BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL NO. 43

and

LLOYD TRANSPORTATION, INC.

Case 3
No. 57140
A-10525

Appearances:

Harvey, Pennington, Herting & Renneisen, Ltd., by **Attorney Christopher J. Murphy**, 11 Penn Center, 29th Floor, 1835 Market Street, Philadelphia, PA 19103-2989, appearing on behalf of Lloyd Transportation, Inc.

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., by **Attorney John J. Brennan**, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, WI 53212, appearing on behalf of Teamsters Union Local No. 43.

RULINGS DENYING UNION'S MOTION IN LIMINE AND GRANTING EMPLOYER'S MOTION TO EXCLUDE GRIEVANTS FROM PORTIONS OF THE HEARING, WITH CERTAIN CONDITIONS

Pursuant to the provisions of the collective bargaining agreement between the parties, Teamsters Union Local No. 43 (hereinafter referred to as the Union) and Lloyd Transportation, Inc. (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate the undersigned as arbitrator of a dispute over the termination of employes J---- C------k and B---- D----g. A hearing was scheduled for February 24, 1999, at the Company's offices. Prior to that hearing, the Company sought a ruling on hearing procedures to protect the anonymity of employes who were to testify on the Company's behalf. The stated rationale for the protective measures was the other employes' fear of reprisals by the grievants, though not by the Union. A conference call was held with counsel for the parties, and in the course of that call counsel for the Union raised objections to the Company's

citation of various grounds for termination which were raised for the first time after the initial decision to discharge the two workers. Union counsel also noted that there was a witness availability problem on February 24th, necessitating a new hearing date. The hearing was rescheduled for April 16th and a briefing schedule was established. The parties submitted briefs, the last of which was received on March 17th.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Now, having considered the arguments of the parties, and the representations of fact contained in the pre-hearing submissions, and being fully advised in the premises, the undersigned makes the following rulings:

1. The Union's Motion to exclude evidence related to drug use and/or sale on Company premises and work time is denied.

2. The Company's Motion to exclude the grievants from the hearing during the testimony of employe accusers, and to direct counsel for the Union and officials of the Union to refrain from disclosing identifying information about these witnesses to the grievants is granted, subject to the following limitations:

> a. The hearing will be bifurcated so far as the anonymous testimony is concerned. A transcript of the direct testimony of these witnesses will be made, and will be redacted to remove identifying information. The redaction will be done by the arbitrator in consultation with counsel for the parties. The transcripts will be provided to Union counsel, and he will be allowed to share the transcripts with the grievants to prepare his cross-examination;
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> b. The testimony so taken will be treated as hearsay, because the failure to reveal the identity of the witnesses to the grievants denies them the opportunity for effective cross-examination.

Dated at Racine, Wisconsin, this 13th day of April, 1999.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

LLOYD TRANSPORTATION, INC.

MEMORANDUM ACCOMPANYING ARBITRATOR'S RULING ON PRE-HEARING MOTIONS

ISSUES

There are two sets of issues before the arbitrator. The first is whether evidence concerning allegations of drug use and sale by the grievants should be excluded from this proceeding, because the initial terminations were based upon the grievants' failure to pass drug tests and not on specific acts of drug-related misconduct. The second set of issues goes to the Company's request that the identity of employe witnesses against the grievants be kept from the grievants, specifically by excluding the grievants from the hearing room during the testimony of those witnesses and directing Union counsel and officials to keep the witnesses' identities from the grievants. Each is addressed in turn.

BACKGROUND

The Company is an affiliate of Quality Carriers, Inc. and Montgomery Tank Lines, Inc. It operates a trucking business in southeastern Wisconsin, hauling liquid freight. The Union is the exclusive bargaining representative for the Company's employes. The grievants, J---- C----k and B---- D----g, were employed as truck washers until they were discharged for positive results on drug tests. The Union challenged the discharge decisions, alleging that the procedure used was not random, but was instead a sham designed to insure that these two were tested because the Company knew they would fail the tests. The Union also pointed out that a positive drug test does not constitute grounds for termination under the contract. Instead, the Company would be required to allow them to participate in rehabilitation and, if they were successful, reinstate them. The Company did not reinstate the grievants, but instead sent another termination letter, based on allegations of drug use on Company premises and on work time. These allegations were based on interviews with other employes after the initial discharge, in the course of which the other employes claimed to have repeatedly observed the grievants and the wash rack supervisor using cocaine during working hours. A sampling of affidavits to this effect, with the accusers' names and other identifying information redacted, were supplied to the arbitrator:

AFFIDAVIT

I, ----------, being duly sworn according to law, do hereby certify and state as follows:

1. My address is ----------. I am currently employed by Lloyd Transportation, Inc. ("LTI") in its shop/wash rack department as ----------. I have had this job since ----------. I am a member of Teamsters Local 43.

2. I understand that Local 43 has filed a grievance against LTI concerning its discharge of J---- C----k and B---- D----g for (1) failing a random drug test and (2) using and/or selling drugs on Company property. I have volunteered information regarding the facts of this case and my unwillingness to testify publicly at an arbitration hearing in front of the grievants. I have been advised by LTI that it will not voluntarily disclose my identity or my statement to the grievants.

3. I have provided this affidavit to LTI willingly and voluntarily. I have not been coerced or threatened by the Company. I have not been promised any benefit or reward for my cooperation. I have been assured that no adverse action would result if I chose not to provide this affidavit.

4. On or about Wednesday, August 12, 1998, I learned that the grievants had been taken for a random drug test. I subsequently learned that both failed that test and that they were discharged on or about Monday, August 18, 1998.

5. About a week later, I was asked by Jeff Lloyd, LTI's vice-president, to have a confidential discussion concerning the use of drugs on Company property. As stated in paragraph 3, my conversation with Lloyd was voluntary.

6. During that conversation, I told Lloyd that the grievants regularly used cocaine on Company property with the wash rack supervisor, Jim Gumm. I told Lloyd that I had personally observed those men using drugs on the property and that I heard them talking about drug use on Company property. Prior to that time, I have never discussed drug use by employees with Lloyd or any other supervisor.

7. On or about September 7, 1998, I learned that Gumm had been fired. About a week or so later, I learned that the grievants were discharged for using drugs on Company property.

8. On or about late October or early November, I met privately with Gerry Jacobs, president of Local 43, at LTI's offices to discuss the grievants' drug use on company property. I told Jacobs the same things I had privately told Lloyd. At that time, I was given assurances by both Lloyd and Jacobs that my conversation would be confidential. I later shared the contents of my conversation with Jacobs with Lloyd.

> 9. I will not testify publicly against the grievants at an arbitration hearing, I am afraid of doing so because both grievants have criminal records. I (sic) addition, one of the grievants is known to be a member of a gang. For these reasons, I fear for my personal safety and that of my family if I testify in the presence of the grievants.
>
> 10. I will testify before an arbitrator, Jacobs and Local 43's lawyer provided that adequate steps are taken to protect my identity.
>
> I have read this affidavit consisting of 10 paragraphs. I fully understand its contents and I certify under penalty of perjury that it is true and correct to the best of my knowledge and belief.
>
> . . .

Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

The Motion In Limine

The Union takes the position that the alleged evidence of specific drug related misconduct should not be considered. The grievants were discharged for testing positive for drugs. Only after the employer learned that it could not discharge them for a positive drug test did it come forward with new grounds for discharge. It is well established that a discharge must rise or fall on the reasons given at the time of termination, and may not be augmented by new charges and new evidence once the weakness of the original case becomes clear. While arbitrators do sometimes allow employers to introduce newly discovered evidence that supports the original charge, arbitral precedent uniformly rejects the addition of new causes of action, unrelated to the original charges.

The Company rejects the Union's argument that the evidence in this case must be limited to the positive drug tests. First, the Company notes that the Union agreed to have all of the issues related to the discharges heard in a single proceeding, and it cannot now renege on that agreement. Moreover, the Company notes that there is no logical reason for excluding this additional evidence simply because the Union thinks the Company investigated drug use because it could not sustain the discharges based on the positive drug tests. The Company can and will prevail on the drug test issue, but even if it does not, the merits of drug use charges stand on their own merits.

The Motion to Exclude the Grievants

The Company argues that public policy favors the elimination of drug use in the workplace, particularly in safety sensitive positions, and by necessity favors the protection of drug informant confidentiality. MOBIL OIL CORP., 303 NLRB 780 (1991). Here, the grievants are engaged in hazardous work, involving the use of dangerous equipment and caustic chemicals. Their use of drugs on work time is clearly contrary to public policy. The grievants' extensive criminal records, including one's gang affiliation, creates a reasonable fear in the other employes that they and their families will be subjected to retaliation if they testify against the grievants. Given the powerful interest that the Company and the public have in deterring drug use, and the practical impossibility of deterring such drug use if witnesses are intimidated, the arbitrator should allow the witnesses to testify in the presence of the Union President and counsel, but outside of the presence of the grievants. There is ample arbitral precedent for such an arrangement. Arbitrators have often protected the identity of professional spotters and informants whose future effectiveness would be compromised by testifying in public, and the innocent employes in this case should be afforded no less protection.

The Union vigorously objects to the use of anonymous testimony. The spotter cases cited by the employer are inapposite, since the rationale in those cases was that the future employment of those individuals would be compromised by revealing their identities. Here, the witnesses are not professional industrial spies -- they are regular employes and their employment will not be affected by disclosing their identities at hearing. The suggestion that they fear physical retaliation from the grievants is simply bunk. The Union notes that there are other witnesses who are willing to testify openly, which puts the lie to the claimed fear of violence.

Taking anonymous testimony is inherently unfair. An accused person has a fundamental right to know the evidence against him and to participate in his defense. It is a practical impossibility to conduct a cross-examination of an occurrence witness whose identity cannot be revealed to the accused. For all of these reasons, the arbitrator should not accede to the Company's provocative and unwarranted request.

DISCUSSION

The Union's Motion In Limine

This situation is distinct from some of those cited in the Union's brief. Unlike MAZZA CHEESE CO., 84 LA 947 (LACUGNA, 1985) this is not a case where the employer imposes a suspension under one rule and then changes its mind and recasts the same action as a more serious offense warranting discharge. Nor is this a case where, as in GIANT EAGLE MARKET CO., 101 LA 581 (ZOBRAK, 1993), the additional charges are raised for the first time at the

arbitration hearing. This case is admittedly more similar to those described in the Awards in AT&T, 102 LA 931 (KANNER, 1994) and HOSPITAL CENTRAL SERVICES, 109 LA 785 (D'ELETTO, 1997). The arbitrators' conclusions were doubtless warranted by the facts before them in those specific cases, but I do not read them as establishing a generally applicable rule that an employer may not respond to serious misconduct discovered after a discharge.

An arbitrator will generally be very skeptical of anything that appears to be "piling on" by making a discharge decision on one basis and then scouring the employe's history for other evidence of wrongdoing that can be thrown into the record in case the actual reason for discharge fails. Often this tactic involves an effort to persuade the arbitrator that the cumulative weight of all of the alleged wrongdoing should lead to upholding a discharge, even if no single incident would suffice. Clearly this is improper, as it essentially seeks to retroactively create a progressive discipline case. Even where the subsequent allegations involve substantial misconduct and would, standing alone, justify termination, an arbitrator will naturally suspect that the employer would not have made a discharge decision but for its desire to shore up the initial case. This suspicion will be particularly acute where the employer cannot explain why it conducted its separate investigation other than as a means of augmenting the original case, or where there is a substantial lapse of time between the initial discharge and the leveling of the new charges. Having made these observations, however, it is not correct that in every case the employer is obligated to ignore adverse information that comes to its attention after a discharge decision.

In this case, the Company claims that it discovered, after discharging them for positive drug tests, substantial and credible evidence that the grievants and a supervisor were in the habit of using cocaine on the job. There are three possible approaches to this information. First, it can be ignored. The Company has not chosen that course of action, and there is no persuasive authority for the proposition that they must pretend that the information does not exist. Being discharged on one basis is not a grant of immunity for distinct misconduct. The second possible course of action is that chosen by the Company in this case -- the issuance of a separate termination notice. This is arguably the most appropriate course from a procedural point of view, since it gives rise to a separate right to grieve and does not inter-mix the issues before a single decision maker unless the parties so choose. 1/ The third possible course of action is to proceed on the initial discharge and to offer the after-acquired evidence of misconduct at the arbitration as relevant to the question of remedy. In that case the argument would be that, even if the grievant was not properly discharged, his right to reinstatement and/or back pay should be curtailed as a result of the separate misconduct. Even under the Union's view of this case, this third approach would make the drug use allegation relevant.

1/ In this case, it appears that the Union proposed consolidating all of the claims of misconduct into a single proceeding. I do not take this as a waiver of the argument that the allegations of drug use and other misconduct should be thrown out. Instead, I read the Union's December 9, 1998 letter to the Company's counsel as proposing that all issues surrounding the terminations, including this request to exclude evidence, should be considered by a single arbitrator.

Inasmuch as the allegations of on-duty drug use and/or sales are relevant, either as going to the merits of terminations or as related to the question of remedy in the drug test aspect of the terminations, the Union's Motion is denied.

The Company's Motion to Exclude the Grievants

The Company seeks to have the grievants excluded because of employe fears of physical retaliation against themselves and their families if they are known to have testified against the grievants. This request is made in the face of the normal presumption that an accused has the right to face his accusers, know the evidence against him and to be present during all proceedings.

As supportive evidence, the Company alleges that C----k is a member of a gang, and that both men have felony records. According to the criminal records submitted by the Company, D----g's record consists of the following:

Arrest	Charge	Disposition
07/10/84	Resisting / Obstructing an Officer	Ordinance
10/12/88	Manufacture or Delivery of a Controlled Substance	Felony
05/13/89	Delivery of a Controlled Substance	Felony

C----k's criminal record is more substantial:

Arrest	Charge	Disposition
03/14/76	Disorderly Conduct	Ordinance
02/23/77	Forgery	Felony
03/22/77	Burglary	Dismissed
06/09/77	Receiving Stolen Property	Dismissed
09/06/78	Attempted Burglary	Felony

10/28/78	Party to Attempted Burglary	Felony
11/13/78	Forgery	Felony
07/04/85	Habitual Criminality - Uniform Controlled Substances Act	Felony
10/04/85	Manufacture or Delivery of Controlled Substances	Felony
10/11/85	Habitual Criminality - Uniform Controlled Substances Act	Felony
08/10/90	Parole Violation	Referred to Probation and Parole Authorities
06/26/92	Parole Violation	Referred to Probation and Parole Authorities
09/18/92	Parole Violation	Referred to Probation and Parole Authorities

These arrest records do not bring great credit on either grievant, but they do not reflect a history of violent crime, nor of recent criminal activity. In the case of D----g, his last conviction was nine and one half years before his termination. In the case of C----k, thirteen years passed between the last felony conviction and his discharge. The submission of these criminal records does not, by itself, suggest a need for some extraordinary protective measures. As for the allegation of gang membership by C----k, this certainly raises some concerns. By their very nature, criminal street gangs intimidate and coerce non-gang members. That is one of the basic purposes of a street gang. However, not every gang is a substantial presence in the community, and there are variations between gangs in their record for violence. The simple assertion that C----k is a gang member, without more, cannot defeat his right to be present during the hearing, and should not implicate D----g's rights.

The rights to be present during proceedings and to know the evidence are so fundamental to the notion of a fair hearing that it requires a strong and specific showing to restrict them. 2/ The allegations made about gang membership and criminal histories raise concerns, but the evidence submitted in support of the request for exclusion in this case is not sufficient to overcome those basic rights. Having said that, the perception among other employes that retaliation is a genuine possibility, as evidenced by the affidavits, cannot be brushed aside. The arbitrator is working from a paper record, disclosing small parts of the grievants' personal histories. The co-workers are presumably better acquainted with the men,

their personalities and proclivities. Moreover, the perception that retaliation is a possibility, even if unwarranted, has a practical effect on the litigation and the Company's ability to present its case.

2/ The decision of the National Labor Relations Board in MOBIL OIL CORP., 303 NLRB 780 (1991), is cited by the Company for the proposition that there is a public policy in favor of protecting the identity of drug informants. Granting the general point, there is a large practical difference between the situation there where anonymous tips trigger a reasonable suspicion drug test that in turn may or may not lead to discipline, and the situation here where the anonymous information is offered as the basis for a discharge decision.

In the arbitrator's view, the appropriate balancing of interests in this case is struck by acceding in part to the employer's request. The employe witnesses who wish to remain anonymous will be permitted to testify separately and anonymously, with direction to the Union counsel and Union President to preserve their anonymity. However, this testimony will take place in a preliminary hearing, which will be transcribed. That hearing will be for the purpose of direct examination by the Company. The transcript will be redacted by the arbitrator with input from counsel for the parties, to remove identifying information, and the redacted transcripts will be made available to the grievants so that they may assist their counsel in preparing cross-examination. Should it prove impossible to remove the identifying information from the transcript, summaries of the testimony will be prepared by the arbitrator. The hearing will then be reconvened for the purposes of cross-examination of the employe witnesses and the presentation of the remainder of the case.

Even with these procedures in place, there is no question that counsel for the Union will be at a substantial disadvantage in cross-examining the anonymous witnesses. The impairment of the right to cross-examine, and of the grievants' right to know the evidence against them, is such that the testimony taken from anonymous witnesses will be treated as hearsay in deciding this case. 3/ Hearsay is routinely used in arbitration cases, but the weight accorded to hearsay evidence is substantially less than that accorded to evidence presented by occurrence witnesses who testify with no restrictions on the right to cross-examination. In proceeding in this fashion, the Company should be mindful that, as noted in Bornstein, et al., Labor and Employment Arbitration, (2d Edition, Matthew Bender), Volume 1 (Release No. 18, April 1998), at §506, footnote 1:

> . . . it is almost certainly the "clear and convincing evidence" standard that will be applied (either expressly or by implication) by arbitrators in cases involving accusations of criminal conduct or moral turpitude . . .

3/ It might reasonably be asked why the special arrangements for taking the testimony in a separate hearing and providing redacted versions are necessary, given that the testimony is to be treated as hearsay in any event. The simple answer is that there is a difference between the impact of classic hearsay testimony and that of a declarant personally testifying before the arbitrator, where the testimony is rendered hearsay by the impairment of the right to confrontation rather than the unavailability of the declarant. The declarant has an opportunity in live testimony to make a greater impression on the decision maker, and the special arrangements for preparing cross-examination are intended to minimize any unfair advantage to the Company. The Union is free to waive this portion of the ruling if it believes it to be unnecessary or cumbersome.

Dated at Racine, Wisconsin, this 13th day of April, 1999.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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