BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL TEAMSTERS UNION
LOCAL 662

and

W.S. DARLEY AND COMPANY

Case 15
No. 57945
A-5797

Appearances:

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

Mr. Jeffrey S. Darley, Executive Vice-President and Chief Operating Officer, on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "Company", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Chippewa Falls, Wisconsin, on November 10, 1999. The hearing was not transcribed and the parties agreed I should retain jurisdiction if the grievance is sustained. The parties there submitted oral arguments in lieu of filing briefs. Pursuant to their joint request, I issued a "bench" decision which this Award augments.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUES

Since the parties were unable to jointly agree on the issues, I have framed them as follows:

1. Is the grievance arbitrable?

2. If so, did the Company properly terminate grievant Robert McRoberts and, if not, what is the appropriate remedy?

DISCUSSION

As I related at the hearing, there is no merit to the Company's claim that the grievance is not arbitrable because the Union did not request arbitration in a timely fashion.

Thus, Union Business Representative Gary L. Franz by letter dated June 8, 1999 (unless otherwise stated, all dates refer to 1999), informed Company Vice-President and Chief Operating Officer Jeffrey S. Darley that the Union would appeal grievant McRoberts' termination to arbitration if the Company did not accept the Union's latest settlement offer (Joint Exhibit 11). Franz's letter stated: "If you can not agree to our request, then I will proceed to arbitration to settle this grievance. I will await a response from you." Franz's letter followed the parties' ongoing efforts to settle McRoberts' grievance. Darley did not respond to Franz's letter.

The 20-day deadline for appealing grievances to arbitration therefore did not immediately kick in because Article 9 of the contract states:

> "If the Company's answer at Step 2 of the grievance procedure is not acceptable, the Union may, within twenty (20) days of the Company's Step 2 answer, demand arbitration. Such demand shall be in writing and addressed to the Personnel Manager."

Since Darley failed to respond to Franz's June 8 letter in a timely fashion, the 20-day deadline never began to run. I thus find that the Union's' July 30 request for arbitration was timely (Joint Exhibit 12).

As for the merits of the grievance, the record shows that grievant McRoberts, a Stock Clerk, on January 20 faxed the following handwritten note to Personnel Manager Mary Knutson:

> "I have taken a position with another company. My last day of work at Darley will be Monday, February 2, 1999." (Joint Exhibit 3).

The Company asserts that following receipt of this note, it was free to terminate McRoberts at any time because nothing in the contract prevents it from terminating an employe after it has received such a resignation note. McRoberts thus was told on January 21 that his resignation was effective immediately and that he would not have any insurance coverage for February, 1999. McRoberts admitted he "got mad" after he was told he would not have any more insurance coverage. McRoberts on January 22 subsequently attempted to report to work, but to no avail.

By letter dated January 22 (Joint Exhibit 4), the Company informed McRoberts:

Dear Robert:

This letter is written to confirm that I have received your notice of resignation dated January 20, 1999. In as much as you have advised us you wish to continue your employment through Monday, February 1, 1999, you have been advised by Gene Normand that the company has accepted your resignation effective at the close of business on January 21, 1999.

. . .

The Company's claim that it could terminate McRoberts before his resignation date is without merit since Article 6 of the contract, entitled "Seniority", states:

. . .

Section 3. Seniority shall terminate for the following reasons:

(a) The employee is laid off and not re-employed, or performs no work for the Company for any reason for a period of two (2) years.

(b) The employee leaves the employment of the Employer of his/her own volition.

(c) The employee is discharged for just cause or during the probationary period.

(d) The employee, after having been laid off, fails to notify the Employer within forty-eight (48) hours after delivery of notice of work, whether or not he/she will return to work, or if the employee, after notifying the

> Employer that he/she will return to work, fails to return to work within subject to a one (1) step roll-back, whichever is less. The roll-back requirement shall not apply to any employee who previously occupied the new job. Such previous occupants shall receive their current rate of pay or the highest rate attained when previously occupying the job, whichever is greater, but in no event shall the rate be more than the top rate for the new job.
>
> . . .

These are the *only* circumstances under which an employe can lose seniority and be terminated under the contract. McRoberts' resignation note did not change any of this because his note made it clear that he wanted to leave "the employment of the Employer of his/her own volition" effective February 2. McRoberts' involuntary termination on January 22 hence was not "of his/her own volition" and thus was contrary to Article 6, Section 3, (b), above.

The Company asserted at the hearing that it nevertheless had just cause to terminate McRoberts under Article 6, Section 3, (c), because of his supposed disruptive behavior on January 21 when he admittedly swore on the shop floor in the presence of other employes and when he supposedly swore at Plant Manager Fred Normand who testified that McRoberts told him "Fuck you" and "Fuck you and fuck this place." McRoberts testified he told Normand "Fuck that" and "Fuck this place," but he flatly denied ever telling Normand "Fuck you."

One problem with the Company's claim is that swearing on the shop floor is common and has been tolerated by the Company in the past. Thus, McRoberts testified that supervisors Mike Hays, Kevin Lafort, (2), and Denise Schvey (?) have sworn. Union Steward Ken Schick testified that Hays and Andy Watson have sworn and that employes Jeff Cronin, Clark Kraemer (?) and Tony Monpas have said "fuck" in front of supervisors. Given this practice of swearing, McRoberts could not be summarily discharged for cursing on the shop floor.

That, though, is a separate question of whether employes can curse at supervisors. Ordinarily, they cannot because that constitutes gross insubordination. However, it is not at all clear that McRoberts swore at Normand, as McRoberts flatly denied doing so and there were no witnesses to corroborate Normand's testimony. However, even assuming he did, the Company never told McRoberts at the time of his January 22 termination he was being fired for swearing at Norman. The Company first made that claim in an April 16 letter to Franz (Joint Exhibit 6).

That was way too late. The Company must set forth in full detail *all* the reasons it is terminating an employe at the time of his/her termination pursuant to Article 7, Section 2, of the contract which states:

> **Section 2. Just Cause Notification**. Employees shall not be disciplined or discharged without just cause.
>
> If the Employer feels there is just cause for suspension or discharge, the employee shall be notified in writing at the time of the discharge or suspension for the reasons therefor.

By failing to do so here, the Company violated one of the most important parts of the contractual just cause standard.

The Company's termination also violated Article 7, Section 3, of the contract which provides for progressive discipline and which states:

> **Section 3. Procedure**. The Employer recognizes the concept of progressive discipline commensurate with the nature of the offense. The usual disciplinary progression shall include the following:
>
> A. Oral reprimand.
> B. Written warning.
> C. Suspension.
> D. Discharge.
>
> . . .

This progressive discipline *must* be followed. When it is not, a discharge decision can be overturned. That is particularly so where, as here, the Company only suspended employe Schick for his *second* alleged act of insubordination and where it only gave him an oral warning over his *first* act of alleged insubordination. In addition, Normand testified that another employe was orally reprimanded for swearing. By subjecting McRoberts to a much stiffer penalty here, the Company has failed to treat similarly situated employes similarly, which again is violative of the contractual just cause standard.

All in all, then, the Company violated McRoberts' rights by terminating him on January 22 rather than on February 2, as he had requested in his resignation note; by violating Article 7, Section 2 when it failed to tell him on January 22 that he was terminated at least in part because of his supposed bad behavior; by not following the progressive discipline mandated in Article 7, Section 3; and by subjecting McRoberts to disparate treatment.

To rectify these contractual violations, the Company shall immediately expunge all references to McRoberts' termination from its personnel files and it shall make him whole for all money and benefits, including overtime, that he otherwise would have earned but for his

termination, less any monies he would not have received but for his termination. If there is any dispute over how any unemployment compensation benefits must be offset, the parties will so inform me.

In light of the above, it is my

AWARD

1. That the grievance is arbitrable.

2. That the Company did not properly terminate grievant Robert McRoberts.

3. That the Company shall make him whole in the manner described above.

4. That I shall retain my jurisdiction for at least thirty (30) days to resolve any questions involving the application of this Award.

Dated at Madison, Wisconsin this 29th day of November, 1999.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

AAG/gjc
5979