

IN THE MATTER OF ARBITRATION
BETWEEN

SUPERVALU, Inc.

Employer,

OPINION AND AWARD

BMS Case Nos.

11-RA-0537

11-RA-0538

and

April 12, 2012

Teamsters Local 120,

Union.

Arbitrator

A. Ray McCoy

Appearances

On Behalf of SUPERVALU, Inc.

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On Behalf of Teamsters Local 120

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INTRODUCTION

The Parties notified the arbitrator of his selection on December 20, 2011. The Parties selected February 8, 2012 as the hearing date. The arbitrator conducted the hearing on that date at the Teamsters Local 120 Union Hall located at 9422 Ulysses St. NE, Blaine MN 55434-3572. The hearing involved two grievances. The grievances were filed on July 14, 2010 and September 15, 2010. The Parties processed the grievances through all relevant steps and agree that the matter is properly before the arbitrator for determination. The Parties had a full and fair opportunity to present their respective cases including the examination of witnesses and the introduction of documentary evidence. At the conclusion of the hearing the Parties elected to submit post-hearing briefs. The Parties agreed to have the arbitrator exchange briefs electronically at the end of the day on March 16, 2012. The Parties mutually agreed to extend the deadline for post-hearing briefs to the end of the day on March 30, 2012. The arbitrator received and exchanged the briefs as agreed on that date and closed the record.

JURISDICTION

The arbitrator has jurisdiction pursuant to Article 16 of the *“Agreement Between SuperValu, Inc. and Teamsters Local No. 120, Affiliated with the International Brotherhood of Teamsters, June 1, 2010 through May 31, 2013.”*

Article 16 .04 states:

“The Arbitrator shall have jurisdiction and authority only to interpret and apply the express provisions of this Agreement. The Arbitrator shall not have authority to amend, subtract from, add to, or otherwise modify any of the terms of this Agreement. The Arbitrator’s decision, rendered in writing, shall be final and binding upon the Employer, Union and employee(s).” p. 20

ISSUE

The Union said the issue to be decided is: Whether the Employer had just cause to suspend Grievant No. 1 (RA) and issue a written warning to Grievant No. 2 (DM). The Employer said the issue to be decided is whether the level of discipline imposed by the Company violated the Agreement. Both sides acknowledge that should the arbitrator determine that the Employer did not respond to the violations of work rules properly then it will be necessary to determine an appropriate remedy.

RELEVANT CONTRACT PROVISIONS & POLICIES

ARTICLE 13 DISCHARGE

Section 13.01

Drunkness, 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.

Section 13.05

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

ARTICLE 25 UNION COOPERATION

Section 25.01

The Union agrees to cooperate with the Employer in maintaining and improving safe working conditions and practices, and in improving the cleanliness and good housekeeping of the department, machinery and equipment.

Section 25.02

The Union agrees to cooperate in correcting inefficiencies of members which might otherwise necessitate discharge.

Section 25.03

The Union recognizes the need for improved methods and output in the interest of the employees and the business and agrees to cooperate with the Employer in the installation of such methods, in suggesting improved methods, and in the education of its members in the necessity for such changes and improvements.

SUPERVALU Minneapolis Distribution Center WORK RULES & REGULATIONS

In order for 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.

1. Falsification of any reports, records, and documents including but not limited to payroll, attendance, production, employment and personal records.
2. Removal from company premises, without proper authorization, company property, records, equipment, or merchandise.
3. Being in possession of any gun, knife or other weapon of any kind on the property regardless of whether licensed to carry the weapon.
4. Insubordination, which is failure or refusal to follow a supervisor's instructions. (Except if asked to operate a piece of equipment you are not qualified to operate).
5. Engaging in criminal activity on company property or any act of dishonesty.

6. Punching a time clock or making a work record entry for any other employee.
7. Restricting operations or interfering with others in the performance of their jobs.
8. Willful destruction of company property or property of employees, visitors or customers.
9. Buying, selling, trading, receiving, delivering or dealing in any way whatsoever in proscribed drugs, narcotics or controlled substances while at work or on company property.
10. Use of alcoholic beverages on or in any company property owned, rented, borrowed, leased or under the control of SUPERVALU.
11. Reporting to work or working under the influence of, or making use of, alcoholic beverages, prescribed drugs, narcotics or controlled substances.
12. Bringing alcoholic beverages, prescribed drugs, narcotics or controlled substances onto company property.
13. Fighting, provoking, or instigating a fight, or involvement in a fight, during working hours or while on company property.
14. Conduct imminently endangering the life and safety of self or other Distribution Center employees.
15. Flagrant misrepresentation of facts and/or circumstances for the purpose of fraudulently obtaining time off from work or avoidance of work.
16. Threatening a Distribution Center employee or visitor with harm.
17. Directed use of vulgar, profane, slanderous or racially derogatory statements both verbal and written while on company property.
18. Directed verbal comments that are threatening or intimidating in nature.
19. Making a false claim or statement of injury.
20. Excessive work related accidents.
21. Failure to permit inspection of any package, lunch container or purse when entering or leaving the company's premises.
22. Smoking, chewing or other use of tobacco products in areas not expressly designated as smoking areas.

GROUP 2 OFFENSES

Group 2 violations are less serious and supervisors are encouraged to follow the normal corrective disciplinary procedure of a verbal warning, a second verbal warning, written warning, 1 day suspension, 3 day suspension, and discharge when appropriate, however, the exact sequence may not always be followed depending on the circumstances of the situation. Even a violation of a Group 2 offense may result in termination depending on the facts of the case.

1. Using company phones, facsimile machines, E-Mail, mail system or other equipment for personal use unless authorized to do so.
2. Failure to wear personal protective equipment.

- other equipment for personal use unless authorized to do so.
2. Failure to wear personal protective equipment.
 3. Inefficient or unsatisfactory performance of assigned duties and responsibilities.
 4. Failure to immediately report an accident to a Supervisor.
 5. Failure to properly use seatbelts in any company vehicle owned, rented, borrowed, leased or under the control of SUPERVALU.
 6. Engaging in horseplay and playing practical jokes on company premises.
 7. Working overtime without authorization.
 8. Posting or removal of any matter on bulletin boards or company property unless authorized by the Human Resources Department.
 9. Failure to observe parking and traffic regulations while on company property, including posted speed limits.
 10. Failure to notify Human Resources in writing immediately of any change in personal data.
 11. Unauthorized use of company trucks, cars or other company owned vehicles and equipment.
 12. Engaging in solicitation for any causes during working hours on company premises without prior written approval.
 13. Violating safety rules, common safety practices or engaging in any conduct that creates a safety hazard.
 14. Failure to be at the appointed work area ready to work, properly dressed, at the regular starting time, or not remaining at the assigned work area excluding break times and until quitting time.
 15. Engaging in unlawful or improper conduct outside of the company premises or during non-working hours, which affects the employee's relationship to their job, fellow employees, supervisor, or the company's products, property, reputation or good will in the community.
 16. Entering the facilities or remaining on company premises unless on duty, scheduled for work or conducting business with managerial approval.
 17. Abusing or destroying company property, tools, equipment or merchandise.
 18. Using entrances other than those designated for such use.
 19. Engaging in or continuing unsatisfactory work performance.
 20. Causing waste or defective merchandise, litter, or contributing to poor housekeeping, unsanitary or unsafe conditions.
 21. Being absent from work without permission.

It is not intended that this listing be all inclusive of the discipline, proper conduct, or other obligations that may exist under the labor contract: rather, it is intended to provide a basis for employees to act in a responsible, safe and proper manner. If there are any questions regarding the suitability of an action, advance approval

should be obtained from your Supervisor.

SUPERVALU may establish additional rules or procedures as necessary to meet operational requirements and all employees are expected to comply with these expectations.

Employees are reminded to maintain proper standards of conduct at all times since non-compliance will subject an employee to disciplinary action which may include termination.

FINDINGS OF FACT

The Employer suspended Grievant No. 1 (SR) for one day. The Employer disciplined Grievant No. 1 after his supervisor observed him wearing ear buds while working in the warehouse. The Employer developed and communicated a work rule prohibiting the use of electronic listening devices in the warehouse. The Employer described the use of such devices as a safety hazard. The Grievant admitted that he understood the Employer did not allow the use of electronic devices in the warehouse. The Employer had issued Grievant No. 1 a written warning earlier the same year after he was observed using ear buds while on duty in the warehouse. The Employer issued the written warning on February 19, 2010 and explained to the Grievant No. 1 that the use of ear buds violated Group 1, Work Rule No. 14 because it endangered his life and safety and that of others working in the plant.

The Employer issued Grievant No. 2 (DM) a written warning on September 9, 2010. The Employer observed Grievant No. 2 talking on his cell phone while operating a forklift. The Employer informed the Grievant that his behavior violated Group 1, Work Rule No. 14 because his conduct placed himself and others in danger. The Employer disciplined others for similar offenses. On February 24, 2010, the Employer issued a written warning to a warehouse worker observed wearing ear buds while working. On March 22, 2010, The Employer suspended a worker for one day riding on and allowing a co-worker to ride on the tines of the machine he was operating. The worker was suspended because it was the second time he was observed violating the prohibition against riding on the back of the tines

within the same year. On May 4, 2010, the Employer issued a written warning to yet another warehouse worker for wearing ear buds while operating an LT in the warehouse. The Employer issued a written warning on September 16, 2010 to a worker observed talking on a cell phone while operating a forklift. The Employer also disciplined workers on at least three occasions in 2010 for taping the "rabbit button" in place on the forklift in an effort to keep the forklift operating at its fastest speed. The act of taping the rabbit switch down alters the manner in which the forklift is designed to operate and essentially amounts to disabling a safety feature of the vehicle. The Grievants' discipline followed the Employer's publication and communication of a revised safety policy. On December 3, 2008, the Employer issued a memo that stated:

"As we continue to strive to provide a safe and healthy work environment it's very important that safety features be consistently followed. If not adhered to they can lead to injury and death. Some violations place associates at greater risk for very serious injury or death, therefore normal disciplinary action will not apply. Below are unsafe acts that we have identified as having more serious disciplinary consequences:

- **Bypassing, altering or tampering with safety switches and operator controls on equipment, or operating equipment in this condition is not permitted. This includes but is not limited to taped down rabbit button on power jacks, jammed switches on compactor control panels so they will run on their own.**
- **Not following lockout/tagout procedures when performing maintenance, service or cleaning of equipment.**
- **Proper fall protection equipment not used when elevated more than five feet above the floor.**
- **Climbing on pallet racking.**

While the management team is committed to improving safety, its important that all associates share in the responsibility for their own safety and that of your coworkers as well. Your help with following safe work practices is expected and appreciated." (Union Ex. 5)

The Employer also communicated with workers about these safety issues

and injuries during regularly scheduled crew meetings. For example, the crew agenda for January 18, 2009 shows the safety focus was on avoiding injury by properly picking products off of pallets. At the January 25, 2009 crew meeting the agenda included the following: "This week we are focusing on the use of electronic devices and are communicating an Associate Safety Policy Communication, these items can distract your attention to the job at hand and thus exposure (sic) yourself and co-workers to potential injury." (Union Ex. 7)

POSITION OF THE PARTIES

Employer's Position

1. The only issue to be decided is whether the level of discipline imposed by the Company violated the Parties' Agreement and if so, what is the appropriate remedy.
2. The Company has long maintained Work Rules & Regulations that classify "Conduct imminently endangering the life and safety of self or other DC employees" as a Group 1 offense which may result in immediate termination.
3. The Work Rules classify "Violating safety rules, common safety practices or engaging in any conduct that creates a safety hazard" as a Group 2 violation which may or may not be subject to progressive discipline based on the facts and circumstances of the case.
4. The Company intensified efforts to improve the safety culture at the DC in 2008 when it became apparent that the existing disciplinary measures were not sufficiently deterring safety violations.
5. The Company revised and re-released its Safety Policy in January 2009, shortly after Minnesota implemented a law banning texting while driving.
6. The Company recognized that the use of personal electronic devices such as cell phones, MP3 players, iPods and ear buds constituted a major safety hazard when used at work.
7. The Company added the use of these devices to the safety policy's list of "serious" safety violations.
8. The Company adopted a reasonable safety rule prohibiting employees

from wearing ear buds or using personal electronic devices while working.

9. The Grievants were aware of the Safety rule and the possible consequences for its violation.
10. The Grievants knowingly and intentionally violated the rule and deserved some level of discipline.
11. Other employees who violated the rule have received the same level of discipline as the Grievants.
12. The Parties have not agreed to a mandatory progressive discipline system in their contract.
13. Section 13.01 of the contract reserves discretion to the Company by expressly providing that "violations of Employer's rules which are not in conflict with this Agreement... shall be grounds for immediate discharge."
14. The Company's work rules make clear that progressive discipline may or may not be used for Group 2 offenses. The exact sequence may not always be followed depending on the circumstances.
15. Accepting the Union's position will remove any teeth from the Company's Safety Policy and turn back the clock to the days when many employees did not take the Company's safety program seriously.
16. Whether the Grievants' misconduct is a Group 1 or Group 2 violation, the actual danger and end result are the same.
17. The Safety Policy is important.
18. Employees do not have the right to assess the risk and determine for themselves whether or not to follow the rules.
19. Employees who disregard the rules face serious discipline up to and including discharge.
20. The Union has the burden of proving that the discipline imposed was excessive.
21. The Union's burden is to prove that the discipline was arbitrary, discriminatory or a clear abuse of discretion.
22. The Union did not meet its burden since it was unable to demonstrate any

mitigating circumstances.

23. The Grievants' misconduct endangered their safety and the safety of others.
24. The Company was not obligated by contract or past practice to impose a lesser discipline.
25. The discipline was reasonable under all of the circumstances.

Union's Position

1. The Employer did not have just cause to bypass the progressive discipline steps prescribed in SuperValu's workplace policies.
2. SuperValu's workplace policies are not a substitute for just cause.
3. SuperValu's workplace policies do not accommodate the just cause requirement imposed on the Employer by the Parties' collective bargaining agreement.
4. SuperValu's workplace policies must be interpreted as subordinate to the collective bargaining agreement's just cause requirements.
5. Just cause should be determined by applying the Daugherty Seven Tests and if any of the tests are not satisfied then just cause does not exist.
6. The discipline imposed by SuperValu is too severe a penalty.
7. Once the Employer establishes work rules it must follow those rules especially when they incorporate progressive discipline.
8. The Grievances offenses fall into Group 2 and should be considered merely violating safety rules as opposed to engaging in conduct imminently endangering the life and safety of self or others which is a Group 1 offense.
9. The Employer is capable of informing employees when a safety policy violation falls within the more serious Group 1 offenses.
10. The Employer did not notify the Grievants that their conduct would be considered a Group 1 offense and absence notice, the Grievants' conduct should fall into Group 2 offenses.
11. The Grievants' conduct did not place anyone's life or safety in imminent

danger.

12. The Employer was unable to articulate a single reason for deviating from the normal progressive discipline described in the work rules and regulations.
13. The most important purpose of this arbitration proceeding is to help the Employer, the Union and the Grievants to reach a harmonious accord.

OPINION AND AWARD

The Union and Employer agree that the only matter for the arbitrator to decide is whether the discipline imposed upon the Grievants was proper. Included in that assignment is the need to fashion an appropriate remedy, if the discipline is found to violate the Parties' Agreement. As stated above, the Employer established a work place safety policy prohibiting the use of personal electronic devices such as cell phones and ipods. The Union did not dispute the Employer's right to establish the safety policy. But, the Union did say the Employer "unilaterally adopted several relevant extra-contractual safety policies and work rules" and "did not negotiate with the Union over the terms of these policies, and the Union did not agree to them." (Union Post-Hearing Brief at p. 5) However, the Parties' Agreement does not prohibit the Employer from establishing work rules or safety policies without negotiating with the Union prior to implementation of those rules.

Article 14, Management Rights, preserves the Employer's authority to develop rules governing conduct in the workplace. The only limitation on that right is found in Article 13. Article 13 gives the Employer the authority to discharge bargaining unit members for conduct violating work place rules not in conflict with the Agreement. In short, the Employer is authorized to develop work place rules regarding safety as long as those rules are consistent with the Agreement. The Union acknowledges this construction of the Employer's authority to develop rules when it states: "The Union does not contend that the Company's work rules and safety policies are per se unreasonable. However, because they do not accommodate the CBA's just cause requirement, the policies were unreasonably

applied.” (Union Post-Hearing Brief at p. 5-6.)

While acknowledging the reasonableness of the rules, the Union maintains that the rules are unreasonable as applied to the Grievants because they do not contain the just cause requirement implied in the Parties’ Agreement. Of course, if that were true, then the rules and not merely their application to the Grievants would have to be declared unreasonable and in conflict with the Agreement. Here, however, the “just cause” requirement nearly universally recognized in labor agreements is clearly present in the work rules the Grievants acknowledge violating. For example, introductory language preceding the delineation of Group 1 Offenses includes the following statement: “When misconduct is of a serious nature, an employee may be immediately terminated.” (Union Ex. 4, p. 1) This is consistent with most just cause standards, namely that serious misconduct will not be subject to progressive discipline unless the Employer determines that discipline short of discharge is appropriate under the facts.

The introductory language preceding the Group 2 Offenses states: “ Group 2 violations are less serious and supervisors are encouraged to follow the normal corrective disciplinary procedure of a verbal warning, a second verbal warning, written warning, 1 day suspension, 3 day suspension, and discharge when appropriate, however, the exact sequence may not always be followed depending n the circumstances of the situation.” (Union Ex. 4, p.2) Here again, the Employer stated an approach to progressive discipline that if applied to an admitted or proven violation of a work rule would certainly be considered consistent with commonly acknowledged principles of just cause.

Thus the arbitrator finds that the policy was both reasonable and contained language consistent with the just cause standard imposed upon the Employer by the Parties’ Agreement. The Employer applied a typical just cause approach to determining the appropriate discipline in both grievances. Even though the Grievants’ conduct was characterized as very serious and thus labeled a Group 1 Offense, the Employer chose to first issue a written warning and to follow that up

with a suspension for a second offense. The approach is entirely consistent with an approach that considers employee misconduct on a case-by-case basis rather than approaching discipline as a matter of strict liability.

The Union's position, when boiled down to its essential elements, seeks two changes in the manner in which the Employer approaches discipline for violations of the safety policy. First, the Union wants the Employer to always characterize the use of ear buds or cell phones as a less serious Group 2 offense. The Union believes that the Grievants' conduct more directly fits into the Group 2 category because the facts show that the Grievants violated safety rules, common safety practices and engaged in conduct that created a safety hazard. The arbitrator agrees with the Union that the Grievants' conduct could properly be considered a violation of Group 2, Offense 13. However, the arbitrator's task is not to determine whether the conduct should be placed in Group 1 or Group 2 but to interpret the Parties' Agreement to determine if the level of discipline applied to the Grievants was proper.

The second change sought by the Union is that the Employer be required to apply each and every step in the progressive disciplinary arsenal once a safety practice violation has been proven. In other words, the Union wants the Employer to start with an oral warning and move sequentially to the more serious forms of discipline should the employee continue to violate that safety practice.

The approach the Union wants the Employer to adopt is inconsistent with commonly accepted principles of just cause. The Employer may, consistent with the Parties' Agreement and the explicit pronouncements included in the safety rules select from among the possible forms of discipline. The goal, consistent with just cause, is to select the punishment that is most likely to achieve compliance given the facts.

Here, the Employer characterized the conduct as a Group 1 Offense. The arbitrator finds nothing in the Agreement that prevents the Employer from placing the Grievants' conduct in that category. It is clear that the Employer is attempting to raise the consciousness of its employees by placing the use of cell phones and ear

buds in Group 1 rather than Group 2 of the policy. By characterizing the Grievants' conduct as a Group 1 violation, the Employer hopes that employees will take more seriously the prohibition against the use of personal electronic devices in the workplace. It is a reasonable attempt to change the culture of the workplace.

It was also reasonable for the Employer to move cautiously with respect to its stated purpose of changing the culture. It did so by making clear in the policy that it would move more quickly through the progressive disciplinary steps in order to encourage compliance with the safety rules. If Employees feel they can get around the rules or risk only a slap on the wrist for violating the rules, then non-compliance will likely result. Even though the Employer characterized the Grievants' conduct as serious, it applied the mild disciplinary step of first issuing a written warning and following that up with a one day suspension for a second offense. That approach is quite consistent with "just cause" standards as developed across the country. Arbitrators generally will look to see if the Employer is considering the evidence on a case-by-case basis including whether there are mitigating circumstances.

In addition, arbitrators will look for consistency in the application of the discipline for similar offenses to rules violations. The Employer demonstrated in both cases here that it paid attention to the track record of each Grievant with regard to safety violations and disciplined them consistent with others who committed similar offenses.

The Union wrongfully believes that lesser discipline should follow if the Grievants' conduct is characterized as a Group 2 offense. However, had the Employer characterized the Grievants' conduct as a Group 2 offense, it could have concluded that the exact discipline given in this case was warranted. Skipping the lesser disciplinary steps would have been warranted under either category.

Depending on the facts, the Employer might decide to skip a few steps and the Grievant could end up with discipline resembling the same kind handed down for a Group 1 Offense and that would be entirely consistent with the Employer's authority under the Agreement. This conclusion is reinforced by the fact that Article

13 permits the Employer to discharge a bargaining unit member for insubordination, repeated negligence in the performance of duty, unauthorized use of or tampering with Employer's equipment. In other words, repeated refusal to cease using ear buds or cell phones in the workplace could very well be considered insubordination and/or negligence in the performance of duty.

How many times should an employee be able to violate the same safety rule before such conduct will be considered insubordination? Each situation may be different but it is clear that when a Grievant shows little or no respect for a reasonable work rule, the Employer need not creep toward severe discipline. Here, for example, Grievant No. 1 wrote on his grievance form: "...the Company has skipped 3 steps of discipline. I would like to be backed up to a verbal and paid full wages plus all available overtime. I will not bring ear buds here ever again. But they are good for noise cancel." (Er. Ex. 9) The Grievant basically argues that he should be permitted to violate the rule at least three times before the Employer is permitted to suspend him without pay. More importantly, the Grievant's statement that ear buds are good for noise cancellation is a clear indication that he has no respect for the rule and thinks it should not be followed. It is apparent that a more severe form of discipline than a verbal warning will be necessary to secure the Grievant's compliance.

Grievant No. 2 wrote on his grievance form "Disputing Discipline Progression Co. has put in place! Move written level to a verbal as all other discipline." (Union Ex. 11) In short, Grievant No. 2 expects that he too should be permitted to violate the safety policy numerous times before any serious form of discipline will follow. The Grievants express a sense of entitlement with regard to being able to decide when and to what extent they will adhere to the safety rules established for their protection and that of others exposed to the workplace. That sense of entitlement makes clear the reasonableness of the Employer's approach to discipline here and its goal of changing the attitudes of employees with regard to safety in this workplace.

The just cause standard¹ requires a case-by-case analysis of the seriousness of the offending conduct. That analysis typically includes consideration of the employee's work record, understanding of the rule and sometimes even the culture of the workplace. A just cause analysis can also include consideration of the unique issues that the Employer faces and that gave rise to the particular rule including the particular approach to discipline. Just cause does not mean that employers must give employees unlimited opportunities to disregard work rules. Were the Union's position adopted, employees could successfully disregard the rule with impunity, especially in light of Article 13.05 of the Agreement requiring the Employer to disregard warning notices after eleven (11) months for disciplinary purposes. Given that language an employee could violate the policy at least once a year and be guaranteed nothing more than another warning. Such a result would actually undermine commonly accepted notions of just cause.

The Grievants expressed a cavalier attitude, at best, toward the need for enhanced safety measures in the workplace. It is obvious even to the untrained observer that the use of a device that allows you to listen to music or a cell phone that allows you to converse with someone requires you to divide your attention between that activity and the assigned tasks. It is also obvious that such activity, particularly when that task includes the operation of heavy machinery, increases the likelihood of an injury to self and others.

Grievant No. 1 testified in such a manner as to make clear the difficult challenge faced by the Employer in terms of changing the culture in the workplace to bring employees in line with the safety procedures outlined in the policy. When asked why he did not grieve the written warning he received for wearing ear buds while driving a tugger or pallet jacker, the Grievant responded: "I've never grieved

¹ The arbitrator declines to apply the Seven Tests of just cause as urged by the Union. Given that the Grievants understood the rule, do not dispute its reasonableness, admit violating it and appear to seek protection against wage or job loss only, the Seven Tests shed no unique light on the issues here or offer any advantage in terms of resolving these grievances.

non-money issues before, and I was in agreement with the policy.” (Transcript p. 79, Ln. 1-2) Grievant No. 1 went on to testify that he filed the grievance at issue in this case because “I have a family of four, and I really can’t afford to be out of work for a day.” (Tr. p. 81, Ln. 15-16)

It is abundantly clear from his testimony that Grievant No. 1 would not be moved to correct his behavior by receiving a verbal or written warning. The only discipline that makes a difference to him is the kind that results in lost wages or loss of his job.

The Union, as the Agreement makes clear, has an important role to play in assisting the Employer with implementing changes to rules and procedures in the workplace that promote the efficient and safe operation of the business. The fact that Grievant No.1 is in agreement with the policy but wants to violate it with impunity and Grievant No. 2, a union steward, request the same makes clear the need for the Union to advance a program of change aimed at following through on the commitment it agreed to and that is spelled out in the Agreement. Section 25.02 specifically commits the Union to “correcting inefficiencies of members which might otherwise necessitate discharge.” Given the attitudes expressed by the Grievants in this matter, the arbitrator believes it is incumbent upon the Union to engage its members in such a manner as to cooperate with the Employer to foster a commitment to comply with the safety rules.

Award

Based on the foregoing and all of the evidence in this matter, the arbitrator hereby DENIES the grievances. The Employer’s discipline of the Grievants is upheld.

Respectfully submitted,

Dated: April 12, 2012

Arbitrator A. Ray McCoy