BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS, LOCAL NO. 43

and

SOUTHPORT LUMBER AND SUPPLY COMPANY

Case 1
No. 43542
A-4585

Appearances:

Mr. John J. Brennan, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, appearing on behalf of the Union.

Mr. James S. Clay, Lindner & Marsack, S.C., Attorneys at Law, appearing on behalf of the Company.

ARBITRATION AWARD

The Union and the Employer named above are parties to a 1989-1990 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The Union made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the grievance of Craig Erickson. The undersigned was appointed and held a hearing on March 8, 1990, in Kenosha, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript of the hearing was made, both parties filed briefs and the record was closed on April 9, 1990.

ISSUE

The parties were unable to agree to the framing of the issue and agreed that the Arbitrator should frame the issue. I frame the issue as follows:

> Did the Company have just cause under Article XXIII of the collective bargaining agreement to discharge the Grievant, Craig Erickson? If not, what is the remedy?

CONTRACT PROVISION

ARTICLE XXIII - DISCIPLINE AND DISCHARGE

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Section 4. Discipline may take the form of oral reprimands, written warnings, demotions, suspensions or discharge from employment and will normally be progressive in nature. The following guidelines shall be followed:

a. Every type of disciplinary action taken against an employee shall be for just cause and administered in a fair and impartial manner.

b. In determining the penalty to be imposed, the Company shall consider the severity and gravity of the offense and the employee's work record, including length of service and disciplinary records.

c. In imposing discipline, the Company will not take into account any prior infraction which occurred more than three (3) years previously without intervening disciplinary action. After a written warning has been on file for nine (9) months without any intervening disciplinary action, it will be removed from the employee's employment record.

d. Disciplinary action must be based upon the preponderence of the evidence.

e. For each disciplinary action,

> excluding discharge, the Company will indicate the desired correctional action(s) for the employee to take.
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> Section 6. Any employee who receives a written warning or is demoted, suspended or discharged shall receive a written statement of the reasons for the disciplinary action, a copy of which shall be placed in his/her personnel file and sent to the Union by certified mail.

BACKGROUND

The Company operates a lumber yard and supply business at two locations in Kenosha, Wisconsin. Grievant Craig Erickson started working for the Company about five years ago. In November of 1987, Erickson was discharged for excessive absenteeism, but after he committed himself to treatment at a center for alcohol and substance abuse, the discharge was converted to a leave of absence. Company accountant Douglas Hansen testified that Erickson was rehired with a final warning. Erickson testified that he was not told that his reinstatement was a "last chance" or that it was tied to his not drinking alcohol.

This case concerns Erickson's discharge for an incident that occurred on December 29, 1989. 1/ The Grievant normally worked in the yard and sales, putting lumber away, loading and unloading trucks and driving a fork lift. On December 28, he worked in the mill shop cutting up sheets of plywood for customers for about four or five hours.

When Erickson punched in the next day, his right index finger was infected from slivers received the previous day while working in the mill shop. While removing a sliver out of his thumb, he punctured his finger. Hansen saw Erickson in the break room about 7:00 a.m., and saw that his finger was very infected. Erickson told Hansen that he was going to the hospital that morning, and Hansen agreed that he should go.

Erickson stayed on the job for about one hour or more to help get a large delivery out. He checked the paper work on the delivery but did not perform manual work. He stopped to see Hansen again before going to the hospital and then went to the hospital's emergency room. A doctor treated the infected finger by first numbing it and then cutting and scraping it. The doctor ordered the puncture wound to be X-rayed. Nurses bandaged the finger, and Erickson was given antibiotics to take. When he left the hospital about 10:30 a.m. he was given a form called "Emergency Admission Record" but not a document called "Emergency Treatment Report," which is a form used as a release for work. According to Erickson, the treating physician told him not to return to work. The Emergency Admission Record was not filled out in the area that designates "work" or "no work."

1/ All dates are for the year 1989 unless otherwise noted.

Erickson testified that he did not intend to return to work, but he did not call in to tell anyone that he would not be returning. He went home, laid down, and slept for awhile. About 2:00 p.m., he drove his van to a tavern owned by his future father-in-law. The tavern is located between two different work sites of the Company. Erickson had no sick leave left for the year and testified that he did not intend to be paid for the whole day.

Around 2:30 p.m., a Union steward asked General Manager, James Gourley if he knew where the Grievant was. Gourley knew that Erickson had been excused to go to the hospital and called the emergency room admissions, which told him that Erickson had been released. Gourley told the Union steward that he was going to the other shop and would see if Erickson was at the tavern where he often spent time.

Gourley saw Erickson's van parked by the tavern, went in, saw him drinking beer, told him that he was still punched in and then left. Erickson followed him out of the tavern to tell him that with his injury, he was unable to work. Gourley told Erickson that he was disappointed in him. Gourley did not tell him directly that he was going to discharge him, but Erickson found out later from a foreman and the Union steward that Gourley planned to discharge him.

On January 2, 1990, Erickson and the Union steward came to Gourley and Erickson wanted to know if he was fired. Gourley told him he was. Erickson said he did not feel that it was justified, but did not offer any explanation about not calling in on December 29, or not returning to work or being in the tavern. Gourley based his decision to discharge Erickson mainly on the fact that Erickson was punched in on the time clock and found in a tavern during working hours, which is a strict violation of Company policy. The 1987 incident played no part in Gourley's decision to discharge Erickson, as Gourley was not with the Company at that time and was not aware of it until after he discharged him this time.

The Union filed a grievance on January 4, 1990. When Gourley received it, he reconsidered his decision but adhered to it, based on Erickson's conduct on December 29, as well as the fact that Erickson could not drive a truck for the Company any longer due to his driving record. The Company's insurance carrier had notified the Company within the past year that due to a number of violations, Erickson was considered uninsurable by it. No disciplinary action was taken, although Gourley considered Erickson's loss of driving privileges to be a type of discipline. Erickson continued to do other work at the same rate of pay, as required by the contract.

The parties agreed that there is no procedural question before the Arbitrator.

THE PARTIES' POSITIONS

The Employer:

The Employer argues that Erickson made more than a mere error in judgment in not reporting his whereabouts after leaving the hospital. The Employer contends that there was a violation of a known work rule and that Erickson attempted to use treatment for a work-related injury as a method of receiving compensation for time not worked.

The Employer points out that Erickson performed work before going to the hospital and could have made himself available for light duty later, especially where his right hand was injured and he is naturally left handed. The Emergency Admission Record was not completed in the area pertaining to whether Erickson could work or not, and the Employer concludes that there was no restriction upon his return to work.

Article XXIII allows the Company to look at an employe's work record and length of service in determining the penalty to be imposed. Due to the previous discharge in 1987, the Employer asserts that Erickson's length of service is two years rather than five and it is relevant to consider the discharge and subsequent rehire in determining the penalty imposed.

The Employer also submits that Erickson's work record includes his driving record, which made him a less valuable employe due to reducing the Company's flexibility in work assignments. While the Company took no action against him upon learning of his uninsurability, the Company should not be penalized for that now, where the Company tolerated the situation until he failed to report his whereabouts and was found drinking beer while still on the clock and being paid.

Company rules prohibit drinking alcohol during working hours and the Union does not contend that Erickson lacked knowledge of this rule or that the rule was unreasonable. The question is whether the enforcement of the rule is

unreasonable.

The Employer further contends that Erickson is guilty of fraud, dishonesty and falsification of Company records. If Erickson had a medical excuse from work, the Employer would have honored it, and there is no reason for him not to report his whereabouts if he had such an excuse. The Employer believes that upon being released from the hospital on a cold and rainy day, Erickson decided not to go back to work. He had no paid sick leave or vacation time left and could only be paid for December 29 by remaining on the time clock for the full day. The Employer believes that he bet his job that he would not get caught, and he lost when Gourley discovered him in the tavern.

The Employer requests that the Arbitrator find that the rule precluding consumption of alcohol on work time is reasonable; that the Grievant knew of the rule and violated it; that the Grievant embarked on a course of conduct intended to result in being compensated for December 29; that the Grievant's conduct violated the Company's policies and procedures as well as the labor contract; and that these infractions warrant discharge. In the alternative, the Employer request that the Arbitrator find that the Grievant's length of service was two years rather than five; that his driving record impacted upon his employment status; that it was proper for the Company to consider that record in determining disciplinary action; and that the grievance be dismissed.

The Union:

The Union believes that the discharge is an overly harsh penalty for an admitted mistake in judgment, and that to sustain the discharge would be to permit punitive as opposed to corrective discipline. The Union asserts that the Employer has failed to carry its burden of proof of wrong doing and the burden to prove that the punishment fit the crime. The Employer proved one thing that is the basis for some type of discipline -- that Erickson failed to call or report to the Employer after he left the hospital, but this is not a dis-chargeable offense where he had a clean work record for two and a half years. The Union asserts that the Employer acted in haste, used poor judgment and refused to weigh all the facts. The Employer never asked Erickson to explain his side of the story.

The Union contends that it was inexcusable for Gourley to consider Erickson's driving record when determining the penalty, as there is no qualification of having a good driving record in order to work at the lumber yard.

The Union asserts that the Company failed to show bad faith or ill intent on the part of the Grievant. Erickson made no attempt to hide the fact that he was at the tavern. There is no support for the inference that he was trying to get paid for not working -- he knew he would be missed as this is not a large shop, the accountant was aware that he left, and the emergency treatment form would show when he was released.

The Company did not meet its burden in proving that Erickson was released for work, according to the Union. Employer Ex. #3 is not marked either released for work or not released and does not enlighten the Arbitrator one way or the other.

The Union is unclear about whether the Company is claiming that the Grievant was dishonest or trying to defraud the Company on sick leave, as the Company never issued a written letter of discharge outlining the reasons in accordance with Article XXIII, Section 6.

In conclusion, the Union asserts that there was no just cause for discharge and requests that the Grievant be reinstated and made whole.

DISCUSSION

Article XXIII and Article XIII of the contract call for the burden of proof involving discipline to be by a preponderance of the evidence. The preponderance of the evidence in this case shows that Erickson's main mistake is that which is already admitted -- that he failed to call in to report his whereabouts after he left the hospital emergency room.

Erickson left the Employer's premises with a work-related injury, with the Employer's knowledge of his condition, and with the Employer's permission to go to the hospital. While the Employer was entitled to know his status once he left the hospital, the facts fall short of proving the Employer's contentions that he was later discovered drinking on duty in violation of Company policy or that he intended to defraud the Company of a day's pay.

While the Company has a reasonable rule prohibiting consumption of alcohol on work time and Erickson knew of that rule, he could not be considered "on duty" at the time that Gourley found him drinking in the tavern. When Gourley called the hospital, he was told that Erickson had been released. However, he testified that he did not recall if he was told that Erickson was released to go back to work. Erickson testified that Gourley told him outside of the tavern on December 29 that the hospital had said that he was released for work. Erickson also testified that the doctor treating him told him not to return to work on that day, as he was to go home and take some medication. The Emergency Admissions Record (Employer Ex. #3) fails to show one way or the other whether Erickson was released for work. Therefore, the evidence must stand on Erickson's statement that he was not released for work, as the Employer has no evidence to the contrary.

Erickson admitted that he had no excuse for failing to call in to report his whereabouts on December 29. He had used up his sick leave and vacation time and would have had no way to get paid for the remaining portion of the day of December 29th once he left the hospital. While the Employer would have the Arbitrator believe that Erickson embarked on a course of conduct intended to result in his being paid for the whole day, the evidence fails to support this assertion. Erickson went to a tavern that he frequented, he parked his van in front of it, the tavern was in a location between two work sites of the Company. This is not the course of conduct that leads one to believe that he was in hiding for the afternoon. Gourley or anyone from the Company could have easily spotted him.

Moreover, if Erickson intended to be paid for the whole day, the only way to accomplish that was to have the Employer believe that he spent the rest of the day at the hospital. The Emergency Admission Record, given to him when he left the hospital, noted the time of release as 10:30 a.m. Even this Grievant -- who was not thinking very clearly on December 29th -- could not have believed that the Employer would assume he was at the emergency room all day with an infected finger.

The Employer failed to make a fair investigation of the incident before discharging Erickson. Gourley never asked him to explain his conduct or make further inquiries of the hospital to determine whether he could have reasonably been expected to return to work on December 29th. Instead, Gourley made the assumption that Erickson should have been considered to be on duty, despite his knowledge that he left work with a work-related injury and with Hansen's permission. An employer who disciplines an employe without making a fair investigation runs the risk of having that discipline overturned if the information that the employer relied upon cannot later be proven.

Additionally, the Employer has not complied with the terms of the contract -- specifically Article XXIII, Section 6 -- by not providing Erickson and the Union with a statement of the reasons for the discharge. It is important that the Employer follow the terms of the contract. In cases of disciplinary action that fall short of discharge, the contractual provision is intended to put employees on clear notice of what they are doing that is unacceptable and what the consequences would be if such behavior continued. Such a contractual requirement is not only a matter of fair play to employees -- it also protects the Employer when taking subsequent action against employees by having a written record of prior conduct. In discharge cases, an employee who has lost his job is certainly entitled to know the reasons for such serious action, and it is the Employer's obligation to provide the reasons. The

Employer's decision must withstand the test of just cause, and when the Employer does not state the reasons for the discharge, neither the discharged employee nor the Union can readily determine whether there was just cause for the discharge. Finally, the Employer needs to follow Article XXIII, Section 6, in the event that in some future case -- and I stress that this is not the case here -- it's disciplinary decision could be overturned on a procedural ground.

While the Arbitrator does not condone Erickson's conduct in failing to notify the Company of his whereabouts, the punishment must match the offense. The punishment of discharge does not match Erickson's offense of failing to notify the Employer that he was not coming back to work.

The Employer asks that the Arbitrator find that Erickson's length of service was two years rather than five years due to the 1987 discharge and reinstatement. It was the Company that converted the 1987 discharge into a leave of absence and it should treat it as such now. However, Erickson's length of service has no real bearing on this case, as there is no link between the 1987 incident and the 1989 discharge. Gourley did not rely on Erickson's record in this instance -- he did not even know of it until after he discharged him. Likewise, Erickson's driving record has no bearing on the disposition of this case, as there is no link between his driving record and his failure to report his whereabouts on December 29th. Implicit in all this, of course, is the fact that Erickson has had some problems in the past with alcohol, and that due to those problems and the fact that he was found drinking beer in a tavern during a time when he did not report his status to his Employer justifies the Company's decision to discharge him now. However, there is no evidence that Erickson was reinstated in 1988 with the condition that he never drink off duty. In fact, Erickson attended a Christmas party after he was reinstated where he drank alcohol and sat at the same table as a manager. The fact that Erickson was uninsurable by the Company's insurance carrier may have made him a less valuable employe with less flexibility in assignments, but this is unrelated to his conduct that resulted in the discharge.

Therefore, I find that the Employer did not have just cause under the contract to discharge Erickson. To rectify Erickson's wrongful discharge, the Employer shall immediately expunge all references to his discharge from his personnel file and it shall immediately offer to reinstate him to his former or substantially equivalent position and make him whole by paying him a sum of money, including all benefits, that he otherwise would have earned from the time of his termination to the present, less any amount of money that he earned elsewhere.

To resolve any disputes which may arise over the application of this Award, I shall retain jurisdiction for thirty (30) days from the date of this Award.

In the light of the foregoing, it is my

AWARD

1. That the Employer did not have just cause under Article XXIII of the collective bargaining agreement to discharge the Grievant, Craig Erickson.

2. That as a remedy, the Employer shall undertake the remedial action noted above.

3. That I shall retain jurisdiction over this matter for thirty (30) days from the date of this Award.

Dated at Madison, Wisconsin this 8th day of May, 1990.

By ____________________________________

Karen J. Mawhinney, Arbitrator