bags at the start of his shift and repeatedly lied in order to save his job, it is clear that that lie is not the kind of dishonesty this policy seeks to address. Here the Employer links dishonesty with conduct such as theft and misappropriation of another's property. The Grievant's statement, even repeated several times over, does not rise to a level of seriousness that warrants discipline under this policy. This is especially true here where the Employer had not announced a formal policy regarding the inkjet coder on the pellet line. As the supervisor testified, no one else was disciplined for this offense and while some training on the coder had taken place, the Employer only "insinuated" a desire to make sure the coder worked consistently on the pellet or non-food grade line. Testimony revealed that it was common knowledge that if the coder on the non- food grade line was needed to keep the food grade line operational, where coding is mandatory, the Employer had no problem moving the equipment to the food grade line.

Thus, the evidence designed to support the discharge decision cannot be credited and there is nothing else in the record that even remotely shows cause to terminate the Grievant. The arbitrator finds that the Grievant did not lie but simply stated his belief that the bags contained codes at the outset of his shift. He did not make a careful inspection but truly believed the codes were there as did the employee responsible for loading and storing the pallets.

The arbitrator acknowledges that the Employer believes that the Grievant's prior record of discipline is sufficient to support the discharge in this case. The arbitrator, however, finds that the Grievant did not commit an act warranting discipline and therefore, there is no need to visit his prior disciplinary record. Moreover, the supervisor testified that, but for, what he considered to be dishonesty, the Grievant would not have received any discipline just as the other employees guilty of failing to catch the inoperative coder did not receive any discipline. In short, the Employer has painted a contradictory picture by saying none of the employees who missed the coding malfunction would have been disciplined for doing so. The Grievant was issued a reprimand for failing to catch the coding malfunction because he lied about missing the coding

malfunction. The Employer then decided to terminate the Grievant for lying about missing the coding malfunction. If it was sufficient to have a “discussion” with the other employees about the importance of ensuring proper coding rather than disciplining them, it was unnecessary to issue a reprimand to the Grievant. Issuing a reprimand when none was warranted shows bias on the part of the supervisor and undermines his credibility. Even assuming that the Grievant lied, the Employer did not prove that its policy regarding dishonesty was designed to sweep up in its purview generalized and insignificant instances of dishonesty- that is statements that while not truthful are also harmless. Because the Employer chose to link dishonesty with crimes such as theft, it simply does not follow that the Grievant’s statements fall within the kind of conduct the Employer seeks to discourage. For all the reasons set forth above and the record as a whole, the arbitrator finds that the Employer failed to meet its burden of establishing just cause for either the reprimand or the discharge.

Award

The grievance is SUSTAINED. Accordingly, the Grievant is to be reinstated to his former position within no more than ten (10) business days of this award with full back pay and other accrued contractual benefits. The back pay award is subject to offsets resulting from any unemployment benefits and/or compensation earned by the Grievant since the date of his termination to the date of his reinstatement as required by this award. The arbitrator retains jurisdiction to resolve any problems associated with this award.

Respectfully submitted,

A Ray McCoy
Arbitrator

Date: November 16, 2010