

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 HOTEL EMPLOYEES AND RESTAURANT : Case 1
 EMPLOYEES, LOCAL 122 : No. 50827
 : A-5208
 and :
 :
 THE GRAND MILWAUKEE HOTEL :
 :

Appearances:

Mr. John S. Pena, Assistant General Manager, The Grand Milwaukee Hotel,
 appearing on behalf of the Company.
Mr. Jerry Koskoski, International Organizer, Hotel Employees and
 Restaurant Employees International Union, AFL-CIO, appearing on
 behalf of Local 122.

ARBITRATION AWARD

On April 18, 1994, Hotel Employees and Restaurant Employees, Local 122, hereinafter Union, and the Grand Milwaukee Hotel, hereinafter Hotel or Employer, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to act as arbitrator in a dispute over the discharge of a Hotel employe. A hearing in the matter was held on June 29, 1994, at which time the parties were afforded an opportunity to present documentary evidence and testimony relevant to the dispute. A stenographic transcript of the proceeding was not taken and the parties made oral arguments to the arbitrator at the conclusion of the hearing.

ISSUE:

Did the Employer have just cause to discharge the grievant JC for failing to report for work, as scheduled, on Sunday, March 13, 1994? If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

ARTICLE V
SENIORITY AND LAYOFF

. . .

Section 4. An employee's employment and seniority shall be terminated automatically:

- (a) By discharge for just cause:

ARTICLE VIII
HOURS OF WORK

. . .

Section 9. The Employer agrees to provide an answering machine with time-recording capability, or some other verifiable method, to record calls from

employees who are notifying the Employer that they cannot make it to work on a given day. The Employer also agrees to notify housekeeping employees by 12 o'clock noon of any changes in their respective work schedules for a given day. No prior notice need be given in cases beyond the Employer's control. The Employer also agrees that the work schedule shall be posted by 4:00 P.M. on Thursdays for the following week.

. . .

ARTICLE XVII
MANAGEMENT RIGHTS

This Agreement is not intended to interfere with, abridge or limit the Company's right to manage its Hotel in order to operate its business, and except as limited or restricted by the provisions of this Agreement, the Company reserves and retains all management rights, prerogatives and privileges to operate and manage the business, including: the right to plan, direct, control, increase or decrease the operations; the right to determine whether the operations or any part thereof continues; the right to determine the price of its product or services, the sales methods, the volumes of sales and the methods of production and financing; the right to determine the products to be sold and the services to be rendered, including their quantity and quality; the right to establish, modify, rescind or change, and the right to enforce reasonable safety and other reasonable work rules for the conduct of Hotel operations; the right to determine the need for administration of reasonable physical examinations; the right to determine the qualifications for, and make the selection of, its managerial and supervisory forces; the right to purchase products, materials and parts from any source, including the right to determine the purchase price of all such purchases; the right to determine the selection, retention or substitution of any vending service; the right to determine the number of employees who shall be employed at any one time; the right to determine when overtime shall be worked; the right to hire employees and to layoff employees because of lack of work or other legitimate reasons; and the right to discipline or discharge employees for just cause. The rights of management will not be used to discriminate against any employee because of membership in the Union or for any other statutorily protected reason.

BACKGROUND:

This grievance contests the discharge of JC, an employee of the Milwaukee Grand Hotel. JC had been employed by the Hotel for approximately six years as a wait staff employee working the night shift in Harold's Restaurant. 1/ On

1/ Unless indicated otherwise, all dates referred to herein are 1994 dates.

Thursday, March 9, JC's supervisor, Restaurant Manager Randy Pluta, advised him prior to actually posting the work schedule that he would be scheduled to work on Sunday, March 13. JC responded to Pluta that he would not be available to work any more Sundays because it conflicted with his other job as an apartment complex manager. Pluta responded that if JC could arrange for someone else to work for him that would be okay, but otherwise the only accommodation that he could make for JC, because of the contractual seniority requirements concerning scheduling employes to work on Sundays, was to change his start time to 5:30 p.m. instead of the normal 3:30 p.m. start time. 2/ He also told JC that, if necessary, he could even move the starting time back to 6 o'clock.

Pluta had determined that it was necessary to have JC work on Sunday based upon the number of reservations already received by Thursday for Sunday evening. By Sunday, the restaurant was 89 percent booked, meaning that it would be a busy evening.

Subsequent to his conversation with JC, Pluta posted the work schedule with the grievant being scheduled for work Sunday evening March 13. On Friday, March 11, the grievant spoke with the Assistant General Manager for the Hotel, John Pena, and told him that he would no longer be able to work on Sundays, because it conflicted with his other employment; and that he was scheduled to work the coming Sunday, March 13, but that he would not be able to do so. He further told Pena that it was his understanding that there was an agreement between the Union and the Employer that senior wait staff employes could be scheduled on a rotating basis to work Sundays. Pena stated that he was not aware of such an agreement, but that he would attempt to arrange a meeting with the Union to iron out any differences in this regard.

After speaking with Pena, the grievant called the Union offices and spoke with Union Business Agent M. Gallo. JC asked M. Gallo to call the Employer and tell them that his Supervisor, Randy, was up to his old tricks by scheduling him to work on Sundays and that he would not be able to work because of a conflict with his other employment. M. Gallo called Human Resources Director, Reed, and advised her that the grievant was scheduled to work Sunday, and the grievant had

2/ Pluta could not schedule less senior wait staff employe Jill to work that Sunday because she was off work on vacation.

called him and explained that he would not be able to work because of a conflict with his other job. Reed told Union Representative M. Gallo that if JC had a scheduling problem he should contact her directly and discuss the matter.

The next day, Saturday, the grievant went back to Pena and asked if a meeting with the Union had been set up regarding his scheduling problem. Pena stated that he was not able to talk with any Union representative on the weekend, but that he would call Monday and try and schedule a meeting for that day. The grievant advised Pena that he was not available to meet on Monday, but that he would be available on Tuesday. Pena told the grievant that he would talk with the Union and try to set up a meeting for Tuesday.

At no time after either meeting with the grievant did Pena believe that the grievant would not be reporting to work on Sunday. However, on Sunday, at approximately 4:30 p.m., the grievant called Harold's Restaurant and asked to speak with Pluta. Because Pluta was not working on Sunday and the assistant manager had not yet reported to work, the grievant spoke with wait staff employe Anita. He told her that he had too much work at his other job and that he would not be coming into work that day, Sunday, March 13. JC had no other contact with the Hotel on Sunday and did not call and leave any message on the answering machine which was the prescribed thing to do. The grievant did not report for work on Sunday, March 13.

On Monday, March 14, Reed became aware of the fact that the grievant did not report for work on Sunday. She then pulled his time card so that he would have to come in and speak with her about that matter. The grievant reported to Reed's office and she inquired about his not reporting to work on Sunday. He told her that he had worked three Sundays in February and his other employer told him his work suffered as a result. He then told Reed he could not work any Sundays in the future. After hearing the grievant out, Reed suspended him pending her further investigation.

Reed then talked with Pena and others, and determined that there was no basis for excusing the grievant's failure to report to work that Sunday. Reed stated that because the grievant's last disciplinary action was a suspension, he was at the discharge step of the progressive disciplinary procedure, and therefore termination was the appropriate penalty in this case. Thus, on Wednesday, March 16, the grievant was advised that his employment with the Hotel had been terminated for his failure to report to work on Sunday, March 13.

The Union contends that the grievant was unjustly discharged for not reporting, as scheduled, for work on Sunday, March 13. He attempted on March 11, 12 and 13 to tell the Employer he had a scheduling conflict, and even called the Union on March 11. The Union called the Employer over its concern for coverage in the restaurant. Based upon these conversations, the grievant did not report for work on Sunday the 13th, but he had done all he could on March 10, 11 and 12 to advise the Employer of his scheduling conflict.

The Union was not aware until the hearing that the Employer restaurant manager had made an attempt to accommodate the grievant's schedule on Sunday the 13th by moving his starting time back to 5:30 p.m.

The grievant, while being aware of the Employer's policies and procedures, believes however that they have not been applied equally to every employe. Furthermore, there is nothing in the record indicating the grievant had a prior disciplinary history that would support discharge in this case.

Lastly, the Union argues that the collective bargaining agreement does

not require that an employe be discharged merely because he/she is also employed at a second job in addition to his employment at The Grand Milwaukee Hotel. The Union, therefore, believes the grievant's discharge should be overturned and he should be reinstated and made whole.

The Employer contends that it had just cause to terminate the grievant in this case because the grievant refused to work on Sunday, March 13. This refusal also amounted to insubordination. Because the grievant was at the last step of the progressive discipline procedure he was terminated.

The Employer argues the grievant knew that his request not to work on Sunday had been rejected and he was also aware that Pluta had accommodated him as much as possible to allow him to finish his other job. Yet, JC still called the restaurant and said he would not be in to work because he had to work at his other job.

The Employer insists that the collective bargaining agreement does not require it to honor every request to be excused from work. In this case he was never given permission to be absent from work on Sunday the 13th. Thus, his failure to work his scheduled shift coupled with his prior disciplinary record justified the decision to discharge. Therefore, the Employer asks that the grievance be denied.

DISCUSSION:

One of the most widely recognized and accepted rules of the work world is "obey now and grieve later." Arbitrator McKenna in Crossroads Press, 72 LA 1015 (1979), explained the rule as follows:

A plant is not a debating society but a production unit. The "obey now and grieve later" principle is founded upon the idea that, if production is stopped, or reduced, every time a dispute arises, everyone suffers. Therefore, a mechanism is provided for the specific purpose of resolving disputes without interrupting production. The usual mechanism is a grievance procedure and binding arbitration. With only a few exceptions . . . the "obey now and grieve later" principle applies whenever an employee is (1) faced with an order he believes to be unfair or in violation of the labor contract and (2) has at his disposal a grievance procedure terminating in binding arbitration.

Also, in Ford Motor Co., Opinion A-116 (1944), Arbitrator Shulman wrote:

The employee . . . must . . . normally obey the order, even though he thinks it improper. His remedy is prescribed in the grievance procedure. He may not take it on himself to disobey.

The grievant in this case, either decided his other job was so important he was willing to risk losing his Hotel job or he took a calculated risk that nothing adverse would result from his failure to report for work on Sunday. What is unfortunate is that the grievant conscientiously attempted to change his schedule to avoid the conflict with his other employment. First, he talked

with his supervisor who was responsible for making up the weekly schedule. While the supervisor would not allow him that Sunday off he did agree to move his starting time back two hours. Also, the only wait staff employe less senior than the grievant was off on vacation that Sunday so the supervisor could not substitute her for the grievant. The next day he spoke to the Assistant General Manager, Pena, in an attempt to get his schedule changed. After his meeting with Pena he spoke with the Union business agent. Notwithstanding these efforts the grievant was unable to get his schedule changed prior to Sunday.

As is obvious from the previously quoted discussions of the "work now grieve later" rule, at that point the grievant's only acceptable choice was to report for work on Sunday. When he failed to do so he subjected himself to the possibility that the Employer would take disciplinary action against him, which it did. Clearly, every employer must be able to schedule employes to work and reasonably rely upon them to report as scheduled. When that does not occur, the consequences can be severe for the employer and that is why employes subjecting employers to these consequences are usually disciplined.

The next question is whether the grievant's failure to come in to work on Sunday is excusable. On the following Monday, when Reed asked him to explain his absence on Sunday, the grievant told her that he had worked three Sundays in February and his other employer had told him that his work suffered as a consequence. Therefore, he could not work that Sunday. JC testified that he did not receive written or verbal permission from anyone to be absent from work on Sunday. Thus, the only reason he did not report was because of the conflict with his other job, and the Employer had already told him that was not sufficient reason to excuse him from work on Sunday. Even if there was an agreement between the Employer and the Union that did not appear in the contract, but allowed the Employer to rotate Sunday work among the most senior employes, the grievant had to work Sunday as scheduled because that agreement could not be confirmed with the Union before the following Tuesday meeting. Consequently, his absence on Sunday was inexcusable, and thus subjected him to possible disciplinary action.

The only remaining issue is whether discharge was an appropriate disciplinary response in this case. The Union argues that the Employer has not applied its discipline policy in a consistent manner to all employes. It contends employes committing similar offenses have not been discharged, and therefore the grievant should not have been discharged in this case. Several disciplinary action notices for failing to report to work as scheduled were introduced into evidence. 3/ Some of the notices showed employes were given verbal and written warnings, but one employe was suspended and also discharged when "he was unable to work due to his other job, and "banquet set-up needed his services and did not excuse him." 4/ These records clearly establish that the Employer had a policy of taking disciplinary action against employes who did not report to work. Also, the record shows that if the employe was at the discharge step of the disciplinary procedure when the incident occurred he/she was discharged.

Reed's un rebutted testimony was that JC had previously been suspended,

3/ Joint Exhibits 4 through 15 and 17.

4/ Joint Exhibits 4 and 17.

and was therefore at the discharge step of the progressive disciplinary procedure. Consequently, this incident being the next misconduct infraction by JC, discharge was the appropriate penalty.

In consideration of all of the above, the undersigned is persuaded that the Employer did have just cause to discharge the grievant for not coming in to work on Sunday, March 13 as he was scheduled to do.

AWARD

The Employer had just cause to discharge the grievant, JC, for failing to report for work, as scheduled, on Sunday, March 13, 1994. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 8th day of August, 1994.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator