BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between GENERAL TEAMSTERS UNION, LOCAL 662, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO and F & A DAIRY PRODUCTS, INC.	Case 8 No. 52357 A-5344

Appearances:

Ms. Renata Krawczyk, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of General Teamsters Union, Local 662, affiliated with the International Brotherhood of Teamsters, AFL-CIO, referred to below as the Union.

Mr. Brooks F. Poley, Winthrop & Weinstine, Attorneys at Law, 3200 Minnesota World Trade Center, 30 East Seventh Street, Saint Paul, Minnesota 55101, appearing on behalf of F & A Dairy Products, Inc., referred to below as the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly waived the application of that portion of the contractual grievance procedure which calls for an arbitration panel, and jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Elmer Nagel, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on June 16, 1995, in Minneapolis, Minnesota. The hearing was transcribed, and the parties filed briefs by July 31, 1995.

ISSUES

The parties stipulated the following issues for decision:

Was the Grievant, Elmer Nagel, discharged for just cause for dishonesty?

If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

ARTICLE 9

DISCHARGE

Section 1. The Employer shall not discharge or suspend any employee without just cause, but in respect to discharge or suspension will give at least one (1) written warning notice by management in the presence of the Union Steward, with a copy of same to the Union and to the Union Steward. The complaint shall be specific as to the offense committed and there shall be no discipline unless the employee again commits the same specific offense within the warning notice period, providing the complaint is serious enough to warrant any discipline. No warning notice need be given to an employee before he/she is discharged if the cause of discharge is dishonesty, drunkenness or drinking; all such complaints to occur while the employee is on duty.

Section 2. The warning notice, as herein provided, shall not remain in effect for a period of more than **six (6) months** from the date of said complaint . . .

EXHIBIT "B"

UNIFORM RULES AND REGULATIONS

1. CONDUCT:

(a) Theft or dishonesty of any kind. **Discharge.**

(b) Consuming intoxicants on duty or on Company premises. **Discharge.**

(c) Possession of firearms on Company premises. **Discharge.**

(d) Flagrant disobeying of direct orders.
First offense - **reprimand.**
Second offense - **discharge.**

(e) Recklessness or horseplay resulting in a serious accident.
First offense - three **(3) days off.**
Second offense - **discharge.**

(f) Malicious destruction of Company property. **Discharge.**

. . .

BACKGROUND

The grievance, dated October 14, 1994, 1/ asserts the Grievant "was discharged for no just cause." Scott Johnson, the then incumbent Plant Manager, confirmed the discharge in a letter to the Grievant dated October 11, which states:

. . .

> Subject: Discharge for the infractions of slander against your employer; misconduct in the work place . . .
>
> On October 1, 1994, you made some very defamatory statements against your employer, F & A Dairy Products, Inc., and its Principal, Mr. Angelo Terranova, to your supervisor's, (sic) Mr. Mike Breault, and Mr. Chuck Engdahl. You stated that Mr. Terranova paid Mr. Mike Thoms, your Union Representative, the sum of two thousand dollars for compensation of gas money spent for the numerous trips he has made from Eau Claire to Dresser. You also stated that Mr. Thoms was on the Company Payroll. You then proceeded to make threats against the Company to your supervisor that you were going to get even with the Company, but did not avail what that course of action might be.

1/ References to dates are to 1994, unless otherwise noted.

> The Company will not tolerate this type of slanderous campaign from any employee. Therefore, because of your misconduct and dishonesty, the Company has no choice but to discharge you in accordance with the Union contract. This discharge is effective immediately.

At the time of his discharge, the Grievant had been employed by the Employer for roughly thirteen years.

The balance of the background is best set forth as an overview of witness testimony.

Michael Breault

Breault is one of the Employer's two Plant Supervisors. The other is Chuck Engdahl. Breault has been employed by the Employer for roughly twenty-three years. He has been in non-unit positions with the Employer for roughly the past three years. The balance of his employment was in unit positions. He served as a Union Steward for the last five or six of the years of his employment in a Union-represented position.

Breault noted that the Grievant was, in September, involved in a thirty-day training period, on a job new to the Grievant. Near the end of this trial period, on a Friday, the Grievant phoned Breault at the plant to advise him that he would return to his former position in the packing department the following Monday. Breault had already made out a work schedule, and attempted to talk the Grievant out of switching jobs. He had no success. The Grievant stated he was returning to his old job, and hung up.

Sometime after this, Breault and the Grievant had the conversation referred to in the October 11 discharge letter. That conversation took place in the packing department, and Breault summarized the conversation thus:

> . . . On the grievance where he come up to me and he was disgusted. A little bit of a lot of things and stuff, and he just told me that Mike Thoms was being paid $2,000 for gas money and that he was on the payroll of F&A Dairy. He knew it. 2/

2/ Transcript (Tr.) at 17.

Breault reported this statement to Johnson, who called meetings involving Breault, Engdahl and the Union Steward from the Dresser plant. Breault became aware, through these meetings, that the Grievant had made a similar statement to Engdahl. He noted that the comment became common knowledge in the plant, although he had no knowledge of the Grievant relaying the statement to anyone other than the Plant Supervisors. He noted that the discussions among the management personnel regarding the basis of the discharge turned on the Grievant's dishonesty in making the statement, and on the adverse impact the statement had on employe morale.

He noted this is not the first time he has had to deal with the Grievant regarding job-related gripes. He testified that while he served as Union Steward, other unit employes would complain to him that the Grievant's comments about work bothered them. Among those comments, Breault testified, were comments to the effect that postal workers involved in widely publicized shootings "were his heroes." 3/ Breault testified that he told the Grievant he could not make such statements because other employes were scared by them. No discipline resulted from these comments.

Michael Thoms

Thoms has served as the Business Agent for the Employer's Dresser plant since April of 1992. He denied that he has ever been on the Employer's payroll, and that he has ever received any compensation from the Employer. He noted that no unit employe ever complained to him that the Grievant's statement had adversely impacted morale at the Dresser plant. The Grievant never threatened him personally other than to sue the Union if it did not properly represent him. He noted Johnson believed the Grievant had mailed the Employer a threatening letter, but he testified he had no knowledge of who, in fact, had authored the letter.

The Grievant

The Grievant noted that, at the time of his discharge, he was working in the packing department, bagging and boxing cheese. The Grievant noted that he did have a conversation with Breault sometime around October 1. That conversation occurred in the break room of the Dresser plant, where Breault approached the Grievant and asked him if he was going to complete his thirty-day training period in the position of Condenser Operator or return to the packing department. The Grievant responded that he enjoyed the work, and thought he would stick with the job unless he felt the Employer would continue harassing him. Breault asked him what he meant by that, and the Grievant responded that he would find out on October 6. This reference, the Grievant noted, was to a scheduled conference between Thoms and Employer representatives regarding a grievance filed by the Grievant alleging an Employer pattern of denying him overtime.

3/ Tr. at 31.

That denial of overtime, which the Grievant valued at roughly $2,000, was what he viewed as Employer harassment. He thought that if the grievance was resolved, it would be an indication of "the company deciding to slack off on me." 4/ In the absence of any such "slack," he feared the Employer would use the increased responsibility of the Condenser Operator position as a vehicle to discharge him.

Sometime on October 6, a Union Steward informed the Grievant that his overtime grievance had been dropped during the meeting between Thoms and the Employer. The Grievant decided he would return to the packing department. He phoned Breault to so advise him. He testified that Breault "got somewhat excited on the phone, and I hung up on him." 5/

The Grievant reported to work the next day, assuming he would complete the work week as a Condenser Operator. Engdahl approached him at the condenser, and told him he could not continue in that position. Engdahl told the Grievant he had other work for him, and proceeded to instruct him to "clean the urinals and the bathroom and sweep out the break room." 6/

The Grievant carried out these instructions, and detailed his next conversation with Engdahl thus:

> I had finished cleaning out the urinals and the bathroom, and I was sweeping up the floor and setting up the chairs in the break room and Chuck entered. Chuck and I were the only ones in there. And he said I really screwed up. That going back to packing, that's a stupid job. It doesn't take any brains to do packing. You ain't got the brains to handle the condenser and things like that.
>
> I don't know exactly how it came out to the harassment part or whatever. And I says yeah, it's easy to harass people when the union rep is bought off. He says well, what do you mean by that. And I says Angelo probably gave him a couple of grand to come up here for gas money because he ain't doing me any good. 7/

4/ Tr. at 70.

5/ Tr. at 73.

6/ Tr. at 74.

7/ Tr. at 75.

The Grievant denied making any statement concerning a pay off to Breault or to any employe other than Engdahl. He denied threatening any employe and denied authoring any anonymous letter to the Employer. He did, however, acknowledge he made the following comment to Engdahl:

> A I mentioned to Chuck on the day that when he and I had the conversation on the seventh, I mentioned to him that Angelo would get his at the end.
>
> Q Meaning?
>
> A When he dies. I believe in heaven and hell.
>
> Q So in other words you were indicating you believed he was going to go to hell?
>
> A Yeah. 8/

Further facts will be set forth in the DISCUSSION section below.

THE EMPLOYER'S POSITION

After a review of the governing contract provisions, the Employer argues that "(t)ogether, Article 9 . . . and the Uniform Rules and Regulations plainly establish that F & A is entitled to discharge, without warning, any employee for dishonesty *of any kind*." Noting these provisions are without "qualification or caveat regarding the magnitude of that dishonesty or the nature of damage arising from that dishonesty," the Employer concludes that no such limitation can be read into the agreement.

The record establishes, the Employer asserts, that the Grievant, sometime around October 1, told Breault that Thoms "was on the F & A payroll, had been receiving sums in the amount of $2,000 from Angelo Terranova and, in sum and substance, had been 'bought off' by F & A." While some dispute may exist as to when the statement was made, the Employer contends that the evidence establishes that the statement was made and that "the statement was both untrue and dishonest." The Employer has consistently treated the statement as fundamental dishonesty and thus as just cause for the Grievant's termination. It follows, according to the Employer, that the "termination should be sustained."

8/ Tr. at 79.

THE UNION'S POSITION

After a review of the evidence, the Union notes that the "warning language in this contract is standard Teamster warning letter language in use throughout Wisconsin and the country." It follows, the Union asserts, that "unanimous" arbitral authority requiring the warning notice to precede a discharge must be followed "even if the employee fully deserves discharge." The Union adds that fundamental interpretive axioms and established arbitral precedent reinforce the conclusion that, with narrow and specific exceptions, the Grievant was entitled to a warning notice preceding his discharge.

The "only way" the Employer can avoid the requirement of a warning notice prior to discharge is, the Union asserts, "to establish 'dishonesty' within the meaning of Article 9 of the contract." While the evidence may show the Grievant "engaged in an unintentional spouting of frustration duly provoked by the Company and perhaps even by the Union" the evidence does not, the Union concludes, demonstrate dishonesty.

Arbitral precedent defines, according to the Union, an "intent to mislead" as an essential element of "dishonesty." That the Grievant honestly believed in the truth of what he said makes it impossible to conclude his statement manifests actionable dishonesty. That the Grievant made the statement in private to a single management representative, and took no action to broadcast the statement to other employes precludes, the Union avers, any conclusion that his conduct could have so adversely affected employe morale to warrant a termination.

The Union concludes by requesting that "the grievance be sustained, and that (the Grievant) be reinstated to his former position with the Company and be made whole for all losses sustained as a result of his unjust discharge."

DISCUSSION

Resolution of the stipulated issue turns on whether the Grievant is guilty of "dishonesty" within the meaning of Article 9 and Exhibit B. The Employer, contending that Exhibit B exempts "dishonesty of any kind" from the warning notice required by Article 9, concludes that the Grievant's summary termination was for just cause.

The Employer's contention that the Grievant's conduct constitutes "dishonesty of any kind" is not, however, supported by the record. This conclusion has both a contractual and a factual component. The factual component is the more significant, but as preface to an examination of that point, it is necessary to touch on the contractual component.

The Employer's contention that Exhibit B grants it considerable latitude in sanctioning

dishonesty is persuasive, but the reference to "dishonesty of any kind" cannot persuasively be treated as a grant of an unfettered right to discharge. Article 9 requires "just cause" for a termination. A just cause determination is inevitably a case-by-case weighing of the degree of an employer's disciplinary interest in employe conduct against the sanction imposed for that conduct. "Dishonesty of any kind" cannot, against this background, be interpreted as "any dishonesty." For example, a fatigued employe's statement to a supervisor that he was not tired, although a "dishonesty of any kind" in a certain sense, could not, standing alone, be treated as a dischargeable offense under Article 9 without reading the just cause provision out of existence.

The language of Article 9 and Exhibit B underscore the conclusion that the level of dishonesty which will warrant immediate termination is significant. Article 9 identifies three offenses warranting summary discharge: "dishonesty, drunkenness or drinking." The Uniform Rules and Regulations of Exhibit B also link summary discharge to egregious conduct. Other than dishonesty, the rules link summary discharge to theft, consumption of intoxicants, possession of firearms and malicious destruction of Employer property. Flagrant disobeying of direct orders and recklessness "resulting in a serious accident" do not, under the Uniform Rules and Regulations, mandate summary discharge. It is, then, unpersuasive to conclude that, standing alone, a casually stated, but factually inaccurate opinion rises to the level of summary discharge.

This prefaces the factual determination of whether the Grievant's statement constitutes the level of dishonesty which, under Article 9 and Exhibit B, is sanctioned by summary discharge. To assess the egregiousness of the Grievant's conduct, it is necessary to examine both the context and the content of his statement. The sole factual dispute surrounding the context of the remarks is whether the Grievant made the statement to Engdahl, Breault or both. This dispute is of no consequence here. Under either the Grievant's or Breault's account, the statement was made "one on one" between the Grievant and a supervisor. The comment was not overheard by other workers nor was it disruptive of the work environment. It can be noted the comment appears to have spread throughout the plant, but there is no evidence the Grievant played any role in that process. Thus, the context of the remark is harmless.

Examination of the content of the Grievant's comments is more troublesome, but will not support a conclusion that they were sufficiently outrageous to warrant summary discharge. The Employer argues that the lack of truth to the allegation is sufficient to establish the requisite dishonesty while the Union contends some element of an intent to deceive is necessary. Dictionary definitions are sufficiently broad to encompass either view. 9/ The evidence will not, however, support the conclusion that the Grievant was either untruthful or deceitful.

It is difficult to pull from Breault's account precisely what the Grievant said or what prompted it. It is, however, apparent that the comment was no more than one of a litany of

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9/ See, for example, Webster's Third New International Dictionary Of The English Language, (Merriam-Webster, 1993) which defines "dishonest" as "characterized by lack of truth . . . or by an inclination to mislead . . ."

gripes. As Breault put it: "it was more or less a lot of things." 10/ Among these things were "the packing room was running too fast" and "the boxes were too heavy." 11/ Even under Breault's account, then, the comment was not an accusation. Rather, it was one of a series of gripes. This one, however, was directed at his union: "he was saying the union wasn't doing anything." 12/

The Grievant's testimony more plausibly accounts for the background to the comment. Under Breault's account, it is unclear why the Grievant declined to continue as a Condenser Operator or chose to comment at all on Thoms. Under his own testimony, the link is apparent. The Grievant placed a great deal of hope in the grievance meeting set for October 6. When that meeting, which took place without his participation, resulted in the loss of what he viewed as a $2,000 claim, the Grievant became embittered. Frustrated by the Union's dropping of his grievance and by at least a perceived harassment, the Grievant vented his feeling to Engdahl.

It is unnecessary to resolve whether Breault's or the Grievant's account of the comment is the more accurate. Under either account, the comments that prompted his discharge were not dishonest. Rather, the comments reflected his honest belief that his Union had betrayed him and his sincere expression of frustration with that betrayal. That Thoms had not been paid off by Terranova is irrelevant to the comment, which was not an accusation but a statement of feeling.

Even if the Grievant had made a direct accusation, it would be difficult to conclude that the work environment is so fragile that it could not absorb an unfounded opinion. On this record, however, the comment cannot persuasively be taken as a direct accusation. Against this background, it is impossible to conclude that the Grievant's comments constitute "dishonesty" which Article 9 and Exhibit B sanction with summary discharge.

The parties raise no issue regarding remedy. Accordingly, the Award entered below states general "make-whole" relief, requiring the Employer to reinstate the Grievant and to make him financially whole for the discharge.

Before closing, it is appropriate to touch on some of the problems posed by the record. In any case, record evidence is a pale reflection of past events. Inevitably, detail is lost or colored through the filter of individual memory, individual interest and the adversarial process. The evidence in this case poses a series of troublesome allegations beyond those put in issue here.

10/ Tr. at 18.

11/ Ibid.

12/ Ibid.

Breault related comments made by the Grievant several years ago which are more intimidating than anything said about Thoms or Terranova. No discipline was meted for those comments, which Article 9, Section 2 places beyond the scope of this proceeding. Beyond this, the discharge letter points to "threats," but the evidence grants no solid foundation for that allegation. The "just cause" determination must be founded on record evidence, and that evidence will not support the Employer's allegations.

AWARD

The Grievant, Elmer Nagel, was not discharged for just cause for dishonesty.

As the remedy appropriate to the Employer's violation of Article 9, the Employer shall make the Grievant whole by reinstating him to the position he would have held but for his

discharge on October 11, 1994, and by compensating him for the wages and benefits he would have earned but for that discharge. The Employer shall expunge any reference to the discharge from the Grievant's personnel file(s).

Dated at Madison, Wisconsin, this 24th day of October, 1995.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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