

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 43

and

PROMOTIONS UNLIMITED CORPORATION

Case 16
No. 56760
A-5711

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Andrea F. Hoeschen**, appearing on behalf of the Union.

Mr. Victor J. Long, Long & Halsey Associates, Inc., appearing on behalf of the Company.

ARBITRATION AWARD

Teamsters Local Union No. 43, hereinafter referred to as the Union, and Promotions Unlimited Corporation, hereinafter referred to as the Company, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The undersigned was selected from a panel of arbitrators furnished by the Wisconsin Employment Relations Commission to hear and decide a grievance over a discharge. Hearing was held in Racine, Wisconsin, on November 10, 1998. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by December 18, 1998.

BACKGROUND

The grievant was employed by the Company as a Sweeper until his discharge on July 16, 1998. The reasons for his discharge were set forth in a letter dated July 17, 1998, which stated the following:

In accordance with our company policy, you were terminated due to the fact that you violated 5 major company rules.

1. Insubordination – You were instructed by your supervisor to clean up a spill and initially refused.
2. Fighting or attempting to inflict bodily injury on a supervisor – You were waving your utility knife at the supervisor.
3. Using threatening language towards supervisory personnel – You were threatening your supervisor.
4. Intentionally making false claim of injury – When told to clean up the spill, you indicated you guaranteed that you would injure yourself.
5. Violating any safety rules or practices or engaging in horseplay or disorderly conduct that endangers the safety of other employees. – You were repeatedly kicking your stick at your supervisor.

Almost all of the facts are in dispute. On July 16, 1998, there was a laundry detergent spill in the Company's warehouse. Bill Gilbert, a supervisor, told the grievant to proceed to the area of the spill and clean it up. Gilbert testified the grievant stated he would not do it. The grievant testified he asked Gilbert if he could get some help and Gilbert said no and to clean the spill or go home or find another job. The grievant then went to speak with Cindi Vance-Smith, the Chief Union Steward, who told the grievant to go do the job. Gilbert called Pam Ostergaard, the Floor Supervisor, and reported to her that the grievant refused to clean up the spill. Ostergaard then went to Vance-Smith who stated she had already spoken with the grievant and he was going to clean the spill. Gilbert followed the grievant on the way to the spill and he testified that the grievant said he would clean up the spill and guaranteed that he would hurt himself. After meeting with Vance-Smith, Ostergaard proceeded to the area of the spill where she met Bill Gilbert. Gilbert testified that he told Ostergaard and another supervisor, Reynoldo "Tony" Arias, that the grievant had said he was going to hurt himself. The supervisors all testified that the grievant then became loud and used obscenities and invited Gilbert to hit him. The grievant was allowed to carry a three-foot stick which he used for leverage to tear plastic and to pick up things off the floor. The grievant testified that Gilbert grabbed the stick out of his hands and threw it outside. The supervisors testified that the grievant threw his stick on the floor and repeatedly kicked it at Gilbert who picked the stick up and threw it outside. The grievant at that point went outside to retrieve the stick. Tony Arias then left to get Union Steward, Mike Smith. According to Gilbert and Ostergaard, when the grievant retrieved his stick and came back to the door to re-enter the building, he took out his box cutter from its sheath and waived it at Gilbert in a threatening manner. The grievant testified that he never took his box cutter out of its sheath. Ostergaard told Gilbert to

take a walk and she then called Wayne Lazenby, the Warehouse Manager, who in turn called security. Lazenby went to the area where he saw the grievant and observed that he was yelling and cursing. Mike Smith came up and the grievant, Smith and Lazenby proceeded to Lazenby's office. Lazenby spoke with Gilbert and Ostergaard and then called the police. After the police arrived, Lazenby terminated the grievant and the grievant was escorted out by the police and the grievant went home.

ISSUE

The parties stipulated to the following:

Was Ray Boske terminated for just cause?

If not, what is the remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 4. MANAGEMENT

It is agreed that the management of the company and the direction of the working forces are vested exclusively in the company and includes but is not limited to the following:

To direct and supervise the work of its employees, to hire, promote, demote, transfer, suspend and discipline or discharge employees for just cause: . . .

COMPANY'S POSITION

The Company contends that its witnesses presented detailed and consistent testimony as to the events of July 16, 1998, whereas the Union provided no witnesses or evidence that would provide a basis to challenge the credibility of the Company's witnesses. It points out that the Union's only witness present for the entire altercation was the grievant whose testimony presents a different version of the events. It observes that the Union's case is that Bill Gilbert is hot-tempered and provoked the grievant, but even if the Company concedes that Gilbert is hot-tempered and had prior incidents with other employees, the Union failed to refute the testimony of Pam Ostergaard and Tony Arias. It claims that Ostergaard's testimony supports Gilbert's in virtually every detail and the grievant's testimony establishes that Ostergaard was present for the entire incident. It asserts that there is no basis to question Ostergaard's testimony and the grievant indicated he had not had any prior problems with Ostergaard.

The Company contends that arbitrators generally agree that serious threats to a supervisor are grounds for immediate discharge. It maintains that intimidation of a supervisor is disruptive of the day-to-day functioning of the plant and is destructive of the labor relationship. It insists that threats and intimidation can be verbal and/or physical threats. It cites a number of arbitration cases in support of its position that discharge for making threats to a supervisor has been upheld.

The Company concludes that each side's case depends on the credibility of its witnesses and the Company alleges that it presented three credible witnesses and the Union presented the grievant who has a significant stake in the outcome of this case. It argues that the Union's attempt to discredit Gilbert fails to overcome the weight of evidence provided by the Company. It states that the grievant made serious verbal and physical threats against his supervisor each of which is sufficient to justify his discharge. It seeks denial of the grievance.

UNION'S POSITION

The Union contends that the Company has the burden of proving the grievant threatened Gilbert by a quantum of proof beyond a reasonable doubt or at least by clear and convincing evidence. It further argues that each element of the offense must be proved including intent. It asserts that a threat to do bodily harm involves a specific intent and the Company must prove the grievant intended to threaten Gilbert. It notes that the grievant has been accused of an assault and this alleged criminal act raises the burden of proof. The Union claims that the witnesses gave a clear picture that Gilbert was the aggressor and they contradict each other whether the grievant did or said anything that was threatening, and therefore, the Company failed to meet its burden of proving that it had just cause to terminate the grievant.

The Union submits that the Company's witnesses do not support the claim that the grievant threatened Gilbert. It observes that Ostergaard is the only witness that comes close to corroborating Gilbert's account of the events but some key aspects of her testimony cast doubt on the Company's charges. It notes that she testified that the grievant waved his utility knife around but did not direct it toward Gilbert as Gilbert stated. It asserts that Ostergaard told both men that it was not worth losing their jobs. It points out she told Gilbert to take a walk which was appropriate if Gilbert was losing his temper and puzzling if Gilbert was calm and the grievant was behaving like a knife wielding maniac. It alleges that Gilbert's testimony confirms that he was more of a threat than the grievant. It notes that no one attempted to restrain the grievant but Ostergaard grabbed Gilbert's arm and pulled him away. It observes that no one felt the grievant was a threat and after Gilbert walked away, the grievant went back to cleaning up the spill. It asserts that Arias failed to corroborate the essential elements of Gilbert's story. It points out that Arias testified "Billy got mad" and he saw the grievant come back in after retrieving the stick but did not see him pull out a knife. It observes that, according to Lazenby, the knife pulling by the grievant was practically an after thought. It argues that if the grievant had really threatened Gilbert with his utility knife, it would be the

highlight of the confrontation and mentioned immediately. It insists that the only thing everyone agrees on is that Gilbert grabbed the grievant's stick and threw it outside and the Company's witnesses established only that Gilbert was the aggressor.

The Union claims its witnesses refute the charges against the grievant. It relies on the testimony of Jeanne McKay who testified that Gilbert grabbed the grievant's stick and threw it outside. It points out that she did not see the grievant pull out his utility knife. It observes that Lazenby did not speak to the Union's witnesses before discharging the grievant. It asserts the Company should have and the evidence proves that although the grievant was provoked, he responded in a calm, non-confrontational manner and did nothing to warrant discharge.

The Union argues that even if it is believed that the grievant made threatening statements or waved his box cutter in the air, the record establishes that Gilbert provoked the grievant by grabbing his stick and thus Gilbert is primarily responsible for the July 16, 1998 incident. The Union cites a number of arbitration cases which held that provocation by a supervisor made the penalty of discharge too severe. It submits that Gilbert grabbed the grievant's stick and was clearly the aggressor in the confrontation and the discharge should be set aside as Gilbert had a responsibility to conduct himself in a responsible and rationale manner. It submits Gilbert's conduct was sufficient provocation for any defensive response by the grievant. The Union insists that Gilbert's conduct was consistent with his history of losing his temper as evidenced by his confrontations with Jay Russ and Charles Henning. It also notes that Gilbert is unpredictable, having quit without notice.

In conclusion, the Union claims that the Company has not sustained its burden of showing there was just cause for the grievant's discharge and he should be reinstated and made whole.

DISCUSSION

The Union argues that the standard for the burden of proof is beyond a reasonable doubt or clear and convincing proof. Arbitration is a civil matter and proof beyond a reasonable doubt is a criminal standard, so proof beyond a reasonable doubt is not applicable even if the case involves an assault. The standard in a civil action based on assault is a preponderance of the evidence and there is no persuasive rationale for applying a higher standard based on the facts of the instant case. Thus, the undersigned will apply the preponderance of the evidence as the standard for the burden of proof the Company must meet to establish just cause for the grievant's discharge. The Union alleged the Company had to prove intent but intent can be inferred from conduct.

As to the merits of the case, it is necessary to make a determination of the credibility of the witnesses as the basic facts have been hotly contested. The incident that resulted in the grievant's discharge started when Supervisor Gilbert told the grievant to clean up a laundry detergent spill. There is some dispute as to whether Gilbert told the grievant to do it without

help, whether the grievant asked for help or simply refused to do it. Assuming that Gilbert said nothing about getting the grievant help and told the grievant to clean it up or be fired, there is nothing improper about Gilbert's conduct. He gave the grievant a specific direction to do a job and told the grievant the consequences for failing to do it which is the normal requirements to support a charge of insubordination. The grievant's response was not to immediately comply but to go see his Union steward who correctly told him to go do what he was told. This is confirmed by Pam Ostergaard who spoke with the Union steward who informed her the grievant was going to clean the spill. The grievant proceeded toward the spill and it is disputed whether or not he told Gilbert that he would hurt himself. Whether he did or did not is not critical to the case but is relevant because Gilbert, Ostergaard and Arias met at the spill area and a conversation ensued between the supervisors in which Gilbert told the other supervisors that the grievant said he was going to hurt himself. The grievant apparently overheard this and all three supervisors testified that the grievant started shouting, using obscenities directed at Gilbert and invited Gilbert to hit him. The supervisors testified that the grievant "went off" and got "real mad." After Wayne Lazenby, the Warehouse Manager, arrived, the grievant was still yelling, cussing and throwing a fit and Lazenby had to tell him on the way to Lazenby's office to stop the yelling and cussing. There are four witnesses whose testimony is consistent that the grievant lost his temper, was loud and used obscenities. This proves that the grievant was not calm and non-confrontational as argued by the Union. Jeanne McKay testified that she did not hear any obscenities. She also testified that the grievant said nothing at all. Either McKay was not in a position to hear or her testimony is just not credible. In either case, I credit the testimony of the three supervisors and the Plant Manager. There is absolutely no reason for Arias to go get a steward if nothing happened or if Gilbert was causing the problem. Additionally, there is no reason for Ostergaard, Arias and Lazenby to make up the comments and statements of the grievant. Their testimony is consistent and credible. The testimony also established that Gilbert never provoked the grievant; rather, it was the grievant that "went off" and directed obscenities at Gilbert and invited him to hit the grievant. (See Ex. 2)

With respect to the stick incident, the Union claims that Gilbert pulled it out of the grievant's hands and threw it outside. This is based on the grievant's testimony as well as McKay's. As noted above, I do not credit McKay's testimony. The grievant has an important interest in the outcome of this case and based on his demeanor at the hearing, the undersigned finds that his testimony is just not credible. The undersigned credits the testimony of Ostergaard and Arias that the grievant dropped or threw his stick on the floor and kicked it at Gilbert's feet at which point Gilbert picked up the stick and threw it outside. This evidence establishes that there was no provocation of the grievant by Gilbert. On the contrary, it was the grievant that was the aggressor in this incident and Gilbert acted appropriately.

After Gilbert threw the grievant's stick outside, the grievant went out and retrieved it. The grievant came back to the entrance and both Gilbert and Ostergaard testified that the grievant pulled out his box cutter from its sheath and waved it at Gilbert. The grievant denied ever removing the box cutter from the sheath. Again, what happened involves a question of

credibility. The undersigned credits Ostergaard's testimony that the grievant pulled out his box cutter and waved it. Ostergaard testified she got really scared, the grievant was provoking Gilbert, she pulled Gilbert back and told him to take a walk which he did. The grievant's denial that he took out the box cutter is not credible. There was no animosity between the grievant and Ostergaard and there would be no reason for Ostergaard to make up such a story. The only plausible reason that the grievant pulled out the box cutter was to threaten his supervisor. Such action is clearly serious misconduct.

The Union noted that Arias did not see the box cutter incident but Arias testified that after the grievant went outside to retrieve the stick, Arias went to get Mike Smith, a Union Steward, and did not see what occurred after the grievant left the building. McKay testified she did not see the grievant pull out a knife. None of this testimony sufficiently discredits Gilbert's and Ostergaard's testimony that the grievant pulled out a knife.

The Union offered testimony of witnesses that in the past before Gilbert was a supervisor he had lost his temper and after this incident had quit without notice. None of this is relevant to the instant case. Also, a witness was called about a conversation between Gilbert and Lisa LaBarre regarding the grievant's discharge. This too is irrelevant because it was Wayne Lazenby who made the decision to discharge the grievant on July 16, 1998, and LaBarre sent the grievant the discharge letter the following day. Gilbert neither made the discharge decision nor drafted the discharge letter. His subsequent discussion with LaBarre proves nothing. In conclusion, the evidence establishes that the grievant used threatening language toward his supervisor and pulled out his box cutter and waved it at the supervisor. The grievant was not provoked by his supervisor and the grievant was the aggressor in the incident. The grievant's conduct cannot be tolerated or condoned in the work place. The totality of the grievant's conduct was such that summary discharge was warranted and the Company had just cause to terminate the grievant.

Based on the above and foregoing, the record as a whole, and the arguments of Counsel, the undersigned issues the following

AWARD

Ray Boske was terminated for just cause, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 7th day of January, 1999.

Lionel L. Crowley /s/

Lionel L. Crowley, Arbitrator

mb
5796.doc