BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 579

and

L.C.L. TRANSIT COMPANY INC.

Case 2
No. 59451
A-5900

(Grievance of Manfred Payne)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Mr. Nathan D. Eisenberg**, on behalf of the Union.

Michael, Best & Friedrich, by **Mr. Donald J. Vogel**, 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 Janesville, Wisconsin, on April 27, 2001. There, both parties agreed that I should retain my jurisdiction if the grievance is sustained. The parties there presented oral arguments in lieu of filing briefs.

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

ISSUE

The parties have stipulated to the following issue:

Did the Company have just cause to terminate grievant Manfred Payne and, if not, what is the appropriate remedy?

BACKGROUND

The Company, a food grade bulk carrier, maintains a truck washing and repair facility in Elkhorn, Wisconsin.

There, grievant Payne washed truck tanks from the time of his September 15, 1999, hire to the time of his September 15, 2000 termination (unless otherwise stated, all dates herein refer to 2000). Payne suffered an on-the-job injury in March which caused him to miss work on and off until September 5, 2000, when he returned to work.

Safety Manager Michael Ott, who is based in the Company's Green Bay offices, testified about some of Payne's past work problems which included repeated tardiness, not calling in, leaving work early, and sleeping on the job. Ott was unable to go into the specifics of certain events because the Company has lost most of the contents of Payne's personnel file. Ott said that incident reports are not given to employees; that Payne was on and off worker's compensation because of his injury; and that he wanted to fire Payne in July, but did not do so because it is too difficult to hire new employees and because Payne was receiving disability payments at that time.

Ott testified that Payne on September 5 – following a doctor's full back-to-work release - only performed about half the work that a truck washer normally performs, and that he, Ott, therefore issued Payne a warning letter on September 6 (Company Exhibit 5), that stated:

. . .

Dear Mr. Payne:

> This letter is written to serve as a warning notice that your productivity as a tank washer with LCL Transit has been unacceptable and future occurrences will be met with more severe disciplinary action up to and including termination. You and I have had numerous discussions today regarding the fact that personnel performing the tank wash job function within our company are able to complete the wash process in 1 hour and 2 hours for a tank that contains chocolate. Over the past two days your performance was significantly slower than the time it normally takes to complete this function which has forced us to issue this warning.

. . .

Ott added that Payne's productivity was so too low on September 7 that a driver filed a formal complaint against him, which is why he that day suspended Payne without pay for five days and that he then expressly told Payne to report back for work on September 14 at 7:00 a.m.

Payne did not report for work on that day and he did not call in. He did report for work on September 15. The Company that day fired him via a September 15 letter (Joint Exhibit 5), that stated:

. . .

> Dear Manfred:
>
> Your employment with LCL Transit Company has been marred with a series of attendance problems from leaving work early without permission to occurrences of not attending work without notifying LCL Transit management. On September 7, 2000 your employment with LCL Transit was suspended for a period of 4 ½ days. You were instructed to return to work on Thursday, September 14, 2000 at 7:00 am, this conversation was conducted by Mike Ott and witnessed by Keith Steingle of LCL Transit management and Jim Grebing, mechanic for LCL Transit. Being that you did not return to duty on the specified date, compiled with your attendance history your employment is terminated effective immediately.

. . .

On cross-examination, Ott testified that he did not personally witness many of the incidents listed on Company Exhibit 1 – which he gleaned from Company records and which detailed Payne's alleged work deficiencies - and that his initial September 6 warning letter was not copied to the Union.

Then-Operations Manager Clayton Weir testified that he personally witnessed the May 22 incident report given to Ott relating to his failure to show up at work (Company Exhibit 2); that he personally spoke to Payne regarding the July 26 incident report relating again to his failure to show up at work (Company Exhibit 3); and that Payne's incident reports – which he provided to Payne whenever he asked for them - were about an inch thick and covered such matters as sleeping on the job, being late, and leaving early from work on about 6-10 occasions. He also said that he was not present when Payne was suspended on September 7 and that he faxed the Company's September 15 termination letter to Payne from the Green Bay office.

On cross-examination, Weir said that he did not copy Union Exhibit 1 and various incident reports to the Union. He also said that he was too lenient with Payne at the beginning of his employment because of his personal problems and that Payne's doctor sent a second letter to the Company stating that Payne was fully released to return to work in September.

Asked what specific incidents listed on Company Exhibit 1 he personally witnessed, Weir replied that he had first-hand knowledge of, *inter alia*:

1. Payne leaving work early on March 22, March 23, March 28, June 6 and July 24 without proper notice.

2. Payne's March 23 suspension.

3. Payne's failure to call in on time on May 22.

4. Payne's time card falsification on July 18.

Union Business Agent Darrell Shelby testified that he was never copied with any prior incident reports or even with the Company's September 15 termination letter and that he first learned about Payne's termination when Payne filed his September 15 grievances (Joint Exhibit 2-4). He also said he was never orally informed about any of Payne's earlier work problems.

For his part, Payne testified that he injured his finger on the job and that he underwent surgery on March 24, which is why he missed several days of work at that time. He also said that he returned to work on light duty "on and off"; that he was not one hundred percent recuperated when he returned to work on September 5; and that the doctor at that time had placed him on a graduated back-to-work schedule.

Asked about Company Exhibit 1 which listed his alleged work deficiencies, Payne stated that he never received a warning for March 1; that he left work early on March 23 because he needed surgery; that he did not recall the March 28 incident and that he was not warned about it; that he got permission to leave early on May 22; that he did not recall the June 6 incident and that no one ever spoke to him about it; that he called in on June 12; that he did not understand the July 17 entry; that the July 18 incident never occurred; and that he did not recall the July 24 incident. He also said that he did not report to work on September 14 because he believed he was to return on September 15.

On cross-examination, Payne testified that he never discussed the July 26 incident relating to supposedly not showing up at work (Company Exhibit 3), with Weir; that he only received notice of Company Exhibit 6 which relates to him not showing up for work on

March 15; that he got permission to leave work early on March 22 and on all other occasions; that he initially grieved Company Exhibit 6 and that a Company representative subsequently told him "don't worry about it" because it would be rescinded; that he did not recall receiving a copy of Company Exhibit 4; and that his personal doctor sent the Company a letter setting forth his back-to-work restrictions. He also initially said "I was not given a specific date" as to when he should return to work after his September suspension. He then was confronted with his September 7 time card (Company Exhibit 7), which stated - in his own handwriting - that: "Suspended for 5 days was told to report 14 Sept. 000700." Payne then said "I did make a mistake in writing that" because he was told to return to work in five days, which he took to mean September 15.

POSITIONS OF THE PARTIES

The Union claims that the Company lacked just cause to terminate Payne because the Company failed to provide it with notice of Payne's disciplinary actions; because some of the incidents charged against Payne occurred when he was on worker's compensation and when he had legitimate reasons for being absent or leaving early; and because Payne was only disciplined over his work performance, as opposed to not showing up for work on September 14, which it calls a "minor issue". As a remedy, the Union seeks a traditional make whole order that includes Payne's reinstatement and back pay.

The Company asserts that it had just cause to terminate Payne because the incidents between September 7 – September 14 "cannot be looked at in a vacuum"; because Wier's testimony rather than Payne's testimony must be credited; because the Union must have been aware of the incident reports even if the Company did not provide them; and because Payne received a full release to return to work in September.

DISCUSSION

This case turns on Article 30 of the contract, entitled "Discharges, Suspension and Voluntary Quit", which states:

> Subject to the provisions of Article 4, Section 1(b), the Employer shall not discharge or suspend any covered employee without just cause, but in respect to discharge or suspension shall give at least one (1) written warning notice of the complaint to the affected covered employee, prior to discharge or suspension, with a copy to the Local Union, except that no warning notice need be given to a covered employee prior to discharge if the cause of such discharge is dishonesty or drunkenness which may be verified by a sobriety test. (Emphasis added). Refusal to take a sobriety test shall establish a presumption of drunkenness. A prior warning is also not required if the cause of discharge

> is: drug intoxication as provided in Article 26, Section 1 of this Agreement, the possession of controlled substances and/or drugs, either while on duty or on Company property; or recklessness resulting in serious accident while on duty; or failure to report any accident which the covered employee is aware of; or unprovoked physical assault on a company supervisor while on duty on company property.
>
> Further, no prior warning is required where there is a discharge for refusal of a work assignment or the unauthorized use of equipment. Any covered employee who absents himself from work for three (3) successive days without notification to the Employer shall be considered a voluntary quit. However, if requested by the covered employee or the Local Union, a hearing concerning such discharge or voluntary quit will be arranged. Discharge, suspension and warning letters must be postmarked no later than ten (10) days following the Employer's knowledge of the violation, except in cases where a letter of investigation was issued within the ten (10) day period. A local meeting shall be required between the Employer and the Local Union in an effort to resolve grievances prior to docketing grievances in all cases involving discipline unless otherwise provided herein. A phone conversation shall satisfy this provision where mutually agreed between the Local Union and the Employer.
>
> The warning notice as herein provided shall not remain in effect for a period of more than nine (9) months from the date of said warning notice. Habitual absenteeism or tardiness shall be subject to disciplinary action up to and including discharge.

This language provides for two important procedural requirements: a notice requirement to the Union whenever formal discipline is issued and progressive discipline for an employee.

As to the former, Union Business Agent Shelby testified that he did not receive copies of the September 7 suspension letter, the September 15 termination letter, or any prior incident reports. For his part, Weir admitted that he never copied any incident reports to the Union.

The Company's failure to comply with the notice requirement in Article 30 is simply inexcusable, as this requirement is one of the most important provisions in the entire contract because it enables the Union to offer aid and protection to employees facing discipline. That is why it must be complied with in all circumstances. The failure to provide such notice therefore can warrant overturning a disciplinary action. See *How Arbitration Works*, Elkouri and Elkouri (BNA, 5th Ed., 1997), p. 919.

But, in order to do so, it must be clear that the failure to provide such notice was prejudicial. Id., at 919-920. If it was prejudicial, the discipline must be overturned. If it was not prejudicial, the discipline cannot be overturned on this basis alone.

Here, the failure to give proper notice was not prejudicial because Payne deliberately chose not to report to work on June 14 after Ott on June 7 had expressly ordered him to do so. While Payne asserts otherwise, I credit Ott's contrary testimony since: (1), Ott testified in such a credible manner; and (2), Payne's own June 7 time card (Company Exhibit 7), states in his own handwriting: "Suspended for 5 days was told to report 14 Sept. 000700."

Moreover, Payne chose to only work at about half speed on June 5, 6 and 7 after he received a full release from his doctor to return to work. While Payne asserts that he was only released to do part of his job, I credit Ott's contrary testimony that Payne had received a full release from his doctor.

Payne's refusal to perform a full day's work for a full day's pay after he returned to work in September and his subsequent refusal to report for work on September 14 show that he really was not interested in keeping his job. In addition, while Payne claimed that he was not guilty of any of the work infractions noted in Company Exhibit 1, I credit Weir's testimony that Payne regularly left work early without permission; that he did not show up at work when scheduled; and that he falsified his time card.

It is true that progressive discipline is mandated under Article 30 of the contract for most offenses. However, it is clear that Payne by September simply no longer wanted to work on the Company's terms. Moreover, the Company in any event properly followed the progressive disciplinary chain when it issued him a written warning on September 6; when it suspended him on September 7; and when it finally terminated him on September 15. In addition, and for the reasons stated above, it had just cause to issue all of those disciplinary measures. As a result, Payne was not prejudiced over the Company's failure to provide the Union with the notice called for in Article 30, which is why his termination must stand.

But, I again want to point out that the Company is skating on thin ice when it does not provide the Union with the notice required in Article 30. Here, it avoided falling through the ice only because the record so clearly establishes that Payne simply no longer wanted to work for the Company and because its lack of notice therefore was not prejudicial. That may not be true in the future if it ever again fails to provide such notice.

In light of the above, it is my

AWARD

1. That the Company had just cause to terminate grievant Manfred Payne.

2. That his grievance is hereby denied.

Dated at Madison, Wisconsin this 15th day of May, 2001.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

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