

BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between

CONAGRA FOODS, INC.

and

**THE BAKERY, CONFECTIONERY,
TOBACCO WORKERS AND GRAIN
MILLERS, INTERNATIONAL UNION
BCTGM – AFL-CIO, CLC, Local No. 13G**

FMCS Case No. 060608-03860-7

Grievant: C. Rehm

Arbitrator: Sharon K. Imes

APPEARANCES:

McGrath North Mullin & Kratz, by **Eric W. Tiritilli**, appearing on behalf of Conagra Foods, Inc.

Metcalf, Kaspari, Howard, Engdahl & Lazarus, PA, by **Robert D. Metcalf**, appearing on behalf of BCTGM and its Local 13G, and the Grievant.

JURISDICTION:

Conagra Foods, Inc., referred to herein as the Company or the Employer, and The Bakery, Confectionary, Tobacco Workers and Grain Millers, International Union, AFL-CIO, CLC and its Local 13G, referred to herein as the Union, are parties to a collective bargaining agreement for a term ending March 31, 2005 and a Supplemental Agreement effective July 1, 2003 to July 1, 2008. The collective bargaining agreement continues in full force and effect from year to year thereafter unless written notice is given by either party in accord with Section XIV of the contract. Under this agreement, the undersigned was jointly selected by the parties to decide a dispute that has occurred between them and appointed by the Federal Mediation and Conciliation Service on August 15, 2006. Hearing in this matter was held on October 3, 2006 and briefs were filed by the parties. Both were received November 3, 2006. The matter is now ready for determination.

STATEMENT OF THE ISSUE:

Did the Company have just cause to discharge the Grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

SECTION VIII – ARBITRATION PROCEDURE

...

64. The arbitrator shall have the authority to act only with respect to grievances relating to the interpretation or application of the provisions of this Master Agreement and any Supplemental Agreement, and his decision shall be final and binding on all parties involved. The arbitrator shall not have authority to amend, change, alter or modify any of the terms of this Master Agreement or any applicable Supplemental Agreement.

...

69. If the Arbitrator shall find that an Employee has been unjustly dismissed, he shall be given an opportunity to return to work. If he also finds that he should be paid for any time lost, such time shall be determined by the Arbitrator.

SECTION X – SUSPENSION AND DISCHARGE

71. Suspension and Discharge. The Company has the right to suspend or discharge any Employee for just cause. Upon written request over the signature of the Employee involved, the Company will notify him in writing of the reason for such suspension or discharge.

72. The Company shall notify the Local Union in writing of the termination of employment of regular Employees covered by this Agreement.

....

OTHER RELEVANT DOCUMENTS:

Operating Policy 16

PLANT RULES, PRACTICES AND PROCEDURES

...

Disciplinary Action

The Company's intent with corrective discipline is to correct unsatisfactory behavior. The Company intends to take whatever steps are necessary to solve problems short of termination, and hopes that termination will never be necessary.

...

Infractions Resulting in Immediate Termination

Infractions of the following rules are considered to warrant immediate termination even on the 1st offense.

...

(3) Violation of Local Out/Tag Out and Try policy such as failure to LOTO equipment or the removal of another person's lock during a LOTO procedure.

....

BACKGROUND AND FACTS:

The Grievant, a six-year employee, at the ConAgra mill that processes wheat and rye into flour in Hastings, Minnesota, worked mostly in the Maintenance Department there. He is classified as Maintenance 1st Rate.

In 2000, the Company hired the DuPont Corporation to conduct a review of its safety program throughout its plants. Following the review, DuPont told the Company that one of its greatest deficiencies was the Company's failure to hold its employees accountable for their own safety. As a result, in October 2003, the Company, on a corporate-wide basis, revised its plant rules to include a section labeled "Infractions Resulting in Immediate Terminations" and unilaterally implemented them. Copies of the revised rules were given to the employees, including the Grievant, and the rules were discussed with him and others in various safety meetings.

On March 6, 2006 the Grievant was working the 7:00 a.m. to 3:00 p.m. shift and early in the day became aware of problems on three machines in the Packing Department, the Department in which he mostly works. He first addressed problems with a palletizer and then went to the 3A Packer, a machine which fills bags with flour and then closes the bag. There, he discovered that the pickup manipulator arm was not working properly; that there was an air problem with the "bag squeezer", and that there was a problem with the bag folder. He proceeded to fix the manipulator arm and the "bag squeezer". When he began to work on the problem with the bag folder he discovered that a cylinder had failed. To repair this problem, the Grievant first went to the second floor where he shut off the air supply and then returned to the packing floor where he locked out the air by the machine and bled out the air. Continuing he turned off the electric power at the emergency stop switch and opened two safety gates to the electric panel which automatically deactivate electricity to the system when open. He neglected, however, to put a lock on the emergency stop switch, a procedure which he is required to do under the lockout/tagout procedures.

While the Grievant was working on this machine, the Maintenance Supervisor came into the area to talk with the Grievant about some earlier work he had performed and observed the Grievant getting out of the machine and going to get a replacement cylinder. When the Grievant returned and started to climb back into the machine, the Maintenance Supervisor noticed that there was no lock on the emergency stop switch and asked the Grievant if he had his lock on.

The Grievant climbed back out of the machine; noted that he had not locked it; went to his toolbox, got a lock and put in on the switch. He then continued to repair the machine. While he was repairing the machine the Maintenance Supervisor talked with him about the earlier work the Grievant had performed and then left. Later that morning, the Maintenance Supervisor met with the Grievant asked him why he had not locked out the stop switch. The Grievant replied that he simply had forgotten.

Later that day, the Maintenance Supervisor discussed the incident with the Plant Safety Director and the Operations Manager. The next morning, the Operations Manager called a meeting attended by the Grievant, the Maintenance Supervisor, the Union President and a Union Steward. At that meeting the Operations Manager reviewed the incident and the Grievant admitted that he had not locked out the electrical switch; that he had been trained in the proper procedures regarding lockout/tagout; that no one had told him to bypass the procedure and that he had forgotten to lock the switch because he had been very busy and was in a rush. At the end of the meeting the Grievant was suspended indefinitely and sent home.

Following that meeting, the Operations Manager discussed the matter with the corporate Human Resources Director at the Company's headquarters in Omaha, Nebraska. In response to this discussion, the Company decided to terminate the Grievant and the Human Resources Director called the Grievant to tell him that he would be terminated. The next day the Company sent the Grievant a letter informing him of its decision.

A grievance contesting this action was filed on March 13, 2006 and was properly processed through the steps outlined in the collective bargaining agreement's grievance procedure. It is this grievance that is the subject of this arbitration.

ARGUMENTS OF THE PARTIES:

The Company asserts that it has just cause to discharge the Grievant since the work rules provide that violation of the lockout/tagout rule will result in immediate termination of employment; since the Grievant is well-aware of that rule, and since the Grievant knowingly violated that rule. It also argues that the Grievant's violation should not be dismissed or mitigated because no injury occurred. And, finally, it maintains that the Grievant's violation of the rule was so serious that progressive discipline is not appropriate. In each instance, it cites arbitration decisions which support its position.

Further, the Company makes two other arguments. First, it declares that the arbitrator should not should “second guess” its decision to terminate the Grievant since it acted in good faith, after a fair investigation and imposed a penalty consistent with the penalty it has imposed in similar cases. And, secondly, it charges that the Union’s “call for ‘extraordinary’ remedies should be rejected.” Stating that the Union seeks a “punitive damages” award, the Company urges that the Arbitrator refuse to award such relief since there is no evidence of egregious bad faith on the Company’s part and since “extraordinary fees or relief of any type are not contemplated by the collective bargaining agreement.”

The Union argues, however, that the Company does not have just cause to discharge the Grievant since the unilaterally-promulgated safety rule is unreasonable and contrary to the contract’s just cause requirement. Further, it asserts that although the Grievant violated the lockout/tagout procedure he did not intentionally disregard the lockout/tagout procedure and his oversight “did not put him or others in harm’s way” because he had locked out the air; because the emergency shutoff switch was turned off and because the two gates to the electrical panel, both of which had cutoff switches, were open, actions which made the machine “effectively inoperable”.

Further, the Union declares that although the Company asserts a “fatal five” violation will result in automatic immediate discharge, the message it has conveyed to its employees since revising Operating Policy 16, as recently as January 2, 2006, is that such violations will result in disciplinary action up to and including termination. It also notes that supervisors don’t always follow the “fatal five” rules and that there are at least three incidents involving supervisors who were not disciplined for similar misconduct. Further, specifically referring to one of the incidents in which the Company decided to not discipline the supervisor because he had not “placed himself or his coworkers in harms [sic] way”, the Union finds “it is especially ironic that the Company would fire (the Grievant). . . after not imposing any discipline on . . . (the supervisor).”

Finally, the Union argues that the Company’s insistence upon automatic termination for “fatal five” violations, despite arbitrators in three separate decisions over a course of less than nine months telling the Company that “its policy of automatic termination without considering all of the circumstances is contrary to its collective bargaining agreements”, manifests “willful, lawless disregard of its Union contracts”. It continues that based upon this fact, the Arbitrator

in this dispute should not only reinstate the grievant with back pay but that she should also impose remedies that would put a stop to future contract violations.

Citing specific comments made *Elkouri and Elkouri, How Arbitration Works*, the Union asserts that injunctive relief is not uncommon in labor arbitrations. Further, relying upon this fact, the Union seeks that the Company be ordered to apply the contractual just cause standard when disciplining employees for violation of Operating Policy 16 and that the Company be directed to notify all employees or the Arbitrator's order in writing. The Union also seeks that this order be made applicable to not just the two Company facilities covered by the Master Agreement but to all Company facilities whose collective bargaining agreement contains provisions requiring just cause for discharge.¹

The Union also seeks exemplary damages and interest on the back pay awarded the Grievant. Noting that arbitrators are often reluctant to award punitive damages and citing arbitration decisions addressing that reluctance, the Union argues that they should be awarded in this instance in order to encourage the Company good faith compliance with the contract's provisions. With respect to awarding interest on any back pay awarded the Grievant, the Union declares this action is necessary in order to make the Grievant whole and to "avoid unjust enrichment to the Company."

DISCUSSION:

In this dispute, the parties ask whether the Employer has just cause to terminate the Grievant for violating a safety work rule which states any infraction will result in immediate termination, a unilateral revision made by the Employer in October 2003. If the question were solely whether the Grievant violated the safety work rule it would be concluded that the Employer did have just cause to terminate the Grievant since violation of a reasonable "zero tolerance" safety work rule is frequently just cause for discharge.² Violation of this work rule (the lockout/tagout rule) is not the sole question, however. Instead, the Union challenges whether the Grievant may be terminated under a "zero tolerance" work rule that was unilaterally implemented and which ignores the just cause standard contained in Section X of the collective bargaining agreement which states that no employee may be disciplined or discharged without

¹ The Union excludes this remedy in facilities where the union may have agreed to the Company's automatic termination provision.

² In this instance, it is undisputed that the Employer altered the discipline for this work rule along with four other work rules in an effort to improve plant safety and to create employee accountability for their own safety. It is also undisputed that the Grievant knew the work rule and that he did violate it.

just cause. Consequently, two questions must be answered, first, whether violation of the “zero tolerance” work rule is just cause for termination, and secondly, if not, did the Employer have just cause under Section X of the collective bargaining agreement to terminate the Grievant. After reviewing the record, it is determined that violation of the “zero tolerance” safety work rule is not just cause to terminate the Grievant since it ignores the just cause standard contained in Section X of the collective bargaining agreement and that under the just cause standard agreed upon in Section X of the collective bargaining agreement, the Employer did not have just cause to terminate the Grievant.

While it is generally accepted that employers have the right to unilaterally adopt and enforce work rules, it does not mean that any rule so implemented is not subject to challenge under the grievance procedure. The grounds for such challenge may be that the rule violates particular contract provisions or that it is unreasonable, arbitrary or discriminatory. Further, although a union may challenge the rule at the time it is implemented, many arbitrators, including this one, have concluded that a union does not waive its right to contest a work rule if it has stated its objection to the rule and waits until the rule has been applied or enforced.³

In this instance, when management revised its plant rules and stated immediate termination would result for any violation of five rules that specifically relate to plant safety the Union objected to these rules declaring that they were not consistent with the progressive discipline procedure in place but it did not grieve the reasonableness of these rules at that time. Since these rules have been implemented, management has immediately terminated at least four employees, including the Grievant. In each instance, the Union has challenged management’s action contending that the unilateral change in the discipline to be imposed for violation of those work rules ignored the just cause provision in the respective collective bargaining agreement. Three of those challenges have been decided by arbitrators who concluded that the plant rule ignored the just cause standard called for in the collective bargaining agreement. That same finding is made here.

Section X of the collective bargaining agreement specifically limits management’s right to suspend or discharge an employee to a finding of just cause. Consequently, although the Employer does have work rules which, if violated, constitute probable cause for termination, it may not unilaterally implement a work rule that calls for immediate termination of an employee

³ See Elkouri and Elkouri, *How Arbitration Works*, The Bureau of National Affairs, Inc., Washington, DC, 2003, p. 767-68.

without having bargained with the union to implement such a change since it has already agreed that an employee may not be terminated except for just cause. This finding does not mean that the rule may not be reasonable and that termination for violation of the rule may be appropriate. What it does mean is that such action may not be taken unless the Employer has determined not only that the Grievant knew of the rule and violated it, but that the degree of discipline imposed is consistent with the seriousness of the violation; that its decision to terminate the Grievant was not arbitrary or discriminatory, and that there are no other mitigating circumstances to be considered. In other words, that it has met the just cause standard agreed upon in Section X of the collective bargaining agreement.

In this instance, although the Grievant admits he knew the rule and that he violated it, the record shows that the Employer failed to establish that the Grievant's failure to lockout the 3A Packer was such a serious safety violation that discharge was the appropriate disciplinary action. The record also shows that the Employer acted disparately when it decided to terminate the Grievant solely for violating the rule.

During the hearing, the Grievant testified that he did take some safety steps before he began working on the 3A Packer.⁴ Not only was his testimony not disputed but the Employer failed to provide any evidence that Grievant's actions, although not in compliance with the required procedure, could result in harm to the Grievant or to another employee and, therefore, was cause for discipline. Further, although the Employer argues that any infraction of the rule requires immediate termination, its own actions following the incident indicate otherwise. The record establishes that while the Grievant's supervisor observed the violation he took no action other than to advise the Grievant to lock the machine. The supervisor then went on to discuss the status of other work. Given this reaction, it is hard to believe that the supervisor found the Grievant's actions so egregious that immediate termination was warranted.

The Employer's actions later in the day also raise a question as to whether it consistently terminates employees for violating this work rule. When the Grievant was finally questioned about his actions later in the day, the Grievant was not told that he would be terminated for violating the work rule but was told that the incident would be reported. Management's conduct at that time, together with his immediate supervisor's action at the time of the offense, hardly indicates the Employer consistently terminates employees for any violation of this work rule.

This finding is further supported by the fact that several witnesses testified to similar infractions by other employees and by supervisors where neither was disciplined for the infractions and, again, their testimony was unrefuted. It is also supported by a memo prepared by management dated April 27, 2006, submitted as evidence by the Union, objected to by the Employer and admitted by the Arbitrator, that states that plant management had decided not to terminate an employee for violating one of the “fatal five” rules because there was no “evidence” that the employee had “placed himself or his coworkers in harms (sic) way.” Based upon this evidence it must be concluded that the Employer has not treated all of its employees who have violated this rule in the same manner.

Also, during the hearing, the Employer attempted to argue that the Grievant’s past employment record was reason to sustain its action. As support for its argument, it submitted five documents issued between September 2000 and March 2004, admitted over the Union’s objection.⁵ Aside from the fact that nearly three years transpired between the time the Grievant received a written warning for failing to lockout/tagout, there is no evidence in the record that the Employer relied upon any of these disciplinary actions when it decided to terminate the Grievant. Absent any Employer consideration of this record at the time it decided to terminate the Grievant, it would be inappropriate for the Arbitrator to now give weight to those documents when deciding whether the Employer’s decision to terminate the Grievant was reasonable.

Consequently, based upon the record, the arguments and the above discussion, it is concluded that the Employer did not have just cause to terminate the Grievant for violating the lockout/tagout safety work rule. Before issuing the award, however, the question of remedy must be addressed since the Union seeks exemplary damages and interest on any back pay awarded.

As the Union noted in its brief, although arbitrators generally do not award exemplary damages, they have the authority to do so and have, in fact, done so at times. This dispute does not fall within the purview of those cases which demand such extraordinary relief. While the Union cites the fact that this is the fourth arbitration, albeit in different locations, to address the

⁴ The Grievant stated that prior to beginning work on the packer he went to the second floor and shut off the air supply; that he locked out the air by the machine on the packing floor and bled out the air, and that he turned off the electric power at the emergency stop switch.

⁵ Two of the memos were issued in 2000, one of which was a verbal warning for the Grievant’s failure to have his fall protection on. One memo, also a verbal warning for failure to clean a work area of oil, was issued in 2002. One memo, a written warning for failure to follow lockout/tagout procedures, was issued in July 2003 and the last memo, also a written warning, was issued in March 2004 for unsatisfactory workmanship.

same issue and argues that damages should be awarded to prevent the Employer from ignoring the arbitrators' finding in each case and continuing to knowingly breach the contract, the record does not yet establish that the Employer is willfully and intentionally ignoring the arbitrator findings. If the issue in arbitration was whether the work rule and its penalty were reasonable rather than does the Employer have just cause to terminate an employee for violating the work rule, there might be cause for some concern regarding the Employer's actions. That is not the issue, however. Therefore, it is inappropriate to conclude that exemplary damages should be awarded.

There is also no reason to award interest on back pay in this dispute. Not only does the contract not provide for the award of interest on back pay, there is no evidence of unnecessary delay in processing this grievance or other egregious wrongdoing on the Employer's part.

Accordingly, the following award is issued.

AWARD

The grievance is sustained and the Employer is ordered to reinstate the Grievant with full back pay and benefits, less any interim earnings, to the date of his reinstatement. The Arbitrator shall retain jurisdiction over implementation of the remedy.

By: _____
Sharon K. Imes, Arbitrator

January 12, 2007
SKI