

THE MATTER OF ARBITRATION BETWEEN

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TEAMSTERS LOCAL UNION 160,)	
)	
	Union,)	
and)	DUXBURY DISCHARGE
)	GRIEVANCE
)	
KEMPS, LLC,)	
)	
	Employer.)	
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Arbitrator: Stephen F. Befort

Hearing Date: June 18, 2013

Post-hearing briefs received: August 9, 2013

Date of Decision: August 28, 2013

APPEARANCES

For the Union: Fred Perillo

For the Employer: John J. Toner

INTRODUCTION

Teamsters Local No. 160 (Union), as exclusive representative, brings this grievance claiming that Kemps, LLC (Employer) violated the parties' collective bargaining agreement by discharging Lyle Duxbury without just cause. The Employer maintains that it had just cause to discharge the grievant for failing accurately to test a load of milk delivered on January 5, 2013. The grievance proceeded to an arbitration hearing at which the parties were afforded the

opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

Did the Employer have just cause to terminate the grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE XXII

Discharge Clause: The Employer shall not discharge any employee without just cause and shall give at least one (1) warning notice in writing to the employee and a copy of the same to the Union, except that no warning notice need be given to an employee before he/she is discharged if the cause of such discharge is dishonesty, drunkenness, or recklessness resulting in serious accident while on duty or violation of properly posted Company rules which do not conflict with the agreement, carrying of unauthorized passengers or any serious and significant gross offense.

FACTUAL BACKGROUND

Kemps, LLC, the Employer, is engaged in the processing of dairy products. The grievant, Lyle Duxbury, has worked for the Employer at its Rochester, Minnesota facility for 24 years in a variety of positions. Mr. Duxbury is partially deaf due to a military service related disability. For the past fifteen years, he has worked as a lab technician responsible for receiving and processing incoming raw milk. On weekends, he fills in for the usual tester and performs tests on the incoming milk to assure proper quality. Mr. Duxbury has no record of prior discipline.

The Employer is a Grade "A" producer of dairy products. As such, its production processes are governed by the federal Pasteurized Milk Ordinance. These rules are enforced locally by the Minnesota Department of Agriculture (MDA). Among other requirements,

employees, such as Mr. Duxbury, who are responsible for testing incoming raw milk are required to maintain certification through the MDA. Such employees receive annual “split sample” training from the MDA and must demonstrate their ability to accurately conduct tests on milk samples. These tests identify four attributes of the milk sample: temperature, water content, bacteria, and antibiotic contamination. Federal and state laws require that milk testing positive for the presence of antibiotics must be rejected.

The testing process begins when raw milk arrives at a processing facility. After securing a sample of the incoming milk, the lab technician undertakes a four-step testing procedure:

- As a first step, the lab technician exposes the milk to a “charm” strip which provides an initial visual test of the sample. If the charm strip detects the presence of antibiotics, the line at the top of the strip will be darker.
- The technician then places the strip into an electronic reader with a screen about the same size as an ordinary business card. If the sample contains antibiotics, the reader will make ten audible beeps. If the test is negative, the reader will make only a single beep.
- The reader also displays the test result visually by spelling out the words “positive” or “negative” on the screen. This visual display remains on the screen until another sample is tested.
- As a final step, the testing device prints out a hard copy of the test result. The printout will show either “Pos” for a positive result or “Neg” for a negative result.

If a milk sample tests positive at any stage in this process, the lab technician is required to conduct a second confirmatory test. The lab technician also is instructed to report a positive test outcome to his or her supervisor.

On Friday February 1, 2013, Prem Thakur, the Quality Assurance Manager for the Rochester facility and the grievant's immediate supervisor, discovered an anomaly while preparing a monthly testing report for the MDA. This report requires Mr. Thakur to review the test results on incoming milk for the previous month. During this process, Mr. Thakur discovered that a milk sample had tested positive on January 5, 2013. Mr. Thakur and Micah Purcella, Director of Quality Assurance for all Kemps facilities, immediately launched an investigation.

The investigation revealed that Mr. Duxbury was the lab technician responsible for testing incoming milk on January 5, 2013, and that Mr. Duxbury had failed both to inform his supervisor of the positive test result and to conduct a follow-up test. The investigation also revealed that in spite of testing positive for antibiotics, the contaminated milk was accepted, mixed with other milk, and then processed into various products and distributed for consumption. Because Kemps has a practice of destroying milk samples approximately three weeks after initial testing, it was not possible to re-test the original sample. The investigation did not find that anyone became ill from consuming the distributed products.

On the following Monday, February 4, Ms. Purcella notified the MDA about the errant testing incident. The MDA responded with a certified letter listing possible outcomes which included financial penalties, loss of licensure, and criminal penalties. A face-to-face meeting involving officials from Kemps and the MDA was held on April 4, 2013. According to the testimony of Ms. Purcella, the MDA officials stressed the seriousness of

the violation, saying that this was a life threatening error of a magnitude that had never previously occurred in Minnesota.

The Employer suspended Mr. Duxbury pending investigation on February 4, 2013, and terminated him on the following day. The Employer's Disciplinary Action Notice stated, as an explanation for the discharge decision, that Mr Duxbury's "failure to reject a positive load or to perform additional testing is a serious and significant gross offense." The MDA subsequently decided that no further action should be taken against Kemps on account of this incident, finding that Kemps took "immediate corrective actions [that] have addressed the immediate cause of the incident."

At the arbitration hearing, Ms. Purcella testified that the MDA had revoked Mr. Duxbury's license to serve as a certified milk tester. Mr. Duxbury testified that he had never been notified about a license revocation, and that Ms. Purcella's testimony was the first time that he had heard of such an allegation.

The parties submitted evidence at the arbitration hearing concerning the Employer's treatment of another employee - Mr. Sexton - who also was employed at the Rochester plant. The testimony established that while testing an incoming milk sample, Mr. Sexton initially observed a positive outcome on the electronic reader test which was followed by a negative confirmatory test. Under these circumstances, a lab technician is required to take a second tie-breaker, confirmatory test, which Mr. Sexton failed to perform. Nonetheless, because this error in procedure was discovered in short order while the initial frozen sample was still in existence, an additional test of that sample confirmed that it was negative for antibiotic contamination and that no bad milk had been accepted into the system. The Employer chose not to discharge Mr. Sexton but gave him, instead, a final warning letter.

POSITIONS OF THE PARTIES

Employer

The Employer contends that it had just cause to terminate the grievant's employment. The Employer claims that Mr. Duxbury's failure to recognize a positive test result constituted a serious and significant gross offense that endangered public health. The Employer further maintains that the MDA revoked Mr. Duxbury's certification as an industry analyst making him unqualified to perform his job as a lab technician. The Employer finally asserts that termination is an appropriate sanction because of the seriousness of the misconduct and the lack of any showing of disparate treatment.

Union

The Union argues that the Employer did not have just cause to support its termination decision. The Union contends that the parties' collective bargaining agreement requires that the Employer generally must issue a warning letter before it can discharge a unit employee in the absence of intentional or reckless misconduct. In this instance, the Union maintains, the grievant's actions merely were negligent so as to not justify discharge for an initial misstep. The Union additionally argues that the Employer denied the grievant due process because of the delay in asserting its allegation of misconduct. Finally, the Union claims that the penalty of discharge is too severe in light of Mr. Duxbury's good work record and the Employer's more lenient treatment of Mr. Sexton.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the

Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See* Elkouri & Elkouri, HOW ARBITRATION WORKS 948 (6th ed. 2003). Each of these steps is discussed below.

The Alleged Misconduct

The Employer alleges, as the basis for its disciplinary action, that Mr. Duxbury failed to identify a load of milk that tested positive for antibiotics, failed to undertake a follow-up confirmatory test, and failed to report the positive test outcome to his supervisor. As a result of these failures, the Employer accepted, processed, and distributed the load of contaminated milk, causing a significant risk of harm to the consuming public. The Union does not seriously contest these allegations, but contends that the discharge penalty is too severe under the circumstances of this case.

The Appropriate Remedy

The Employer contends that discharge is appropriate in this instance because Mr. Duxbury committed a very serious error that could have resulted in life threatening harm to the public. The grievant's actions also placed the Employer in jeopardy for fines, loss of licensure, and possible criminal prosecution. The Union objects to this conclusion for a variety of reasons that are discussed below.

The Contract Standard

The Union contends that the discharge of Mr. Duxbury violates the standards set out in the parties' collective bargaining agreement. In this respect, Article XXII of the agreement provides as follows:

The Employer shall not discharge any employee without just cause and shall give at least one (1) warning notice in writing to the employee and a copy of the same to the Union, except that no warning notice need be given to an employee before he/she is discharged if the cause of such discharge is dishonesty, drunkenness, or recklessness resulting in serious accident while on duty or violation of properly posted Company rules which do not conflict with the agreement, carrying of unauthorized passengers or any serious and significant gross offense.

Article XXII provides that the Employer generally must provide a letter of warning to an employee prior to any discharge decision. It is undisputed that the Employer did not provide such a letter prior to terminating Mr. Duxbury. The provision contains an exception for certain situations, but the only arguably applicable exception is with respect to “any serious and significant gross offense.”

The Union maintains that the types of misconduct listed in Article XXII require a showing of intentional or reckless misconduct in order for an employer to escape the requirement of providing a prior letter of warning. In this instance, the Union argues, the Employer has asserted only that Mr. Duxbury acted negligently in failing to discover the tainted load of milk. As such, the Union contends that the Employer’s termination of Mr. Duxbury without any prior warning or progressive discipline cannot stand.

The Employer counters that Mr. Duxbury’s actions constitute a serious and significant gross offense for which no prior warning was necessary. I agree with this assertion. Mr. Duxbury’s transgression clearly was serious in that it broadly endangered the health of the consuming public and, according to the MDA, it constituted the single most significant life threatening error with respect to dairy safety that had ever occurred in Minnesota. Mr. Duxbury’s actions also constituted conduct that was “reckless” in nature. He accepted a contaminated load of milk only after ignoring four very clear warning signals: 1) the visual indicator on the charm stick; 2) the ten audio beeps emitted by the electronic reader; 3) the visual

display of the test result that remained on the screen until another sample was tested; and 4) the printout identifying a positive test result. Given these many fail-safe steps, Mr. Duxbury's acceptance of the contaminated milk goes beyond mere negligence and constitutes the reckless performance of his work duties.

In sum, while I do not believe that Mr. Duxbury intentionally set out to accept a load of contaminated milk, his actions on January 5, 2013 represent a total and inexplicable failure to perform the most important of his work responsibilities. I do not believe that the Employer is required to excuse this misconduct because it was not preceded by progressive discipline.

The Delay in the Employer's Accusation

The Union contends that the Employer denied Mr. Duxbury due process because of the long delay in making its accusation of misconduct. The Union points out the Mr. Duxbury was not made aware of the alleged testing deficiency until more than three weeks after the incident in question. By that time, the frozen milk sample had been destroyed, and Mr. Duxbury had no means to rebut the Employer's accusation of misconduct. In support of this argument, the Union cites to arbitration decisions that have reduced disciplinary penalties in situations where an employee is not informed of the alleged offense for such a length of time that he is effectively deprived of the opportunity to present a defense. *See, e.g., Ameripolsynpol Co.*, 109 LA 896 (Nicholas 1993).

This argument might have some merit if the Employer had deliberately delayed its accusation of misconduct or if there were any doubt about Mr. Duxbury's responsibility for the testing mistake. In this instance, however, the Employer promptly informed Mr. Duxbury of the claim of misconduct once it became aware of the pertinent facts. In addition, the evidence clearly establishes that Mr. Duxbury was the lab technician tester on duty when the contaminated

milk was accepted. Under these circumstances, considerations of due process do not warrant a reduction in discipline.

Disparate Treatment

The Union claims that the Employer is punishing Mr. Duxbury more severely than it did another employee who engaged in similar conduct. In particular, the Union argues that the Employer did not discharge Mr. Sexton, another employee at the Rochester facility, in spite of the fact that he also violated testing procedures. The Union contends that this disparate treatment negates the Employer's claim that the penalty of discharge is supported by just cause in this instance.

The record establishes that Mr. Sexton, while processing an incoming load of raw milk, observed a positive outcome on the electronic reader test which was followed by a negative confirmatory test. Mr. Sexton, however, failed to run a second confirmatory test as required by the Employer's testing guidelines. As a penalty, the Employer issued a final warning letter, but did not discharge Mr. Sexton. The Union argues that Mr. Sexton's conduct was more egregious than that of Mr. Duxbury in that Mr. Sexton deliberately failed to run a second test, while Mr. Duxbury's actions were not deliberate in nature.

While it is true that both of these employees failed to follow testing protocols, Mr. Sexton's actions did not threaten harm to the consuming public because the sample was retested and found to be negative. Thus, Mr. Sexton's actions did not result in the distribution of contaminated milk to the consuming public. A second distinction alleged by the employer is that the MDA revoked Mr. Duxbury's testing license as a result of the January 5, 2013 incident, while the MDA never revoked Mr. Sexton's license. These distinctions dispel the Union's disparate treatment argument.

Long and Good Work Record

The Union also contends that discharge is too harsh of a penalty in light of Mr. Duxbury's long and satisfactory work record. He has worked for the Employer for 24 years, and he has no record of prior discipline. Given this exemplary work history, the Union argues that it is inequitable to terminate Mr. Duxbury for an initial offense.

This argument is not without some merit. The grievant has a good work record, and termination for a first offense typically is reserved for very serious infractions. But, Mr. Duxbury's infraction in this matter is very severe, and his misconduct goes to the core of his public safety job duties. Mr. Duxbury's job involves the testing of raw milk for the purpose of ensuring that it is safe for human consumption. A dereliction of that duty carries enormous risks to the health of the consuming public and cannot be tolerated.

In sum, the Employer has carried its burden to show that the discharge sanction is supported by just cause.

AWARD

The grievance is denied.

August 28, 2003

Stephen F. Befort
Arbitrator