

IN THE MATTER OF ARBITRATION BETWEEN

TEAMSTERS LOCAL UNION 120  
Union

and

SUPERVALU, INC,  
Company/Employer

OPINION AND AWARD

Termination Grievance  
E.H., Grievant  
BMS Case No. 11-RA-0989

Award Dated: November 7, 2012

Date and Place of Hearing:

July 25, 2012  
Offices of the Employer  
Chanhassen, Minnesota

Date of Receipt of Post Hearing Briefs:

October 9, 2012

APPEARANCES

For the Union: Martin Costello, Esq.  
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For the Employer: Jonathan O. Levine, Esq.  
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ISSUE

Did the Company have just cause to terminate the employment of the Grievant for falsifying a Company record in violation of a last chance agreement he was under at the time? If not what shall the remedy be?

WITNESSES TESTIFYING

Called by the Company

Jeff Gray,  
Transportation Superintendent

Edward Myer,  
Transportation Supervisor

Called by the Union

E.H., Grievant  
Driver

ALSO PRESENT

On Behalf of the Company

Pat Salzar,  
Transportation Manager

Mike Van Sloun,  
Transportation Supervisor

On Behalf of the Union

Tom Erickson,  
Business Agent, Local Union 120

JURISDICTION

The issue was submitted to the Arbitrator for a final and binding resolution under the terms set forth in Article 16 of the Collective Bargaining Agreement between the parties (Joint Exhibit 1) and under the rules of Bureau of Mediation Services of the State of Minnesota.

The Arbitrator was selected by the parties from a list of names of arbitrators supplied to them by the Bureau of Mediation Services, and they stipulated at the hearing that the Arbitrator had been properly called. The parties also mutually stipulated at the hearing that the grievance had been processed through the required steps of the grievance procedure without resolution, and that it was properly before the Arbitrator for a decision.

At the hearing the parties were given full and complete opportunity to examine and cross-examine witnesses and present their proofs. Final argument was provided by post hearing briefs

filed by both parties that were received by the agreed upon deadline as amended. Upon receipt of the post hearing briefs by the Arbitrator the record in this case was closed. The issue is now ready for determination.

#### STATEMENT OF THE ISSUE

The parties phrased the issue to be decided in somewhat different terms. The Company phrased the issue as “Whether or not the Grievant violated the terms of a last chance agreement, and if not what shall the remedy be?” The Union phrased the issue as “Whether or not the Company had just cause to terminate the employment of the Grievant, and if not what shall the remedy be?” The parties deferred a final framing of the issue to the Arbitrator. After carefully considering the testimony and record evidence the Arbitrator has determined the issue to be:

Did the Company have just cause to terminate the employment of the Grievant for falsifying a Company record in violation of a last chance agreement he was under at the time? If not what shall the remedy be?

The sections of the Collective Bargaining Agreement that bear directly on this issue are contained in Article 13 – DISCHARGE, Article 15 – GRIEVANCE PROCEDURE, and Article 16 – ARBITRATION. In relevant part they read as follows:

#### ARTICLE 13 – DISCHARGE

- 13.01. 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 immediate discharge.
- 13.02. Discipline based on computer performance and/or video documentation: The Employer agrees to thoroughly investigate prior to issuing discipline based on computer information and/or video documentation. The investigation will, at a minimum, include a discussion with the employee.

- 13.03. Employees desiring to protest discharge must do so within five (5) calendar days by giving notice in writing to the Employer and the Union. All discipline must be issued no later than five (5) working days following the Employer's knowledge of the violation. In all cases of discharge or when a suspension with investigation is occurring, the Employer must notify (via email or fax) Teamsters Local 120 within five (5) working days. In all cases where an employee has been suspended pending investigation, a decision will be made within 30 days. By mutual agreement (Employer and Union) the investigation period may be extended.
- 13.04. All grievances, other than "discharge", must be raised within ten (10) days of the alleged occurrence, or they will be deemed to be waived.
- 13.05. Warning notices will be disregarded after an eleven (11) month period for disciplinary purposes.

#### ARTICLE 15 - GRIEVANCE PROCEDURE

- 15.01. Any differences, disputes or complaints arising over the interpretation or application of the contents of this Agreement which cannot be resolved between the employee and his immediate supervisor shall be a grievance and, to be timely, shall be submitted in writing by the aggrieved party within five (5) working days of its occurrence to the supervisor's superior.

\* \* \* \*

#### ARTICLE 16 - ARBITRATION

Any grievance not settled through the above-mentioned procedure shall, if it is to be processed further, be appealed by the Union to arbitration by serving written notice of intent to arbitrate upon the Employer's Vice President of Labor Relations within thirty (30) days from receipt of the Step 3 answer. All grievances noticed for arbitration shall, unless settled, be heard by an arbitrator.

- 16.01. The Union and the Employer, within ten (10) calendar days after receipt of the notice of intent to arbitrate shall meet and attempt to select an arbitrator. If the parties fail to select an arbitrator by this mutual agreement, then the moving party should request a list of five (5) arbitrators from the State of Minnesota Bureau of Mediation Services. The parties should attempt to select an arbitrator in accordance with Bureau of Mediation Services procedures, with the moving party striking first.

- 16.02. Any grievance which has not been presented under the Grievance Procedure within the time limits for presentation of grievances, and/or any grievance which is not appealed to the next Step of the Grievance or Arbitration procedures in the applicable time limit specified herein, shall be considered as settled with the last answer as given and shall not be subject to further discussion or appeal.
- 16.03. 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 alter, 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, the Union and employee(s). The total costs of the arbitration shall be shared equally between the Employer and the Union. In the event either party elects not to receive a copy of the transcript of the hearing, the cost of the reporter and transcript shall be borne exclusively by the party using such copy.
- 16.04. All time limits specified in this Article may be extended only by written mutual agreement of the Union and the Employer.

In addition to the above referenced contract language the Company has promulgated certain rules that bear on this case as follows:

SUPERVALU Minneapolis Distribution Center  
WORK RULES AND REGULATIONS

PERSONAL STANDARDS OF CONDUCT

In order for the 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 personnel records.

\* \* \* \*

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.

## FACTUAL BACKGROUND

Involved herein is a grievance that arose when the employment of the Grievant was terminated on April 1, 2011 for violation of work rule #1 – falsification of reports, records and documents. The Company operates distribution centers and retail stores in connection with its grocery distribution and sales business. The Union is the exclusive bargaining representative for the drivers and warehouse personnel whose job classifications are shown in the Collective Bargaining Agreement. The parties have maintained a collective bargaining relationship for many years. The controlling labor contract in this case became effective on June 1, 2010 and continued in full force and effect through May 31, 2013. For all relevant times the Grievant was

covered by its provisions. The Grievant was hired by the Company on June 21, 1996 as a delivery driver, and continued in that position until the date of the termination of his employment on April 1, 2011. During his tenure with the Company the Grievant received discipline as follows:

- September 17, 1998 - Written warning for failure to clean out trailer
- October 19, 2000 - Written warning for intimidation
- March 22, 2001 - Verbal reprimand for taking coffee breaks at improper time
- April 12, 2001 - Written warning for improper check out
- April 19, 2001 - Two day suspension for falsifying documents
- October 22, 2002 - Written warning for seat belt violation
- February 13, 2008 - Written warning for failure to report to work
- October 9, 2008 - Verbal warning for preventable accident
- December 15, 2008 - Written warning for utilizing another driver's identification.
- April 24, 2009 - Discharge for improper backhaul and falsification of documents  
[Reinstated pursuant to a 'last chance agreement' on June 3, 2010]
- June 10, 2010 - Verbal warning for failure to pick up and deliver mail
- November 10, 2010 - Verbal warning for violation of DoT hours of service regulation
- April 1, 2011 - Discharge for falsifying Company/DoT documents.

It is noted that the Collective Bargaining Agreement provides at Article 13.05 that "Warning notices will be disregarded after an eleven (11) month period for disciplinary purposes." Eleven months prior to the Grievant's termination on April 1, 2011 was May 1, 2010.

The incident that led to the termination of the Grievant's employment occurred on March 28, 2011. The facts related to that incident are largely undisputed with an important exception. It is not disputed that the Grievant falsely entered his March 28, 2011 start time on his trip sheet as 3:00 AM when in fact he started his shift at 4:00 AM. His actual 4:00 AM start time was documented on the computer generated DoT log. It is not disputed that the Company and its drivers are required to comply with DoT regulations, and that pursuant to those regulations a

driver's trip sheet and DoT log must agree. It is also not disputed that the Company is subject to fines for violating DoT regulations.

The Grievant was an "extra board" driver who preferred to take 'mileage runs' that were paid on a mileage basis rather than an hourly basis. He also preferred to start his shift as early as possible. The Grievant was assigned a 4:00 AM mileage run the day before the incident based on the Dispatcher's understanding of his preferences and seniority. After completing the run on March 28, 2011 the Grievant returned to the distribution center at approximately 11:00 AM. Upon arriving at the distribution center he asked Dispatcher Meyer if there was any additional work for him. Mr. Meyer advised that there was not, and that he was through for the day. The Grievant returned to his truck and retrieved his trip sheet.

While at the distribution center the Grievant discovered that another driver with less seniority had been assigned a run that began at 3:00 AM. Feeling that his seniority rights had been violated he complained to Transportation Superintendent Gray. The Grievant stated to Mr. Gray that he believed he should have been assigned the 3:00 AM run that he would have preferred and he believed he was eligible for based on his seniority. Mr. Gray told the Grievant that he would investigate the matter.

At this point the version of the incident as testified to by the Grievant differs from the version testified to by Mr. Gray. The Grievant testified that during the discussion with Mr. Gray the two of them agreed that the Grievant could simply indicate on his trip sheet that he started his shift at 3:00 AM. Mr. Gray denies approving the 3:00 AM entry, and testified that he stated only that he

would investigate whether the Grievant's seniority was violated in the run assignment that was made. The Grievant turned in his trip sheet showing a 3:00 AM starting time. It is not disputed that entry is false, and the Grievant actually started at 4:00 AM.

When the Grievant left his office Mr. Gray asked Transportation Supervisor Van Sloun to determine if the Grievant's seniority rights had been violated by an improper run assignment. Mr. Van Sloun determined that the run that the Grievant was assigned actually paid more than the one he was seeking that left at 3:00 AM. Additionally, and importantly, Mr. Van Sloun determined that the starting time shown on the Grievant's trip sheet [3:00 AM] did not match to the DoT log which showed a 4:00 AM starting time. Mr. Sloun discussed his findings with Mr. Gray. Mr. Gray then discussed what had occurred with Transportation Manager Salzer, and additional interviews with the Dispatchers involved were held.

On April 1, 2011 Mr. Gray and Mr. Van Sloun met with the Grievant and Union Steward Irrgang. The Grievant admitted that he entered a 3:00 AM starting time on his trip sheet, and that he actually began his shift at 4:00 AM. He went on to state, however, that Mr. Gray had approved his doing so. It is not disputed that such entries were a violation of DoT regulations. The Grievant was then suspended pending further investigation. He was discharged later that same day.

The Union filed a timely grievance, which was moved through the steps of the grievance procedure without resolution. It was heard in arbitration on July 25, 2012.

## POSITION OF THE PARTIES

### Position of the Company

The Company contends that the grievance should be denied and the termination of the Grievant upheld. In support of this position the Company offers the following arguments:

1. The Grievant's misconduct was a blatant violation of his last chance agreement. The consequence of such a violation is immediate termination.
2. The Grievant's falsification of a trip sheet violated Article 13, Section 5 of the Collective Bargaining Agreement, and is a Group 1 offense under the Company's Work Rules. Either of these offenses is just cause for immediate termination.
3. The Grievant's claim that he altered his trip sheet only after speaking with Mr. Gray and obtaining his permission to do so is not credible. Mr. Gray testified that he did not give the Grievant permission and advised him that he would follow his normal practice and investigate the matter. Mr. Gray had no motive to lie, and would never authorize the Grievant to falsify his trip sheet. There is no way that the Grievant could have misunderstood that conversation.
4. The Grievant has a long history of dishonesty and falsification of records. He was previously discharged for the same offense in 2009, only to be returned to work in June, 2010 under a 'last chance agreement'.
5. The Grievant's prior disciplinary record can be considered to establish the Grievant's knowledge of the work rules, impeach his credibility, or defend against claims that his record mitigates the offense in this case. In any event the Company terminated the employment of the Grievant because he violated the terms of his last chance agreement. It did not rely on his prior discipline to determine that termination was the appropriate penalty.
6. The Grievant's inconsistent testimony and his record of dishonesty and falsifying work records challenge his credibility. He alternately testified that Mr. Gray told him to go ahead and put down a 3:00 AM starting time on his trip sheet, and then contradicted himself by stating that there was a misunderstanding between him and Mr. Gray. A clear authorization to put down a 3:00 AM starting time is not a statement that could be misunderstood.
7. The Grievant's testimony also defies logic and common sense. The Grievant's claim that he convinced Mr. Gray that allowing him to falsify his trip sheet would

be "a lot easier and simpler" than going through "all the ritual and hoops and jumps and going through the Union and file a grievance". However, the Grievant admitted that when he experienced pay discrepancies in the past, they were corrected by simply bringing them to the Company's attention, after which an adjustment was made through payroll without any grievances being filed. The Grievant admitted that he could have remedied the alleged seniority violation without filing a grievance and without falsifying his DoT trip sheet.

8. In order to believe the Grievant, one would need to believe that Mr. Gray told the Grievant, who was already on a last chance agreement for the same offense to go ahead and falsify his DoT trip sheet in violation of the law and Company policy. This allegation also assumes that Mr. Gray suddenly decided to put the Company, his own job, and the jobs of other Company employees at risk in order to avoid a grievance over one hour of pay. This argument simply makes no sense.

9. The Grievant's account of the incident does not match with the time line as described by Dispatcher Meyer. The Grievant was angry about what he perceived to be a violation of his seniority and he did not want to waste time getting the additional one hour of pay he felt entitled to. It is reasonable to believe that the Grievant was brazen enough to falsify his trip sheet and then ask Mr. Gray for permission to do so, or that the Grievant went ahead and falsified his trip sheet after Mr. Gray told him not to do so.

10. Violation of the June 3, 2010 last chance agreement is just cause for discharge. The last chance agreement clearly and plainly stated that the Grievant would be terminated if he engaged in any misrepresentation or falsification of Company documents or records. A last chance agreement is a negotiated agreement which essentially modifies the terms of the Collective Bargaining Agreement. It defines what the parties have agreed is "just cause" for discharge of a specific employee. An arbitrator lacks authority to consider the usual factors for just cause when a last chance agreement is controlling as it is here.

11. The Company had just cause to terminate the Grievant's employment even in the absence of his last chance agreement. The Grievant falsified his trip sheet in violation of Article 13. When, as here, the parties have negotiated the level of discipline an employer may impose for a particular offense, the only inquiry is whether the offense was committed. If the offense was committed, the inquiry ends and the grievance must be denied as a contractual matter. While "just cause" for the Grievant's termination exists in the general sense, it need not be established as argued by the Union. Article 16, Section 4 limits the authority of the Arbitrator to only interpret and apply the express provisions of the Agreement. The Arbitrator shall not have authority to alter, amend, subtract from, add to, or otherwise modify any of the terms of the Agreement. The parties have agreed in Article 13.01 that falsification of records shall be grounds for immediate

discharge. Even if the usual tests for just cause are applied the grievance must be denied.

12. The Union must prove that the Grievant had a reasonable basis for his belief that the Company authorized him to falsify his trip sheet. It has failed to meet that burden.

13. The Grievant was the author of his own misfortune. His falsification is a violation of both federal regulations and Company policy and simply cannot be tolerated. The Grievant was not authorized to falsify his trip sheet; he simply resorted to self-help because he was angry at the Company. There is no excuse for his misconduct, and the grievance should be denied.

### Position of the Union

The Union on behalf of the Grievant contends that there was not just cause for the termination of the employment of E.H. and his discharge should be reduced to a suspension of an appropriate length and a continuation of the last chance agreement. In support of this position the Union offers the following arguments:

1. The Employer did not have just cause to terminate the employment of the Grievant. Termination of employment is the most extreme form of discipline available. It results in the loss of his job and livelihood as well as his seniority rights and other benefits under the Collective Bargaining Agreement.

2. In discharge cases, therefore, a significant quantum of proof is required to show not only that the grievant did the act alleged, but also that the act justifies the most serious disciplinary action of discharge. A heavy burden is clearly on the Employer to support its action in this case. It has not met that burden and the termination must be overturned.

3. An employer seeking to discharge an employee for misconduct assumes the burden of proof in two areas: (1) whether the employee committed a dischargeable offense; and (2) whether the act, if proven, justifies termination. In this case the standard of review for disciplinary action is "just cause" by the parties' agreement, past practice, and prior decisions.

4. The Employer has insisted that it did not need to show just cause to terminate the Grievant, but rather only a proven violation of the last chance agreement. It may be that the Employer believes that violation of the last chance agreement fulfills the just cause requirement. If that is their position why did they introduce into evidence stale discipline shown in Employer's Exhibit 12? Obviously they

do not genuinely believe that a simple, technical violation of the last chance agreement standing alone justifies firing the Grievant. It sought to enhance its position by dragging out expired discipline over the Union's objection to bolster its case and prejudice the Union's case.

5. The Grievant's transgression is simply not the kind of transgression that either the Collective Bargaining agreement or the last chance agreement contemplate is enough to terminate his employment. More is needed, but the Company does not have any more admissible evidence in the instant case. The Grievant should be reinstated and the penalty modified to reflect the actual nature the Grievant's error in judgment.

6. There was no just cause, much less the extreme industrial penalty of discharge. Just cause is a concept requiring individualized application to the particular circumstances of each and every grievant's case. The burden is on the employer to show just cause to discipline, even when the the discipline was based on a violation of company work rules such as a documents integrity policy as was involved here. The work rules are subservient to the parties' labor agreement and subject to challenge as they are administered. The Company's work rules in this case should be found to be not determinative but subservient to the labor agreement and the application of the just cause principle requires an individualized examination of the particular circumstances.

7. Just cause is a qualitative concept, incapable of quantification. It can be defined using the seven tests for just cause that were described by Arbitrator Carroll R. Daughtery in 1966: 1) notice, 2) reasonable rule or order, 3) investigation, 4) fair investigation, 5) proof, 6) equal treatment, and 7) fairness of the penalty. If the employer fails any one of these tests, then just cause does not exist for the imposed discipline. Because equal treatment and investigation are lacking here and the penalty is not supported by the circumstances, the Employer has not met its burden of proof.

8. Under these circumstances, just cause dictates that if the Arbitrator finds reason for discipline, the penalty be modified from discharge to a suspension. Given the length of time since the Grievant's discharge, more than ample punishment has occurred to properly reprimand him for any and all wrong doing.

9. The Company's termination of the Grievant violated the just cause standard, which standard the Company has consistently agreed was implied in the Agreement even though it is not explicitly imposed therein. Just cause was lacking because SuperValu cannot show misconduct justifying termination. The grievance should be sustained and the Grievant reinstated with a suspension and continuation of the last chance agreement for an appropriate length of time.

## ANALYSIS OF THE EVIDENCE

All of the evidence adduced at the hearing along with the thoughtfully made arguments of the parties was carefully considered in the analysis of this case and rendering this award. A threshold question to be resolved is whether the “just cause” standard is to be applied or is the last chance agreement under which the Grievant was working at the time of his termination controlling. The record compels a finding that this question poses a distinction without a meaningful difference. The standards for just cause include those of proof that the Grievant committed the act of which he is accused and a determination of whether the penalty was reasonable given all the facts in evidence. Discharge under a last chance agreement also requires a meeting of those standards. Just cause also requires that the Employer meet other, additional standards and those need to be examined in this case as well.

The Company argues that the Grievant was terminated pursuant to the last chance agreement, and that the elements of just cause do not have to be present. The Company goes on to argue, however, that it had just cause to terminate the employment of the Grievant in any event due to his violation of Article 13 of the Collective Bargaining Agreement and published Company work rules.

The Union argues that just cause must be shown and that the Company has failed in its burden to meet that standard. It argues that an individualized examination of the facts and the controlling contract language must be made. The Union contends that such an examination shows that the work rule the Grievant stands accused of violating is subservient to the terms of the Collective Bargaining Agreement, the penalty of discharge is unreasonably harsh, and the Grievant was not

afforded equal treatment. The Union goes on to argue that parties' agreement, past practice, and prior decisions compel the application of the just cause standard.

A last chance agreement is a negotiated agreement between the parties that sets out the terms under which an employee is returned to work after being involuntarily terminated. The record shows that the Grievant was initially terminated on April 17, 2009 for accepting a back haul without approval or notification of dispatch, and falsifying Company documents for time worked. He was returned to work without backpay over a year later under the terms of last chance agreement [Employer Exhibit 6].

It is noted that the termination of his employment on April 17, 2009 was more than eleven (11) months prior to his termination on March 28, 2011. The Union argues that Article 13.05 of the labor agreement bars consideration of his previous termination because it occurred more than eleven months prior to the incident giving rise to his termination in the instant case. The Union's argument is misplaced. The language of Article 13.05 relates to warning notices that will be disregarded after eleven months for disciplinary purposes. [Emphasis supplied.] The clear language of that Article relates to warning notices and the use of such notices for disciplinary purposes. It is clear from the record that the progressive discipline applied by the Employer in the past has included verbal warnings and written warnings. Given that such warning notices have been an established part of the disciplinary practices at the Company in the past it is simply not reasonable that the parties intended a last chance agreement which returns an employee to work after termination is simply a "warning notice" as that term is used in Article 13.05.

The terms of the last chance agreement the Grievant was working under specify that "... any misrepresentation or falsification of company documents or records by Mr. H. will result in his immediate termination of employment with SUPERVALU." The last chance agreement did not specify an ending date after which the agreement would be nullified and any future falsification of documents would be treated as an initial offense without reference to his prior misconduct. Clearly the last chance agreement was still in effect at the time of the incident that gave rise to his termination that is the subject of the instant grievance. The Grievant's continued employment was controlled by it.

The last chance agreement specifies that the Grievant "... does not give up any rights afforded him under the current collective bargaining agreement." It is noted that the Collective Bargaining Agreement does not specifically refer to "just cause" standards as a basis for termination of an employee's employment with the Company. Such standards are, however, regularly applied by arbitrators in deciding discharge cases even when the labor agreement does not specifically refer to them. Importantly, what Article 13.01 does specifically provide for is that "... falsification of any records ... shall be grounds for immediate discharge". The Grievant is clearly held to that requirement here.

The Company argues that Article 13.05 does not bar an employee's prior disciplinary record from being considered in a subsequent disciplinary action. That argument is credited. The prior discipline of an employee occurring prior to the eleven month period specified in Article 13.05 can properly be used to show, *inter alia*, that the employee had knowledge of the rules. A discipline free record would also serve to possibly mitigate the seriousness of an infraction and

any penalty being considered. What Article 13.05 prevents is warning notices more than eleven months old to be used in advancing an employee along the steps of progressive discipline.

The evidence in this case, including the Grievant's prior disciplinary record, shows that he had knowledge of the rule barring falsification of Company records and that the penalty for doing so was termination of employment. Not only does the labor agreement specifically bar such falsification, the Grievant was previously terminated for doing so. He was returned to work pursuant to a last chance agreement that specifically put him on notice that "falsification of Company documents or records will result in his immediate termination ...". The Grievant certainly must have known that falsification of any Company record would likely result in his termination. Accordingly, the record compels a finding that the Grievant had notice of the rule barring falsification of Company records.

The reasonableness of a rule barring falsification of Company records was not challenged in this proceeding. Indeed, the parties have recognized the reasonableness of such a rule by agreeing in Article 13.01 that falsification of records was grounds for immediate discharge. A similar agreement with regard to the reasonableness of a rule barring falsification of Company records is found in the last chance agreement under which the Grievant was returned to work in June, 2010. The reasonableness of rules test required under the doctrine of just cause is clearly met.

The record shows that the Company investigated the Grievant's complaint that he was denied his seniority rights. In the course of that investigation, however, the falsification of the Grievant's trip sheet was discovered. Investigation showed that the starting time on his trip sheet did not

match that on the DoT log. The circumstances surrounding the Grievant's entry of his starting time on his trip sheet were investigated, and the Grievant was provided an opportunity to provide his side of the story. The record shows that the Company conducted a sufficiently thorough and fair investigation to show that the Grievant had falsely entered his starting time on his trip sheet. The test for conducting a fair and thorough investigation prior to imposing discipline is deemed to have been met.

The Union asserts that the Grievant was afforded disparate treatment. There was, however, no evidence presented that any similarly situated employee had been given any lesser penalty. Indeed, the record contains no evidence of any other employee who had falsified Company records and who had been returned to work under a last chance agreement. No showing of disparate treatment was made on the record of this case.

As to the matter of proof that the Grievant falsified his trip sheet, the record clearly shows that he entered a start time on his trip sheet that was one hour earlier than his actual starting time. The mismatch between his entry on the trip sheet and the DoT log clearly shows an improper entry. The Grievant claims, however, that he was authorized by Mr. Gray to make the improper entry. Indeed, the matter of proof and the outcome of this case turns on whether or not the Grievant's claim of being authorized to make the entry he did is believable based on the record of this proceeding.

The evidence compels a finding that the Grievant's claim of being authorized to make the entry he did on his trip sheet is simply not believable. Mr. Gray testified without serious challenge

that he never gave such authorization, and told the Grievant only that he would investigate whether or not his seniority rights were violated in the run assignments that were made. A reasonable person, familiar with DoT regulations would find it nearly impossible to believe that Mr. Gray would authorize an entry that clearly would be in violation of those regulations. A reasonable person would inquire why would the Company terminate the employment of the Grievant in 2009 for falsifying company records, and then authorize him to make a false entry in 2011. No reason was found in the record of this case for the Company to do so, especially when the matter underlying such falsification was merely one hour of pay for the Grievant.

The record shows that adjustments to the Grievant's pay had been made on prior occasions when he had a dispute over what he was due. Those adjustments were made by simply advising the payroll department to make an adjustment. No falsification of records was needed or used to make such adjustments in the past. It is not reasonable to expect that the Grievant's supervisor authorized a false entry to be made to the Grievant's trip sheet in this case. The record shows sufficient proof that the Grievant falsified a Company record and did not have authorization to do so.

The Union argues that the Grievant should be suspended, but returned to work under the continuance of the last chance agreement. It argues that termination was not envisioned in the labor agreement or in the last chance agreement as the appropriate penalty under the circumstances of this case. It deems the penalty of termination of employment as too harsh. This perspective was carefully examined, but found to be unsupported by the evidence. The evidence is overwhelming that the parties have agreed that falsification of Company records or

documents is a dischargeable offense. Such agreement is shown in Article 13.01 of the Collective Bargaining Agreement and in the last chance agreement under which the Grievant was returned to work in 2010. The record clearly shows that the Grievant was given a second chance to conform to the rule requiring true and accurate reporting. He did not take that second chance to heart, and resorted to entering a false entry when it appeared to serve his need. The record of this proceeding shows that there is little, if any, likelihood that affording the Grievant an additional chance by returning him to work with a suspension, would result in different conduct. It is noted that keeping accurate records is vital in the transportation and distribution industry. The Grievant's conduct shows he has repeatedly placed his own benefit ahead of the Company's need to comply with Federal regulations by maintaining accurate records. For these reasons the termination of the Grievant's employment is found to be the appropriate penalty to be imposed in this case

IN THE MATTER OF ARBITRATION BETWEEN

TEAMSTERS LOCAL UNION 120  
Union

and

SUPERVALU, INC,  
Company/Employer

OPINION AND AWARD

Termination Grievance  
E. H., Grievant  
BMS Case No. 11-RA-0989

AWARD

Based on the evidence and testimony entered at the hearing the Employer had just cause to terminate the employment of the Grievant for falsifying a Company record in violation of a last chance agreement he was under at the time. The grievance and all remedies requested are denied.

November 7, 2012

James L. Reynolds

Dated: \_\_\_\_\_

\_\_\_\_\_  
James L. Reynolds  
Arbitrator