

ARBITRATION DECISION - AWARD

IN RE

Aggregate Industries
Maple Grove, Minnesota

and

FMCS #05-52059-7

Teamsters Union Local 120

DISPUTE:

J T discharge - Gr. #03-2409.

Arbitrator:
Daniel G. Jacobowski, Esq.
February 28, 2006

BACKGROUND - FACTS

The employer is in the cement and ready mix business with several plants in the Twin City area. The current contract between the parties is for the period from May 1, 2004 through April 30, 2009. The grievant has been a cement truck driver since 1998 at the company Maple Grove plant. This dispute is over his discharge on November 16, 2004 because of his tardies in being late.

The company case. The company notes that attendance timeliness by drivers is important in the mixing and delivery of cement to its customers. Drivers start at various times early each morning and call in the prior evening for their designated start time each day.

In 2004, from April into November, the grievant had a number of excused and unexcused tardies and absences. In particular the company faulted him for his occasions of lateness with resulting progressive disciplines. His admitted problem was oversleeping.

The company record showed the following unexcused occasions. On May 12 he was 30 minutes late. On June 8 he was late. On June 29 he was 1 3/4 hours late and given a verbal warning. On August 12 he was 60 minutes late and given a written warning. On November 1 he was 15 minutes late and given a 3-day suspension. He did not call in on these occasions. Finally, on November 16 he was recorded as 10 minutes late and terminated. He did call in some minutes early that he anticipated he might be late because of traffic congestion.

In addition, the company recorded additional instances when he was excused. On April 29 he was 10 minutes late due to traffic and excused. On July 24 and 26 he was excused for sickness with a prior call in. On August 7 he was excused early to repair his vehicle. On August 26 he was excused for sickness with a prior call in.

In the prior warnings for coming late on June 29 and August 12 he was told that his tardies interfered with customer service during extremely busy periods. In his November 16 termination letter it was cited that the six unexcused late starts combined with the other instances when his absences were excused made his attendance record totally unacceptable.

The company noted its tardy and absenteeism policy, last revised on January 2, 2004 required employees to call in a minimum of one hour in advance of unscheduled absences and provided that employees who failed to report regularly and on time will be subject to a progressive discipline policy of a verbal warning, written warning, three-day suspension, and discharge.

The company noted that it discussed and sought to improve his attendance on each occasion when he was late. The grievant admitted his problem of oversleeping, promised to improve, and did not grieve the prior disciplines. The company also stated that it sent a copy of its last policy revision to the union and received no reply nor protest of it.

The union case. The grievant has three school-age children and lives in North Branch, 44 miles from the plant. He admitted the occasions of his being late from oversleeping noting that the highway to work is

frequently stalled with traffic congestion. After his August 12 discipline, he sought to improve by getting an additional alarm clock and increasing his drive time to work from 1 hour to 1 1/2 hours.

In spite of that, on November 16 when he was scheduled to start work at 8:10 a.m., he experienced unusual heavy traffic and called in on his cell phone some minutes earlier citing the traffic and that he might be late. The manager told him to come in as fast as he could. The grievant explained that as he was stuck in a stall close to his turn off he decided to go off on the right shoulder when he was stopped by a patrol car and held up for some minutes. As a result, he said he arrived 6 minutes late and then went right to work. He explained that his truck was not loaded until 40 minutes later. He then went on his scheduled deliveries and later after his completion and return to the plant he was advised of his discharge.

The grievant could not recall having seen or been shown a copy of the January 2, 2004 revised company policy. The union likewise could not recall being given a copy and could find none in its file. The union noted a prior policy of February 26, 2002 which provided that an occurrence would be more than 10 minutes late from scheduled start time and not calling in within 2 hours of scheduled start time, and that under the discipline sequence provided, a discharge would not occur until 7 occurrences. The union also noted that the company submitted an interim revised policy dated July 29, 2002 which contained some changes, but still provided for a discharge after 7 occurrences, but which the union grieved and the company later withdrew in 2002. According to the union, there were no further revisions submitted and nothing negotiated in the last round of contract negotiations.

The company manager had explained that if an employee calls within an hour it gives the company time to accommodate and revise the drivers and scheduling. After cross exam by the union, the company further explained that with its last policy revision it allowed for more flexibility and gave management more latitude for judgment and allowing some tardiness. The company had also claimed that other drivers complained of the grievant's lateness but did not want their names revealed for fear of trouble.

ARGUMENT

COMPANY: In brief, the company argued the following main points in support of the discharge. 1. The nature of the company business and policy requires employees to be on time or provide adequate call in to avoid interference with customer service and deliveries. 2. The grievant cannot challenge the prior disciplines issued to him for his tardiness. He was given progressive discipline and warnings. He did not grieve them and he was advised that one more tardy would lead to his dismissal. 3. The company had just cause to terminate him for his November 16 tardiness, combined with his prior tardies and discipline. He was aware of the heavy traffic on his route. It is more believable that he simply overslept again. He violated the law when he drove on the shoulder of the highway. The November 16 incident was shortly after the November 1 suspension. The challenge by the union of the policy or its changes has no merit and no impact on the just cause the company did have for his discharge on his tardiness. 4. Respectfully, the discharge had just cause and should be upheld.

UNION: In brief, the union argued the following main points that the discharge lacked just cause. 1. The employer has the burden of proving just cause for the termination. Termination is typically for the most serious offenses. This case does not meet that burden of proof. 2. The company attendance policy is subject to just cause review. The policy was imposed and not negotiated. The application of the company policy is still subject to the just cause, which the contract required. The discharge lumped together his excused and unexcused instances. 3. The company policy was neither effective nor enforceable. It was never provided to the union nor the grievant. The company never provided rebuttal evidence that a copy was given the union. There was no evidence that it was posted nor given to employees as the contract provides. The revised company policy altered the conditions of employment contrary to the maintenance of standards clause in the contract. Its interim revision in 2002 was grieved by the union and then withdrawn. If any policy is to be applicable it would be the earlier policy of February 26, 2002 under which the discharge would not have been justified. 4. The grievant could not have been terminated under the first 2002 policy. At the most he would have been subject to a suspension. That policy referred to being more than 10 minutes late. On November 16 the grievant believed he was 6 minutes late. 5. Under any company policy just cause did not exist for the termination. The termination was unreasonable. The grievant was working hard to correct his prior tardy incidents. 6. Respectfully, the discharge should be revoked and the grievant fully reinstated. Or in the alternative, because the matter was not sufficiently serious to justify discharge, the penalty should be modified.

DISCUSSION - ANALYSIS

In review of this case, I recognize there is considerable merit in the company case for the discharge. He had a definite admitted problem of oversleeping for being late. He was previously warned and disciplined. He was aware of the frequent traffic congestion on the highway route. In particular, his November 16 lateness was only a few days after his return from the prior suspension and due to the patrol car stop when he drove off on the shoulder.

However in spite of this merit in the company case, I feel that the union has a better case of showing a lack of just cause, based on the following factors and reasons.

1. He did show and make improvement after August 12. He stated he bought a loud alarm clock and added a half hour to his drive time. He was not late for several months and far less late in the occasions in November.

2. On the last November 16 instance, he did call 10 to 15 minutes before his start time, and would not have been late but for the patrol car stop. Further, there was no evidence of disruption of customer service and he stated that his truck was not loaded until 40 minutes later. Also, he was allowed to work his full schedule that day to the benefit of the company.

3. The union argued that the last company policy reduced the benefit of the former no-fault policy by its definition of an occurrence and the number of occurrences for a discharge, which it claimed violated the maintenance of standards clause.

4. The company stated that the new policy allowed more latitude and judgment in the application of discipline, but did not show that this was applied to the grievant as such in the prior disciplines other than the number of occurrences. It made no reference to the improvement he had shown from the past.

5. In reviewing the last company tardy and absenteeism policy revision of 2004 from the element of just cause, it presents some confusion and lack of clarity in distinguishing between tardies and absenteeism. The progressive discipline recited, makes no reference to severity or circumstances, which the company stated the revision provided for more latitude and application of judgment. Admittedly, the company has a separate no call - no show policy for failure to show up for work without a 2 hour call in, with a discipline progression of the same as for tardies except for a verbal warning. Traditionally tardies are regarded as less serious than absences or no calls. These considerations detract from the element of just cause in the policy.

6. Another element lacking for just cause is the evidence that there was no showing that the last policy revision was actually furnished to the union, nor advised nor given to employees, nor posted on a bulletin board.

7. In summary, while I find that the November 16 tardiness of the grievant did justify a serious discipline by the company, it fell short of constituting just cause for the final discharge because of the above mitigating factors and considerations.

8. As an appropriate remedy, the company is directed to revoke the discharge and reduce the penalty to a three-day suspension, with full reinstatement and restoration of benefits provided the grievant, with back pay for the lost time less any interim earnings and compensation the grievant may have received in the interim due to the discharge. The arbitrator will retain jurisdiction in the event of any dispute over the implementation of the award.

DECISION - AWARD

DECISION: The discharge lacked just cause and was not justified. The union grievance is sustained.

AWARD: The discharge is to be revoked and reduced to a three-day unpaid suspension penalty, with rights of reinstatement and restoration of benefits to be provided the grievant, including back pay less any interim earnings and compensation the grievant may have received during the discharge time.

Dated: February 28, 2006

Submitted by:

Daniel G. Jacobowski, Esq.
Arbitrator