BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL NO. 695

and

REYNOLDS TRANSFER & STORAGE COMPANY, INC.

Case 14
No. 60609
A-5983

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorneys Scott D. Soldon** and **Mark W. Floyd,** 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Union Local No. 695.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney Daniel D. Barker,** P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of Reynolds Transfer & Storage Company, Inc.

ARBITRATION AWARD

Reynolds Transfer and Storage Company, Inc. and Teamsters Local Union No. 695, hereinafter Employer and Union, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. A request to initiate grievance arbitration was filed with the Commission on December 7, 2001. Commissioner Paul A. Hahn was appointed to act as Arbitrator on December 13, 2001. The hearing took place on January 22, 2002 in the offices of the Wisconsin Employment Relations Commission, Madison, Wisconsin. The hearing was transcribed. The parties were given the opportunity to file post hearing briefs. Post hearing briefs from the parties were received by the Arbitrator on March 21, 2002. The parties declined the opportunity to file reply briefs. The record was closed on March 22, 2002.

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.

ISSUE

The parties agreed to the following statement of the issue:

> Did the Company violate Article IX of the collective bargaining agreement when it discharged the Grievant, and if so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE IX – DISCHARGE, SUSPENSION

> The Employer shall not discharge or suspend any employee without just cause, but shall give at lease (sic) one (1) warning notice of the complaint against such employee to the employee in writing, and a copy of the same to the Union affected. No warning notice need be given to an employee before he/she is discharged or suspended if the employee is guilty of serious misconduct, such as:
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> . . .
>
> (7) Conduct which alienates or antagonizes customers of the Employer or any others.
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> (8) Causing damage to or mistreating the property of the Employer and/or its customers, and/or causing damage to property] (sic) of others where the Employer may be held responsible for the damage or loss.

STATEMENT OF THE CASE

This grievance involves the Reynolds Transfer and Storage Company, Inc. and Teamsters Local Union No. 695. (Jt. 2) The Union alleges that the Employer violated the collective bargaining agreement by discharging the Grievant on November 27, 2001; the reasons given by the Employer for the discharge were that the Grievant violated Article IX, subsections 7 and 8 in that on November 26, 2001 his conduct during a move of a residential customer alienated or antagonized the customer and caused damage to the customer's property. [In this award the customer was an elderly couple that I will refer to in the singular or plural] .

The Employer operates a relocation division that performs commercial and residential moving services. On November 26, 2001, the Grievant and a colleague were assigned to move the personal belongings of the customer from two small apartments into one larger apartment in the Oakwood Retirement Center in Madison, Wisconsin. The customer's daughter and granddaughter were also present at the time of the move. The customers had packed their own boxes to be moved. The Grievant and his colleague, upon arriving at the retirement center, were unable to use the freight elevator because it was being used by another moving company and were forced to use a regular elevator as the customer was concerned that the delay was adding to the cost of the move. The Grievant and his colleague moved the customer's boxes containing their household goods on four-wheel carts which measure 18 by 28 inches and ride on casters 6 inches off the ground but that do not have any sides or handles and are moved by the movers pushing the actual items on the cart.

On one of the trips, the Grievant and his colleague loaded a four-wheel cart with eight boxes stacked about five feet high which were not of uniform size and were stacked in four layers with at least one of the boxes marked "fragile." After pushing this particular load off the elevator and leaving it in the center of the hallway, the Grievant and his colleague were told by the granddaughter of the customer that, because the hallway needed to be kept clear for purposes of fire codes, they needed to move the cart against the wall. Grievant proceeded back into the elevator to continue the move and his colleague moved the cart against the hallway wall. As the colleague turned toward the elevator, several boxes fell off the cart. Several items in the fallen boxes were damaged or broken, and, evidently, these were heirlooms of the customer causing the customer's daughter and granddaughter to become upset.

There were verbal exchanges between the daughter and granddaughter and Grievant during which they expressed their displeasure with the move and broken property, and during which Grievant explained that damage to customer property rarely happens and that he would discuss the situation with the customer after he finished the move. Grievant subsequently apologized for the damage and destruction of the property. The Grievant and his colleague called the Employer and one of the Employer's supervisors arrived on the scene and witnessed the broken items as shown to him by the customer's daughter who told the supervisor that three boxes containing broken items had been marked fragile.

The Employer, because of the damage to the customer's property, did not charge for the move. The Employer performs numerous moves for the residents of the Oakwood Retirement Center.

The Employer did not take any statement from the Grievant or his colleague before a meeting with management representatives on the day following the incident, November 27, 2001. The Grievant was called into the Employer's office, and the Employer discharged the

Grievant for damage to the customer's property and alienation of the customer in violation of Article IX of the collective bargaining agreement. (Jt. 3) Grievant's colleague was also discharged on November 27, 2001 but for reasons independent of the incident on November 26, and Grievant's colleague did not grieve his discharge.

The Union filed the grievance in this matter on November 28, 2001. (Jt. 1) The matter was appealed to arbitration. Hearing in the matter was held by the Arbitrator on January 22, 2002 in Madison, Wisconsin. No issue was raised as to arbitrability of the grievance.

POSITIONS OF THE PARTIES

Union

The first argument of the Union is that the Employer was required to have just cause for the discharge of the Grievant and failed to meet its burden of proving just cause. The Union argues that the only testimony presented by the Employer was hearsay testimony of the Employer's employees who were not present when the incident

on November 26, 2001 took place. The Union submits that the Employer submitted no direct evidence and cannot prove that the Grievant was at fault in any way. The Union argues that the Employer is trying to prove just cause based on hearsay testimony by the representative of the Employer who met with the customer after the incident and that hearsay cannot be used to establish a factual background that supports a valid just cause decision. The Union points out that the mere fact that damage was caused is insufficient to support the discharge of the Grievant. Grievant testified that the boxes, packed by the customer, were stacked in a way which he and others in the Employer's employ had done in the past. The allegation of alienation and antagonism of the customer, the Union submits, is solely based on the hearsay testimony of alleged comments made by the customer's family to the Employer's supervisor who was not present during the incident and this hearsay cannot be used to sustain the burden of just cause. The Union points out that it never had an opportunity to cross examine the customer regarding what happened on November 26, 2001.

Further, the Union submits that there should be no presumption that Grievant is biased to the point of lying to save his job and that such presumption has long since been rejected by arbitrators.

The Union argues that the Grievant was not in the area of the cart but was on the elevator when the boxes fell from the four-wheel cart and that Grievant was not the last person to handle the boxes stacked on the four-wheeler. The Union posits that Grievant made every effort to calm the granddaughter and daughter of the customer and called the Employer to get assistance in handling the situation. The Union notes that the actual customer never complained and never talked to the supervisor who came to the scene or anyone else from the Employer.

The Union submits that the Employer must prove the charge it leveled at Grievant at the time it decided to punish him. The November 27, 2001, termination letter charged only that Grievant had caused damage to the property of the customer and that the Grievant had been inattentive and had shown a lack of regard for the customer. The Union strongly objects to the introduction at the hearing of evidence regarding Grievant's attendance record and other work history and argues that such must be rejected by the Arbitrator because the Employer chose to discharge Grievant only with what was specified in the discharge letter.

The Union argues that the Employer failed to investigate the incident and at no time did any representative of the Employer attempt to investigate the incident by

speaking with either the Grievant or his colleague. The Union argues that this failure to investigate shows that the Employer's discharge decision is based on nothing more than hearsay. The Union submits to the Arbitrator that even though the agreement allows for a summary discharge for the two alleged violations of the agreement, that does not mean that the Employer is relieved of its burden of proving just cause for the discharge of the Grievant.

In conclusion, the Union submits that the Employer violated the collective bargaining agreement when it discharged Grievant without just cause and asks for Grievant's immediate reinstatement and that Grievant be made whole for all lost wages and benefits.

Employer

The Employer submits that it acted consistent with the labor agreement's terms when it discharged the Grievant because the Grievant's actions constituted serious misconduct as defined by the labor agreement. The Employer points out that it is proper for the Employer in this case to discharge employees that engage in serious misconduct without prior warning pursuant to Article IX of the collective bargaining agreement. The Employer notes that the labor agreement enumerates specific offenses that the Union and the Employer have agreed are so detrimental to the Employer's business that they constitute serious misconduct justifying immediate discharge. Two of those agreed upon serious offenses are: Causing damage to customer property and conduct that alienates the customer. The Employer submits that the hearing evidence established that the Grievant committed both of these violations at the Oakwood Retirement Center on November 26, 2001. Therefore, the Employer had just cause to discharge the Grievant.

The Employer argues that the parties' labor agreement, Article IX, is a strict liability clause and there need be neither intent nor gross negligence shown as a prerequisite for immediate discharge under numbers (7) and (8) of the Discharge and Suspension Article. The

Employer submits that customers trust their personal belongings to the Employer and that if that trust is breached then good will and its value to customers is destroyed. The

Employer argues that this principle was made perfectly clear in the labor agreement between the Union and the Employer. The Employer argues that because neither gross negligence, nor intent nor Employer responsibility is required, all that is necessary for a finding of serious misconduct pursuant to number (8) of the Discipline and Discharge Article for immediate discharge is a finding that the employee (Grievant) caused damage to or mistreated customer property.

Even though the Grievant and his colleague testified that no one had physical contact with the boxes to cause them to fall, because stacked boxes do not just fall by themselves, it follows that Grievant must have stacked them in a way that they could become unstable and that it was Grievant's responsibility to use common sense to stack the boxes in a manner in which he was certain they would not fall over, especially when the boxes were marked fragile. By stacking the boxes in a way that allowed them to fall, the Employer argues Grievant is guilty of conduct that caused destruction of the customer's heirlooms and therefore summary termination for just cause was appropriate.

The Employer next submits that the Grievant's defensive attitude alienated the customer in violation of the 7th term under the discharge and suspension article that provides for summary discharge under a just cause standard. The Employer submits that both the Union and the Employer recognize that customer good will can only be built by a staff of respectful, courteous movers who treat customers well, even when things go wrong, which is the reason the parties negotiated the 7th standard. The Employer argues that Grievant's responses to the customer were both objectively and subjectively alienating and that Grievant was defensive as to the falling of the fragile marked boxes. Essentially, Grievant told the customer to leave him alone because he had to finish the job and only after the job was completed did he attempt to apologize to the customer. The Employer argues that it anticipates a Union claim that Grievant's testimony should be credited over the reports taken by the supervisor who arrived on the scene afterwards and took statements from the customers; however arbitrators have upheld an employer's decision not to subpoena a customer.

The Employer cites case law to the Arbitrator that arbitrators have upheld a discharge where the parties have an agreed-upon list of offenses in the labor agreement warranting immediate discharge and that in those cases the employer retained the discretion to decide whether discharge was the appropriate course of action. The Employer argues that in this case it has not acted arbitrarily, capriciously or unreasonably and therefore based on arbitration case law the discharge should be sustained. The Employer notes that the Employer has applied its work rules and the collective bargaining agreement even-handedly in that Grievant's colleague was discharged the same day for causing damage on another project and that another employee was earlier discharged for negligent handling of customer property.

The Employer argues that Grievant did receive due process in that he was not just mailed a discharge letter but had an opportunity to meet with Employer representatives to raise any mitigating factors. The Employer submits that in the past Grievant has been disciplined for attendance and tardiness problems which the Employer's President took into consideration in his discharge decision and which are legitimate to consider.

In conclusion, the Employer submits that the record supports a finding that the Employer did not act arbitrarily, capriciously or unreasonably and that the discharge should be sustained. The Employer requests that the grievance be dismissed in its entirety.

DISCUSSION

This case involves the discharge of the Grievant for serious misconduct in violation of the Employer's work rules and Article IX of the parties' labor agreement. (Jt. 2 and Er. 11)

> (7) Conduct which alienates or antagonizes customers of the Employer or any others.
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> (8) Causing damage to or mistreating the property of the Employer and/or its customers, and/or causing damage to property] (sic) of others where the Employer may be held responsible for the damage or loss.

The agreement permits, but does not require, the Employer to discipline and discharge an employee for serious misconduct without a warning letter provided that the discharge is for just cause. I believe there are three elements to this case; (1) did Grievant's conduct on November 26, 2001 alienate or antagonize the customer whose belongings Grievant was moving; (2) did Grievant cause damage to the customer's property and (3) was there a just cause investigation that provided Grievant reasonable due process before the decision was made by the Employer to discharge him. For the reasons I discuss below, I find that the Employer did not prove a just cause discharge.

I find that the record does not support a finding that Grievant's conduct

alienated or antagonized the customer. It is apparent that to find whether the Employer met its burden, I must make the finding based on the uncorroborated hearsay evidence put in through the Employer's supervisor who was not present at the time the customer's property was damaged and the alleged alienation and antagonizing conduct occurred. The customers were not called

to testify nor did they make or were they asked to make a statement. I accept that the customer's daughter and granddaughter were upset by the damage; this finding is supported by the Grievant's own testimony. I believe Grievant credibly testified that he tried to deal with a person yelling at him by apologizing to the customer and the daughter and by trying to calm the daughter after the boxes fell. (Tr. 73-75) Even if I accept that Grievant tried to tell the customer that such accidents don't usually happen, I do not find this to be an unusual response given the situation; it may not have done much to satisfy the customer's daughter and granddaughter, but I do not believe such a response rises to the level of alienation or antagonism. The Grievant tried to get help from the Employer's office and let the daughter talk to an employee of the Employer in order to calm the situation. I also note that the real customers in this incident were not the daughter or granddaughter, and there is no evidence that the customers were alienated or antagonized.

The Employer has cited case law where discipline has been upheld in a situation where the customer did not testify, but there is equal case law to find discipline ameliorated where the customer did not testify. 1/ Regardless of case law and offsetting cases, I do not believe the record supports a finding of serious misconduct under the seventh standard of Article IX, at least to the extent of discharge.

1/ MEMPHIS LIGHT, GAS AND WATER DIVISION, 100 LA 291, CARAWAY (1993). I also note that in the case cited to me by the Employer, the employee received a three-day suspension. AMERICAN TELEPHONE & TELEGRAPH, 98 LA 102, BYARS (1991).

The second element of the discharge is whether Grievant caused the damage to the customer's property. The facts to this charge are essentially not in dispute. The

Grievant and his colleague placed boxes, which the customer had packed, on a small cart used for moving which was on wheels six inches off the floor. The cart did not have any sides and to move it one pushed the boxes or articles on the cart; in other words, there was no handle used to move the cart. (Tr. 7, 8, 26, 68, & 96) The boxes were stacked approximately five feet high on the cart in four layers with several boxes on the top layers marked fragile. (Tr. 10, 11, 72 & 82) The cart in question was moved from one apartment to the elevator on that floor, into the elevator and up to the floor to which the belongings were being moved. The cart was then moved off the elevator to the middle of the hallway prior to being moved into the destination

apartment. To that point the boxes were stable or at least had not fallen and there was no damage. (Tr. 64, 69 & 91) Both the Grievant and his colleague testified that the boxes were properly stacked and their procedure was no different that had been done by them in other moves. (Tr. 72, 85 & 96)

When the Grievant and his colleague moved the cart to the center of the hallway off the elevator, they were informed by the customer's granddaughter that they could not leave it there because of fire codes. (Tr. 70) Grievant's colleague proceeded to push the cart against the wall; Grievant went back to the elevator to off load more boxes. Grievant's colleague turned away from the cart and the boxes fell; Grievant at that point was in the elevator. (Tr. 69, 70, 71, 91 & 92) There is no direct evidence in the record to prove what caused the boxes to fall, but it is clear that the last person to move the cart was not the Grievant but his colleague, and, as noted, the colleague had to actually use the boxes on the cart to push the cart out of the center of the hallway to the wall. No one else from the Employer was present and there was no testimony or statement taken from the granddaughter or anyone else present which might have better established what caused the boxes to fall. One could make a reasonable conjecture, but I am bound to deal with the record and the last time the Grievant had anything to do with the cart and the boxes on it they were stable in the middle of the hallway.

Based on the credible testimony of the Employer's supervisor, I do not doubt that there were boxes marked "fragile," that there may have been heirlooms in the boxes, and whether they were heirlooms or not there was damage. (Tr. 10 & 11) It is also doubtful that the Employer would have waived the cost of the move if it did not

feel there was damage to the customer's property. (Tr. 15) It may be a close question between responsibility and cause, but while I believe as a member of the crew the Grievant bears some responsibility for the damage, I cannot find that Grievant caused the damage to the point of being discharged.

The third element of this case is whether the Grievant received due process from the Employer as part of a just cause finding. I believe there is substantial case law to support a requirement that an employer must conduct some reasonable investigation into an incident before it takes disciplinary action against its employee. 2/ I do not believe in this case there was adequate investigation and therefore the Grievant did not receive due process. No one ever even talked to the Grievant and his colleague about the incident and received Grievant's side of the story, a basic element in any due process investigation. No one took a statement from the customer or even called back later to talk to them and get their story and reflections on the incident. When Grievant was called into the President's office, he was not given an opportunity to tell his story or to seek mitigation before he was read the letter of discharge. At

that point, it would not be unusual for anyone to decide, as Grievant did, that there was no point in defending himself. In fact, it is uncontroverted that the first time Grievant got to tell his story was at the arbitration hearing. (Tr. 32, 49, 50, 60, 78, 79 & 80) There are certainly cases where an employee's conduct is so outrageous that a due process investigation is not necessary, but this is not one of them and the lack of an investigation weakens in this case a just cause finding as required by Article IX of the agreement.

2/ CAL-COMPACK FOODS, 105 LA 865, OESTREICH (1995).

Having found that the record does not support a finding of alienation, antagonism or causal damage to the customers property, I do not address the Employer's argument that I should not modify its discharge decision given its authority to discharge without a warning under the agreement. I do need to address the

Employer's argument that Grievant's attendance record which resulted in several warnings and a three-day suspension should be considered. The discharge letter did not refer to these attendance problems and discipline in any way as a reason for discharge. While I agree that arbitrators can consider an employee's record, I do not believe that is permissible unless that record is at least alluded to in the reasons for discharge. I believe the better law is that an employer is limited to justifying discipline before an arbitrator to the reasons stated in the discipline letter and cannot wait until the arbitration hearing to introduce evidence of the employee's past disciplinary record. 3/ To do so puts the Union and the Grievant at a disadvantage as having no idea what to prepare for and in particular does not give the Union the background necessary to determine its response when advised of a member's grievance. In this case, I had no idea that the discipline record was ever considered in the discharge decision until the Employer's last witness, the Employer's president; and while I credit the president's testimony that he considered it, I find the real reason for the discharge was as stated in the discharge letter.

3/ GRESCHLERS' INC., 103 LA 135 NADELBACH (1994).

In this case, I find the Employer's discharge to be unreasonable and to not have met the just cause standard required by the labor agreement. I am not unappreciative of the strong stance the Employer needs to take in cases involving the heart of its business; a mover's

reputation often is built or destroyed on word of mouth referrals. It is not my intent by this decision to undermine the importance to the Employer and the jobs of the employees that moves must be carried out in a manner that in all respects will be satisfactory to the customer. As I mentioned above, while Grievant may not have been the direct cause of the damage to the customer's property, I find that as a member of this two man crew he certainly can and must be held partially responsible for what happened on November 26, 2001.

Based on the foregoing and the record as a whole, I issued the following

AWARD

The Employer violated Article IX of the collective bargaining agreement when it discharged the Grievant.

REMEDY

The Grievant's discharge will be modified to a sixty calendar day suspension without pay from the date of discharge on November 27, 2001 and his seniority date will be adjusted to reflect said suspension. Grievant will be reinstated to his previous position with the Employer within fourteen calendar days of this decision with back pay and benefits, less any interim earnings or unemployment benefits received for the period following the end of the suspension in this remedy until his date of reinstatement.

Dated at Madison, Wisconsin, this 11th day of April, 2002.

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Paul A. Hahn, Arbitrator

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