

**IN THE MATTER OF ARBITRATION
BETWEEN**

CHS, INC., WINONA, MINNESOTA

Employer,

and

TEAMSTERS LOCAL UNION, NO. 792

Union.

**ARBITRATION DECISION
AND AWARD
FMCS Case No. 12-1118-51183
(Discharge)**

Arbitrator:	Andrea Mitau Kircher
Date and Place of Hearing:	March 16, 2012 Winona, Minnesota
Date Record Closed:	May 7, 2012
Date of Award:	May 21, 2012

APPEARANCES

For the Union:	For the Employer:
Brian Barlage	Lloyd Peterson
Business Agent	Senior Labor Staff Consultant
Teamsters Local No. 792	Trusight
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INTRODUCTION

Teamsters Local Union No. 792 (“Union”) and CHS, Inc., Winona, Minnesota, (“Employer” or “Company”) are subject to a Collective Bargaining Agreement (“Contract”), Joint Exhibit 1, effective March 1, 2011 – February 28, 2015. The Union filed a formal grievance on October 20, 2011, which the parties were unable to resolve, and the Union

exercised its right to invoke arbitration. The parties duly selected the undersigned arbitrator from a list provided by the Federal Mediation and Conciliation Service.

On March 16, 2012 the Arbitrator convened a hearing in Winona, Minnesota. During the hearing, the Arbitrator accepted exhibits into the record; witnesses were sworn and testimony was presented subject to cross-examination. The parties agreed to file briefs simultaneously by U.S. mail and the Arbitrator received the last of these briefs on May 5, 2012, whereupon the record closed.

ISSUES

Was the Grievant discharged for just cause on October 18, 2011? If not, what should be the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article 3. EMPLOYMENT RELATIONSHIP

Employees accept employment with the Employer on a purely voluntary basis and the employment relationship may be terminated by either the employee or the Employer subject to the terms of this Agreement, however, no employee shall be discharged or disciplined without just cause.

FACTS

The Grievant has been employed by CHS, Inc. since May 14, 1990. He was discharged on October 18, 2011 (Employer Ex. 5) for rude behavior toward a customer. Within the previous two years, the Grievant had two written reprimands for similar conduct. According to the notes from the discharge meeting, Mr. Laber, the General Manager of the Winona facility, discharged the Grievant because he yelled at a customer and “used vulgar language.” (Union Ex. 5)

CHS is a grain elevator cooperative located on the Mississippi River in Winona, Minnesota. During the harvest season, local farmers, who may also be co-op members, bring their grain to the facility to be tested, graded and shipped. The Company decides how much to pay the farmer based on a sampling of grain taken from the truckload. Some of the grain is non-GMO grain and must be tested separately by a licensed grain inspector.

At the time of his discharge, the Grievant worked with two other people, Corey Schaub, a licensed grain inspector, and Les Ellis, in a small “sampling trailer”. It is located about six feet above ground level and about 15-20 feet from the spot where the farmer stops his truck for the grain sampling. The three employees who work in the trailer are within 3-8 feet of one another. One of these employees operates a boom equipped with a probe to remove a small sample of grain from a truckload so it can be tested. The employees communicate with each truck driver, when necessary, through a one-way loudspeaker, and it is hard for the driver to understand what the boom operator is saying. This difficulty may be caused by ambient noise in the area or by the poor quality of the sound system. After the grain is probed, the truck is driven elsewhere to unload the grain.

On or about October 14, 2011, Nick Redig, a local farmer who has grain contracts with CHS, brought some corn to the terminal. He was driving a new truck for the first time, and when he stopped at the sample trailer, he was concerned about getting the tarp that covered his load to open all the way. There was another truck right behind him. Mr. Redig heard someone yelling at him through the speaker system, but didn't understand what was being said, or what he had done wrong. Then he saw an employee come out of the building, and recognized him as the employee with the “long hair.” Only one employee fit that description, the Grievant. Mr. Redig believed that the Grievant was yelling at him to open

the tarp further. Mr. Redig was upset because he didn't like being yelled at, and he went to the office to complain to Larry Laber. Later, Mr. Laber called Mr. Redig back on the phone and taped a conversation about the complaint. The conversation was transcribed. (Union Exhibit 1.) Mr. Redig testified that he did not know what the person on the speakerphone said to him. He did recall a second communication where he saw the Grievant step out of the trailer and say in a loud voice something to the effect of "Don't ever try anything like that again." Mr. Redig did not understand what that meant, but objected to the tone of voice.

On October 18, 2011, Mr. Laber called the Grievant and his Union steward into the office for a meeting. He asked the Grievant if he had yelled at Mr. Redig over the loudspeaker. The Grievant denied it, and told him Les Ellis was the person who used the loud speaker. Mr. Laber believed the Grievant was lying to him, because he had had trouble with the Grievant's unpleasant communications with fellow employees and customers before. Another reason he assumed it was the Grievant who yelled over the loudspeaker was that he believed the Grievant's job was to use the boom and the loudspeaker for sampling. Mr. Laber fired the Grievant at the meeting on October 18, 2011.

At the hearing, Les Ellis, a grain sampler who worked with the Grievant, testified that the Grievant was not the sampler and did not use the loudspeaker that day. It was the Grievant's job to handle the paper work and put the information into the computer rather than operate the sampler. The Grievant and Corey Schaub confirmed Mr. Ellis' testimony. As to the Redig incident, Mr. Ellis knew Mr. Redig as a driver who had trouble following instructions and did not hand over the "paperwork" first as instructed by a sign observable from the trucks. Mr. Ellis stated that he, himself, was the person doing the sampling and using the loudspeaker. Whatever investigation took place concerning this incident, Mr. Ellis

was positive that no Company administrator asked him about the incident before the Grievant was discharged.

Mr. Ellis, the Grievant, and Corey Schaub, all long-term employees who worked together in the sampling trailer, testified that it was very noisy at the facility at the time of the incident. The trucks' diesel motors were running, and there was construction going on nearby. There was so much ambient noise that the employees believed they had to yell to make themselves heard. The three agreed that no one said anything disrespectful or used any profanities toward Mr. Redig. Mr. Ellis and Mr. Schaub both believed that Mr. Redig contributed to his own problems by not following the proper order of the transaction, handing in his own paperwork first as requested by the posted notice. Mr. Schaub and Mr. Ellis testified that Mr. Redig needed more instruction than others who arrived at the probe facility, and it was very hard to convey these instructions to him without raising their voices because of all the noise and the one-way loudspeaker device. They agreed that the Grievant did step out of the trailer and speak to Mr. Redig in a loud voice, but he said, "paper work first, please," according to Mr. Schaub and Mr. Ellis. This confirmed the Grievant's version of events.

UNION POSITION

The Union argues that the Employer failed to establish just cause, because it failed to conduct a proper investigation. Had it done an investigation before concluding that the Grievant should be discharged, it would have learned that an important assumption made by Mr. Laber was not true; that is, despite the fact that Mr. Redig saw the Grievant after the loudspeaker incident, Mr. Hare was not the person who spoke to Mr. Redig over the loudspeaker. The Union also claims that if Mr. Laber had interviewed Mr. Ellis and Mr.

Schaub before he decided to discharge the Grievant, he might have learned that the two were disinterested employees with no reason to lie about the incident. The Union points out that the Redig complaint was vague and the yelling he complained of may have been merely improperly amplified sound, or because the general area was noisy. Neither Mr. Ellis nor Mr. Schaub heard the Grievant say anything like “don’t ever try that again,” and the Grievant denied making such a statement. The Union claims that the process of deciding to take action against the Grievant was flawed and further, the Employer did not prove that the Grievant committed misconduct.

The Union also argues that even if the Grievant said, “Don’t ever try that again” as Mr. Redig recalls, or “Hey, no, no, no, one paper at a time, please”, as the Grievant recalled, or “I would like the paperwork first, please” as Mr. Schaub remembered, discharge is not an appropriate penalty. The Grievant has over 20 years of employment with CHS, Inc. and “just cause” requires progressive discipline before discharge. The Union claims that the few recorded incidents regarding the Grievant’s communication skills are insufficient to meet the requirements of progressive discipline before discharge.

EMPLOYER POSITION

The Employer argues that the discharge was administered fairly and was reasonably related to the seriousness of the offense. The Grievant had been warned in the past over a period of many years that he was not to speak to fellow employees or customers rudely. The Employer claims that it is not bound by the concept of progressive discipline because it is not mentioned in the Contract, but even if it were, it has met that standard. Just six months prior to the incident in this case, the Employer issued the Grievant a disciplinary action for disrespectful communications with other truckers who did not approach the probing area

properly; as part of that written reprimand, the Employer notified the Grievant that the next such incident might lead to discharge.

The Employer claims that the veracity of the employees who testified on behalf of the Grievant is suspect, as is the veracity of the Grievant himself. The Employer argues that the complaining customer had nothing to gain by making a complaint about the Grievant, but that the Grievant's testimony and that of the men with whom he worked in close quarters might be affected by bias in his favor. The Employer contends that the facts detailed by Mr. Laber and Mr. Redig are the most believable and this incident constitutes just cause for discharge.

DISCUSSION AND DECISION

The Employer has the burden of proving just cause for discharge, and Article 3 of the Contract explicitly provides that "no employee shall be discharged or disciplined without just cause." (Joint Exhibit 1.) Thus, the Company must establish that when it discharged the Grievant, it acted in a fair and reasonable manner. The "just cause" concept allows an employee's termination in two types of situations: a single incident of very serious misconduct or the final step in the progressive discipline process.¹ Based on the evidence, the Employer did not establish either a single incident of very serious misconduct or that there has been sufficient progressive discipline so that it was reasonable to discharge the Grievant for raising his voice to a customer. The reasons for my conclusion are set out more specifically below.

Two principles central to the meaning of "just cause" underlie the analysis of this case. These are the concepts of "due process" and "progressive discipline." *See, id.* at 29.

¹ See, Discipline and Discharge in Arbitration, Norman Brand, ed., ABA Section of Labor and Employment Law, BNA, 1999, at 68. Citations omitted.

At the hearing, the Company's witness argued that the contract did not explicitly set out progressive discipline steps, so the Employer need not use progressive discipline. Generally, arbitrators do not share that view:

Even in the absence of bargained-for steps, however, arbitrators have generally asserted that an employee must be given some warning that his behavior is unacceptable and some opportunity to conform his behavior to the employer's legitimate expectations... Ordinarily... notice and an opportunity to improve, together with the imposition of increasing severe disciplinary penalties, are at the heart of progressive discipline as that principle is applied by arbitrators.
Id. at 30.

Due Process

One element of due process requires that the employer conduct a fair investigation before imposing discipline. It almost goes without saying that the purpose of the investigation is to avoid mistaken assumptions about an incident that occurred, to hear both sides of a story with a relatively open mind, and to base conclusions on facts. The Employer must understand the specifics and the Grievant is entitled to a clear statement of what he has done wrong. I am persuaded that investigation of this incident did not meet minimum standards, and had it been conducted more thoroughly, the Employer would have reached a different result.

1. The Redig complaint was vague and affected by a false assumption about the identity of the employee about whom he complained.

Even though Mr. Laber accused the Grievant of using "vulgar" language toward Mr. Redig (Union Ex. 5), the recorded and transcribed version of the Redig complaint (Union Exhibit 1,) does not contain any accusation of the Grievant using vulgar language. At the hearing, neither Mr. Laber nor Mr. Redig recalled any specific vulgar language allegedly used and neither had any written record of what it was that the Grievant allegedly said

through the loudspeaker. Mr. Redig stated that he couldn't understand what the employee said to him through the loudspeaker. When the Grievant came outside the sample trailer and spoke to him after the loudspeaker incident, Mr. Redig recalled that the Grievant said something to the effect of "don't ever try that again." Mr. Redig felt that the Grievant's tone of voice and manner were inappropriate. (Union Ex. 5.)

Mr. Laber's notes from his investigatory meeting with the Grievant indicate that the Grievant denied the Redig accusations. The Grievant told Mr. Laber that it was Les Ellis who spoke to Mr. Redig over the loudspeaker. Mr. Laber assumed that this was untrue. Part of the reason for this assumption was that he had dealt with the Grievant before, and believed that the Grievant always denied things and tried to blame others when criticized. Another reason for his assumption was that Mr. Laber thought that the Grievant's job was to probe the truckload and to use the loudspeaker. The Grievant's direct supervisor did not testify, and all three employees who worked in the probe shack testified that Mr. Ellis, not the Grievant, did the probing and used the loudspeaker when necessary. Mr. Ellis stated that he had used it in this case, and that it was not the first time that Mr. Redig needed more direction than most truckers. The employees at the work site insisted that the Grievant's job was to do computer data entry, not to operate the probe or direct truckers over the loudspeaker.

I found Mr. Ellis and Mr. Schaub credible witnesses. I believed Mr. Ellis and Mr. Schaub when they described how the three men worked together, and I heard no good reason for them to fabricate the story. They worked together but had no social relationship outside of work. Their demeanor was relaxed, they did not appear anxious about the consequences of their testimony, which was internally and externally consistent. I can only conclude that Mr. Laber, the General Manager who worked in the office, was uninformed about the specifics of

the work operation in the sample trailer when he concluded that the Grievant had shouted at Mr. Redig over the loudspeaker.

Had Mr. Laber conducted a complete investigation of the complaint, he would have interviewed Mr. Ellis and Mr. Schaub before reaching the conclusion that the Grievant had committed misconduct serious enough to warrant discharge. Although Mr. Laber stated that he questioned Mr. Ellis and Mr. Schaub, or that Glen Haupt spoke to them, there are no notes of these conversations, and Mr. Ellis and Mr. Schaub both denied being questioned or interviewed prior to the discharge. Mr. Haupt did not testify. Based on these factors I find that Mr. Ellis and Mr. Schaub's testimony is more credible than Mr. Laber's on the question of who used the loudspeaker. Most likely, it was Mr. Ellis who upset Mr. Redig by speaking to him over the loudspeaker.

2. The cursory investigation may have been affected by bias.

Mr. Laber had lost patience with the Grievant and admitted that he no longer wanted him as an employee, because he believes that the Grievant is disruptive to the workplace. Reasons Mr. Laber gave to support this view were: 1) Farmers say he berates them and is critical of the way they pull up to the trailer; 2) Employees and truckers have many complaints about him; and 3) Employees don't want to work with him. Nonetheless, over the 21 years the Grievant has worked for the company, there is a record of only four complaints, one dating back to 1996, one letter of reprimand dated October 1, 2004 (Union Ex. 12) that remained in his personnel file despite a note that it was to be removed in 2006, a letter of reprimand dated November 11, 2009 (Employer Ex. 3), and one dated May 3, 2011

(Employer Ex. 4.)² This is a total of four reprimands over a twenty-one year period, the first two of which must be considered stale for purposes of progressive discipline. Yet, because Mr. Laber had had complaints about the Grievant's communication style before, Mr. Laber admitted he did not believe anything he said, and so did not make a sufficient effort to look into the facts of this case, preferring instead to seize upon an opportunity to rid the workplace of an employee whom he had come to believe was a thorn in his side. Nonetheless, an investigation fails to meet the standards of due process when the Employer decides to discharge an employee based on a false assumption about who had spoken to Mr. Redig and what had been said. Although the grievant was charged with using "vulgar language", there was no evidence of it. That Mr. Laber's conclusions were not based on verifiable facts may have been colored by his eagerness to terminate Mr. Hare's employment rather than by findings of fact after a reasonable investigation.

Progressive Discipline and Conclusion.

Prior to discharge, an employer should have compiled a record of increasingly severe penalties for the type of verbal misconduct that Mr. Laber would like to extinguish. Progressive discipline can serve to modify behavior and save an otherwise valuable long-term employee. The Grievant has two written reprimands within the last several years for disrespectful communications. Prior to discharge, a suspension is in order for the next occurrence of punishable misconduct. The Employer has every right to expect its employees to treat customers respectfully, and some unpleasantness must have occurred in order for Mr.

² The May 3, 2011, reprimand resulted from settlement of a grievance stemming from a three-day suspension. That disciplinary action concerned the same type of allegations as in this case, rudeness toward three (unnamed) truckers who did not approach the probing area properly or did not roll their tarps properly. (Employer Ex. 3.) The letter of reprimand warns of possible future termination for impolite behavior.

Redig to come to Mr. Laber's office to complain. But after shearing away the deadwood of mistaken assumptions and unproven facts, not much remains that appears to be the Grievant's fault. Mr. Redig testified that when he arrived at the probing station, it was the first time he had driven the truck, he couldn't get the tarp in the correct position, another truck was waiting in line right behind him, and he couldn't understand what Mr. Ellis had said over the loudspeaker. All this caused him frustration, which was exacerbated by the ambient noise of engines and construction and the fact that the employees believed they had to yell to make themselves heard. The Grievant tried to help Mr. Ellis by stepping out of the trailer and saying something in a loud voice to Mr. Redig about the correct order of handing in one set of paperwork before rolling the tarp. Mr. Redig thought he said, "Don't ever do that again!" Mr. Hare testified that he said "hey, no, no, no, one paperwork at a time, please." (He recalled that Mr. Redig had given them two sets, and he added "please" because he had been told to be more polite.) Mr. Ellis stated that he heard the Grievant say "The man asked you to give him the paperwork first, please." Mr. Schaub said that he recalled hearing the Grievant say "paperwork before tarp." Mr. Ellis, who was closest to the Grievant said he did not hear him say "don't ever do that again." Even taking at face value Mr. Redig's complaint that the Grievant said to him, "Don't ever do that again," I find the whole incident to be affected by mistaken assumptions, the failure of due process as described above, and factors outside the Grievant's control. The Employer has not sustained its burden of proving just cause for discharge.

AWARD

The Grievance is sustained. The Grievant will be reinstated with back pay, subject to offset for any income or unemployment compensation he received since the discharge.

Seniority and benefits shall be reinstated. To ensure the proper execution of this Award, the undersigned will retain jurisdiction of this matter for a period of (60) days from the date of this award as requested by the parties.

Dated: May 21, 2012

Andrea Mitau Kircher
Arbitrator