

IN THE MATTER OF THE ARBITRATION BETWEEN

INTERNATIONAL BROTHERHOOD	)	MINNESOTA BUREAU OF
OF TEAMSTERS,	)	MEDIATION SERVICES
LOCAL 120,	)	CASE NO. 10-RA-0514
	)	
	)	
Union,	)	
	)	
and	)	
	)	
SUPERVALU, INC.,	)	DECISION AND AWARD
	)	OF
Employer.	)	ARBITRATOR

APPEARANCES

For the Union:

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On July 27, 2010, in Blaine, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by discharging the grievant, Donald Robinson. The last of the parties' post-hearing submissions was received by the arbitrator on September 24, 2010.

## FACTS

The Employer operates a large retail and wholesale grocery business. Among its facilities are a number of distribution centers, where it warehouses merchandise received from vendors for later distribution to its retail stores as needed. One of its distribution centers is located in Hopkins, Minnesota. The Hopkins Distribution Center (also referred to by the parties as the "Minneapolis Distribution Center") is located in several large buildings, one of which is the "Fresh Building."

The Union is the collective bargaining representative of the non-supervisory employees of the Employer who work at the Hopkins Distribution Center in classifications such as Driver, Building Maintenance Mechanic and Warehouseman.

The grievant was hired by the Employer in September of 1979, and since then he has worked in various job assignments at the Hopkins Distribution Center, but always in the Warehouseman's classification.

On July 9, 2009, the Employer issued the following Notice of Disciplinary Action, which was signed by Thomas Erickson, the grievant's supervisor, and by Aaron R. Restemeyer, the Employer's Risk Control Manager:

During an interview on June 15, 2009, you admitted to theft of Company product which is supported by evidence found during the course of an 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 activities on Company property or any act of dishonesty." As a result, your employment is hereby terminated effective immediately.

The grievant testified that his job assignment for twelve to fifteen years before his discharge was the same -- to work on the "clean-out dock" unloading trailers of merchandise returned from the Employer's retail stores in plastic boxes, and placing the boxes on pallets for shipping to the Employer's Reclamation Center, where the bar code for each item of merchandise is read to enable the giving of appropriate credits to the Distribution Center and to the retail stores.

In January of 2009, after the Employer received an anonymous tip that warehouse employees were pilfering merchandise from the clean-out dock, the Employer's security department began an investigation. A major part of the investigation consisted of monitoring tapes from video cameras situated near the clean-out dock.

On June 15, 2009, after completion of the investigation, Restemeyer and Scott T. Nelson, an investigator from the Employer's Loss Prevention Department, met with the grievant and a Union Steward, Fred Longhway. Nelson informed the grievant that he was under investigation for theft and told him that the Employer had months of video recordings showing the grievant stealing from the warehouse. Nelson told the grievant that he had a lot to lose as a long term employee and that it would be hard for him to find another job with a felony conviction on his record. He told the grievant that he was willing to "work with" him if the grievant was willing to cooperate.

During the meeting, Longhway asked to meet privately with the grievant. After a private discussion between the grievant

and Longhway, they returned to the meeting with Restemeyer and Nelson. The grievant then told Nelson that he was willing to cooperate with him. The grievant said that he had taken items over a period of four to six years, and he signed a statement, which I set out below:

6-15-09. My name is Don Robinson. I've worked at Supervalu for 29 years. I was caught takeing items out the DRC [Damaged Reclamation Center] boxes and to resolve what I've taken. The Company is willing to work with me. Some of the items I was taking was sport drinks, candy bars, batteries, pain pills, DVDs, lotion, Kleenex. Many of these items I took I put in watermelon bins for fellow workers. I've took a lot of these items when we received bins from World Wide. I feel I should return the items I have and pay the value of the other things I took. I took 2 GPS systems and DVDs that I never open. I've taken these items for 4 or 6 yrs and I feel I owe the company about 2000.00.

As I describe more fully below, the grievant's testimony at the hearing was substantially consistent with this statement.

At the conclusion of the meeting of June 15, 2010, Restemeyer told the grievant that he was suspended for further investigation. On June 18, 2009, the Union grieved the suspension. The parties agree that that grievance should be considered as a challenge to the grievant's discharge of July 9, 2009, the notice of which I have set out above.

#### DECISION

Article 13 of the parties' labor agreement is entitled, "Discharge." Section 13.01, which is set out below, establishes grounds for discharge:

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 discharge.

The Employer's Work Rules and Regulations include Personal Standards of Conduct, which provide:

. . . 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.

The labor agreement does not include language providing that discipline or discharge must be for "just cause."

The Union argues that, notwithstanding the absence of an express provision in the labor agreement requiring just cause for discharge, that standard should, nevertheless, be applied.

The Employer argues that Section 13.01 of the labor agreement states the parties' only agreement about the grounds that must be established to justify discharge of an employee. It argues that the evidence clearly establishes that the grievant had a long history of theft from the Employer -- conduct that constitutes the Group 1 offense of "engaging in criminal activity on company property or any act of dishonesty."

The Union presented evidence that, in many previous grievances that have challenged the Employer's discharge of a Union member, arbitrators have applied a just cause standard despite the lack of express contract language establishing that

standard. In addition, the Union argues that, in past cases, the Employer has conceded that a challenge to discharge should be measured by the just cause standard, despite the absence of express contract language establishing that standard. The Union urges that this history shows an implied agreement by the Employer to include just cause as a contracted standard for discharge.

I make the following ruling. The evidence shows a consistent past use of the just cause standard in discharge grievances -- one that has been applied by arbitrators and accepted by the Employer. Accordingly, I use that standard here as an addition to the express language the parties have adopted in Section 13.01. In the circumstances of the present case, however, it appears that adding a just cause standard to the language of Section 13.01 makes little difference. Application of either the just cause standard or the standard set out in Section 13.01 requires resolution of substantially the same primary subissues.

Though Section 13.01 does not expressly require the use of due process in proceedings that lead to an employee's discharge, I read into the provision an intention that it be applied reasonably, to afford due process to the employee. Thus, it appears that under either standard, a grievant must receive due process in the investigative proceedings that lead to discharge. Further, though Section 13.01 does not expressly require that the prohibited misconduct -- "engaging in criminal activity on company property or any act of dishonesty" -- must

be egregious, I read into the provision an intention that it be applied reasonably, to include egregious acts of "criminal activity" or of "dishonesty," but not minor such acts, such as, for example, an employee's misstatement that is unimportant in its potential consequence.

The Union makes several arguments that the Employer's investigation of the grievant's conduct failed to provide him with due process. It argues that, after the Employer began its investigation in January of 2009, it should have confronted the grievant earlier than it did -- in the meeting of June 15, 2009. The Union also argues that, during the meeting of June 15, 2009, Nelson threatened the grievant with a possible report to law enforcement about his alleged thefts and by so doing obtained the grievant's admissions. The Union urges that this meeting was not really an investigative meeting, but one designed only to get further evidence in support of a discharge decision that had already been made.

In July of 2009, the Employer discharged two other warehouse employees, John Bjork and Louis Anderson, for theft. Those discharges were also based upon evidence the Employer obtained during the investigation that began in January of 2009. The Union grieved each of those discharges, and separate arbitration proceedings resulted in awards that reinstated Bjork and Anderson to employment, reducing the discharge of both employees to a ninety-day suspension with the requirement that they make restitution. It appears that in those cases, each arbitrator determined that the grievant believed that he was

permitted to consume on the Employer's premises beverages and candy returned to the clean-out dock, notwithstanding that the Employer had since 2006 posted notices that such consumption was not permitted. In both cases, the arbitrator considered the conduct of the grievant to be misconduct, justifying a long suspension, but not justifying discharge -- though in one of the cases, the arbitrator characterized the consumption as theft.

The Union argues that the grievant in the present case also believed that taking property from the clean-out dock for consumption on the Employer's premises was permitted -- just as the arbitrators found was true of Bjork and Anderson in their cases. The Union argues that the grievant was not aware of the warnings that the Employer had posted since 2006 against taking products from the clean-out dock.

The Union urges that the grievant has shown remorse that indicates the Employer will not be at risk of his repeating his conduct if he is reinstated. The Union argues that the grievant has no record of criminal activity and has no history of discipline during his long employment -- a history that, under the just cause standard should lead to progressive discipline less than discharge.

I make the following rulings and additional findings of fact. I rule that the investigation that led to the discharge was not deficient in due process. Though the investigation began in January of 2009 and continued till June, nothing in the evidence indicates that the Employer was under a duty to curtail the investigation before it was complete. When the Employer ended the investigation, it acted promptly, on June 15, 2009,

1) to inform the grievant that he was being investigated for alleged theft, 2) to disclose to him that he was a subject of the investigation because his actions were monitored on video recordings, 3) to give him the opportunity to respond, and 4) to permit him Union representation during the investigative interview. The grievant voluntarily participated in the meeting of June 15, 2009, and his admissions were made voluntarily after consultation with his Union representative.

The grievant testified that he had taken food and beverages from the clean-out dock for consumption on the Employer's premises and that he had done so for many years. He also testified that he had taken home property taken from the clean-out dock, including food and beverages, two GPS devices, DVDs, CDs and "cosmetic" items such as tooth paste.

The Employer presented video recordings showing the grievant leaving the Distribution Center on several occasions with filled plastic bags. These recordings were taken during the grievant's work shift; they show him returning a short time later empty handed to complete his shift. In addition, the Employer presented a video recording that shows the grievant moving another video camera that was near the clean-out dock so that it would not record what was occurring nearby.

The evidence leaves no doubt that the grievant took property from the clean-out dock for his own use over many years. The grievant's admissions during the meeting of June 15, 2009, are confirmed by his testimony at the hearing before me, excerpts from which are set out below:

- Q. And you know that the company terminated you for theft and some related activities, is that correct?
- A. Yes.
- Q. Do you deny any of that?
- A. No.
- Q. So let's start with the allegations of theft. Do you admit that you took property from the warehouse without permission?
- A. Yes.
- Q. And that you consumed some of that on the premises such as food items, beverages or food, ate it right on the premises?
- A. Yes.
- Q. And also that you took some of the items home?
- A. Yes.
- Q. Or out of the warehouse?
- A. Yes.
- Q. Is that correct?
- A. Yes.
- Q. And those included, among other things, the GPS devices, is that correct?
- A. Yes.
- Q. And some DVDs or CDs?
- A. Yes.
- Q. And I think you mentioned some other items, some cosmetic type items, tooth paste and other things like that, is that correct?
- A. Yes.
- . . .
- Q. A third area related to the theft that you are accused of is altering or moving the security camera. Did you hear that accusation?
- A. Yes.
- Q. Did you do that?
- A. Yes, I did.
- Q. Just briefly tell the arbitrator what you knew about the existence of security cameras in the area where you worked.
- A. I have known that there has always been cameras present in the DRC area and I have no good reason for moving that camera. It was just a mistake.
- Q. Well, you say it was a mistake. Are you saying that you accidentally did it or did you do it on purpose?
- A. I did it on purpose, but it wasn't a smart thing to do. There was no legitimate reason for moving it.

The evidence clearly shows that the grievant took a substantial amount of the Employer's property over many years. It may be that before 2006 he thought that consumption of food and beverages on the Employer's premises was permitted. Even if I were to find that he continued to think so after 2006, despite

the posting of many warnings to the contrary, the evidence shows that the grievant's taking of property was substantial, that it was not limited to items consumed on the premises, but included property that he took home, and that it included items of much greater value than food and beverages. I accept the Employer's argument that the grievant's movement of a video camera is evidence of culpable knowledge that what he was doing was theft.

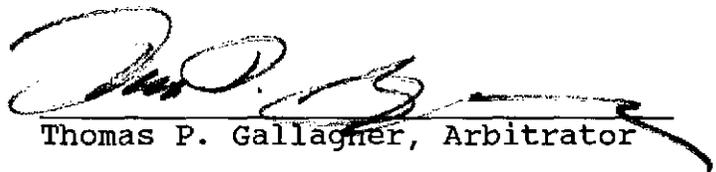
These facts distinguish the grievant's case from that of Bjork or Anderson, who were reinstated with a ninety-day suspension for improper consumption of food and beverages on the Employer's premises.

I conclude that, under either standard -- the just cause standard or the standard expressed in Section 13.01 of the labor agreement -- the Employer was justified in discharging the grievant. Notwithstanding the length of the grievant's employment without previous discipline, the Employer should not be required to reinstate him. Such a disposition would require the Employer to accept not only the risk that the grievant's misconduct may be repeated, but, in addition, the risk that other employees may view his reinstatement as at least a partial condonation of similar misconduct.

AWARD

The grievance is denied.

November 26, 2010

  
Thomas P. Gallagher, Arbitrator