BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TEAMSTERS LOCAL UNION NO. 695

and

GATEWAY FOODS

Case 45
No. 52023
A-5321

Appearances:

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

Mr. Alan J. Reiner, Attorney, Fleming Companies, Inc., appearing on behalf of the Company.

ARBITRATION AWARD

The Company and Union above are parties to a 1992-1995 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the discharge grievance of Art Willette.

The undersigned was appointed and held a hearing on July 19, 1995 in LaCrosse, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, and neither party filed a brief.

Stipulated Issues:

1. Was the grievant discharged for just cause?

2. If not, what remedy is appropriate?

Relevant Contractual Provisions:

ARTICLE 8 - DISCIPLINE AND DISCHARGE

8.1 Progressive Discipline. The Company shall not discharge or suspend employees without just cause and shall warn an employee in writing at least once of any offense or series of offenses which, if continued or repeated, shall be considered cause

for discharge. Such written warnings shall be considered to have full force and effect for a period of time not to exceed nine (9) working months from the date of warning. Copies of all written warnings, notices of suspension and notices of discharge will be promptly provided by the Company to the Union. Any month in which an employee works shall be counted as a work month for purposes of this section.

8.02 Grounds for Immediate Discharge. If the conduct of an employee falls within the conduct prohibited by 8.2A through J, it shall be considered just cause for purposes of this Agreement.

. . .

I. Misconduct calling for immediate discharge under the Company's Operating Rules and Absenteeism Policy.

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Relevant Work Rules:

WORK RULES AND ABSENTEEISM POLICY

On the pages which follow, the Company's Work Rules and Absenteeism Policy are contained. These policies have been implemented pursuant to the Company's management right to unilaterally implement Work Rules and Absenteeism Policies. They are printed in the contract booklet for convenience only, and in no way indicates any obligation on the part of the Company to negotiate Work Rules, Absenteeism Policies, Productivity Standards, or any other Operating Rules with the Union.

Warehouse Operating Rules

The conduct of the business, and the management and supervision of all procedures and operations is vested exclusively in the Company. The Company has the right to adopt reasonable work rules and to change them from time to time as Company operations require.

The following work rules are in effect beginning _____

____, 19____. Any employees failing to comply with these work rules is subject to disciplinary action. Please review these rules continually and retain this copy as your permanent record until these rules are changed.

A. Major Violations

It shall be a major offense to engage in any of the following actions:

. . .

8. Willful negligence, or horseplay or practical jokes which could result in personal injury or substantial expense to the Company.

. . .

The penalty for a major offense shall be suspension or immediate discharge depending on the severity of the event and the employee's past record. The penalty for a minor offense shall generally follow progressive discipline of a verbal warning, followed by a written warning, then a three day suspension and finally discharge. With the exception of the absenteeism policy, progressive discipline may be applied for any minor offense and is not restricted to offenses of the same type. Warnings and suspensions shall remain on an employee's record for nine (9) months, pursuant to Article 8.

Facts:

Grievant Art Willette was employed as a Warehouseman by the Company for eight years until December 5, 1994, when he was discharged for alleged horseplay. A single incident is involved, and virtually every aspect of that incident is disputed. What is clear initially is that an accident did occur in the Company's large LaCrosse warehouse. The grievant was driving a forklift truck at the time, and employe Roger Jeranek was driving a "scooter", a small vehicle capable of carrying a passenger, but with four wheels. The collision occurred in the warehouse's main aisle opposite side aisle number 90. There was no damage to property, nor any injury.

Virtually everything else is disputed. Jeranek, a shipping clerk, testified that on Sunday, December 4, he ended work at 3:30 p.m., and took number 5 Cushman Scooter to the far end of the warehouse to punch out. Jeranek testified that he turned into the main aisle somewhere

between side aisles 30 and 34, and turned south toward the main office. Jeranek stated that he saw Art Willette come out of another side aisle farther down, approximately 200 feet away, but could not see what aisle he came out from. Jeranek stated that Willette swung out wide, then pulled in towards his own side of the aisle, but that as Jeranek approached him, Art swung out again. Jeranek testified that he pulled his Cushman Scooter into the rack at the end of aisle 90, but that Art's forklift kept coming, swung around and hit the scooter. Jeranek testified that Kyle Clavins (who was riding on the back of the scooter facing the other direction, in order to return the scooter to the shipping desk after Jeranek had punched out) reached up to the back of the forklift and pulled the wire which serves as a kill switch. Jeranek testified that the Cushman was pinned against the rack, and that he had been going about three-quarters speed when the collision took place. Jeranek testified that he was scared and angry at Willette because Willette had done this a couple of times before, either to scare him or as horseplay, and that there could have been a serious accident. Jeranek stated that he reported the incident the following day.

The grievant testified that the incident happened quite differently. According to the grievant, he pulled out from aisle 87 into the main aisle, turned right, and saw Roger and Kyle coming into the main aisle from side aisles 35 or 34, approximately 200 to 300 feet from him. Willette testified that he swung out wide, into the middle of the aisle, and then pulled to the left in the path of the oncoming Cushman. But Willette testified that this, a common practice in the warehouse when an employe wished to converse with another (stipulated to by both parties), resulted in his being stopped for between 20 and 30 seconds while the Cushman approached him. Willette testified that he wanted to "shoot the bull" with Roger and Kyle about the Packer game which had just ended. Willette testified that Roger slowed down when he came close, but that he heard him hit the brake petal, and then heard him release the brake petal and then hit the rack and then the forklift. Willette testified that he thought Jeranek was trying to "shoot through" the gap between Willette and the wall, about three feet. Willette testified that his forklift was sitting at an angle, and the load was about two feet from the rack, not enough space to get through. Willette testified that when he stopped his forklift, Roger and Kyle were still around aisle 96, and that he registered this because he could see the charcoal supply which is kept in that aisle. Willette testified that after the collision, Kyle turned around and hit the deadman switch, and that "Kyle does this frequently because he thinks it's a big joke" because the operator loses control of the machine. Willette testified that the spring-loaded lever which puts the forklift into gear was in the neutral position when the collision occurred and his hand was not even on it.

Kyle Clavins did not testify. One thing that the Company and Union agree upon is that Clavins has changed his version of the events of that day several times in repeated questioning, and neither party believes in his veracity.

Distribution Director Warren Nedegaard testified that the following day he and Warehouse Superintendent Bob Zeeb heard about the December 5 collision and began to investigate. He and Zeeb called a meeting with Clavins, Jeranek, Willette, and Union Steward Darrell Wilcox. Nedegaard testified that when giving his explanation of the incident, Willette did not say he was

stopped at the time of the collision and did say that his brakes were faulty.
Nedegaard testified that later, Union Steward Joe Severson told him that there was information he had not heard, and that he should meet with Willette again. Nedegaard testified that on this occasion, Willette stated that he had been stopped at the time. Nedegaard testified that while Clavins has changed his story more than once, he believed Clavins' first statement, and concluded that the grievant had been engaging in horseplay with a 4,000 pound piece of equipment. Nedegaard testified that there have been serious accidents in the warehouse, including one fatal accident, in the past, and that he determined first to suspend the grievant pending further investigation, and then to discharge the grievant, because he did not consider a lesser penalty appropriate in view of the danger to another employe created by this incident.

Wilcox testified that he was present at the meeting the day after the incident, and that Willette did say he was stopped at that meeting. Wilcox took notes at the meeting and offered these in evidence to support his testimony. Wilcox further testified that Jeranek's story changed between the time the group met in the office and a further discussion immediately afterwards, when the group met on the floor of the warehouse at the accident site. Wilcox testified that in the office, Jeranek said he came straight out from the shipping desk and saw Art as soon as he turned into the main aisle. Wilcox testified that on the floor at the site, he (Wilcox) remarked that if Willette was moving, the accident would have happened farther down the aisle. Wilcox testified that at that point Jeranek said "well maybe I didn't see him till I got closer to the wall." Wilcox also testified, consistently with other witnesses, that the normal speed for all equipment in the warehouse is full speed.

Willette denied having said anything about his brakes. He testified that he did not say at any time that his forklift was moving at the time of the accident, or that he hit Jeranek. He testified that another employe, Bob Turk, said something at the accident site about the brakes not working on the scooter, 1/ and that no one said anything about the brakes on the forklift.

Then-Union Steward Severson testified that after the first meeting about the incident, a friend of Willette's called him at work and said that they should have a meeting with Warren Nedegaard because Willette would not speak up. Severson testified that when he asked why, the friend said that Willette did not want to make waves, and that Severson would have to get involved. He agreed and set up a meeting with Willette and Nedegaard. He stated that at this meeting there was no complaint about the brakes. He estimated that the forklift weights approximately 5,000 pounds, and that the scooter weighs approximately 300 pounds. Severson argued that the forklift cannot be controlled if the deadman switch is killed, and that if it was moving, killing that switch would be the worst thing you could do.

The parties introduced two exhibits demonstrating the distances in the warehouse, and

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1/ Emphasis added.

stipulated to those distances, which will be discussed below.

The Company's Position:

The Company contends that the evidence is clear as to motive and credibility. The Company argues that Jeranek's story has not changed except for a small amount of doubt about whether he came out of aisle 35 or 33, and that Jeranek has received no favors from the Company, having been laid off and recalled since the incident involved. The Company argues that Nedegaard is also credible, but that Clavins is not credible and that that is why neither party called him. With respect to the grievant's credibility, the Company contends that the grievant has a selective memory, and cannot recall the important details. The Company argues that the discharge was for cause, because the grievant put someone at risk of serious injury, and that this is not a case appropriate for a warning. The Company requests that the grievance be denied.

The Union's Position:

The Union contends that Jeranek's story did change, almost immediately after he first made a statement. The Union contends that first, Jeranek stated that he saw the grievant as he pulled out of aisle 35, and only when the steward indicated that if Willette was moving the collision could not have happened at aisle 90 did Jeranek say that maybe he was nearer the wall when he saw the grievant. The Union notes that there are other witnesses who support the grievant's testimony that he said nothing about brakes, and that Jeranek has as much reason to lie as the grievant does. The Union agrees with the Company that Kyle Clavins is not credible, noting that he also has a reason to lie, because he hit the kill switch, a dangerous thing to do if the forklift was moving. The Union contends that this is a confused case in which, however, the Union's version of the facts has been more consistent than the Company's. The Union argues that all the grievant did was to pull over and stop, a common and accepted practice in the plant, and requests that the grievance be sustained.

Discussion:

In analyzing the credibility of the relevant witnesses, I note that the grievant and Jeranek both have a motive not to tell the truth, and that both parties have agreed that Clavins' various accounts are not to be trusted. There is no conspicuous reason why Nedegaard, Severson or Wilcox should depart from the truth, yet their versions of the investigation meetings do differ. In this confusing pattern of accounts, there are, however, some fixed points of reference. These are the physical distances involved, to which the parties stipulated.

I will not reproduce the documents submitted as drawings of the relevant part of this very large warehouse. The relevant facts from them include that the aisle numbers in the area proceed according to the following sequence: 35, 34, 33, 32, 31, 30, 29, 97, 96, 95, 94, 93, 92, 91, 90,

89, 88, 87, 86. The parties stipulated that most of the racks are eight feet wide, and that there are ten feet in each side aisle (i.e., between two racks) except for 16 feet between aisles 91 and 92; 40 feet between aisles 96 and 97; and 20 feet between aisles 93 and 94. The wall referred to be all witnesses is approximately 12 inches wide and is located between aisles 93 and 94.

A calculation of distances based on these stipulated facts yields the result that if Jeranek turned out from aisle 30 (the closest aisle to the accident site of the several indicated as possible in his and others' testimony), there would be a total of approximately 208 feet between the point where he turned into the main aisle and the point where the collision took place. If Jeranek turned in at aisle 34, there would be approximately 281 feet to the crash location.

A further fixed point of reference is that no witness has challenged Willette's testimony that the aisle he turned into the main aisle from was number 87. The same process of calculation yields a result that the distance from aisle 87 to the point of impact was 54 feet.

I note that Jeranek, even at the hearing, testified that when he saw Willette, they were approximately 200 feet apart. Assuming that Jeranek's testimony as to the distance between them at the point where he first saw Willette was correct, and assuming that the unrebutted testimony by Willette to the effect that he came out of aisle 87 was also correct, the scooter had approximately 155 feet to travel to the point of impact, while the forklift had approximately 54 feet to travel. If Willette were credited as to the distance, it would be even greater for the scooter to travel -- but the same for the forklift. The consequence is that even crediting Jeranek's account of the distances, the distances remain three times as large for the scooter as for the forklift. Several witnesses testified that the scooters travel faster than the forklifts. But no witness appeared to me to be indicating that the scooters travel so much faster as to account for the difference; furthermore, Jeranek testified that he was going at approximately three-quarters of full speed. In short, the numbers appear to support the grievant's contention that he came to a stop at aisle 90 before the scooter arrived. This of course in turn supports the rest of his testimony.

None of the witnesses who appeared seemed particularly hard to credit, in the absence of competing information. And it is possible that Jeranek misidentified the distances involved, and that when Wilcox testified that Jeranek changed his estimation, Jeranek was telling the truth in his second rendition that he might have been closer to the wall when he saw Willette.

But it is impossible to know for sure what happened -- for one reason, because there was no damage to give physical evidence later. I must therefore turn to the basic rule that in a discipline case, under the just cause standard it is for the Company to prove that the grievant committed a wrongdoing, and not for the grievant to prove his innocence. Here, it remains possible that the grievant may have caused the accident. But in view of the distances involved, I do not find that a predominance of the evidence supports that assertion. I therefore conclude that

the Company has not sustained its burden of persuasion, and that the discharge should be overturned.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the grievant was discharged without just cause.

2. That as remedy the Company shall, forthwith upon receipt of a copy of this award, offer the grievant reinstatement to his former position or a substantially equivalent position, and shall make the grievant whole for losses suffered by virtue of the Company's action by payment to him of a sum of money equal to wages and benefits lost as a result of such action, less interim earnings, if any.

3. That in the event of a dispute concerning the application of this award, the undersigned reserves jurisdiction for at least 60 days from the date below.

Dated at Madison, Wisconsin this 8th day of September, 1995.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator