BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 563

and

INDUSTRIAL TOWEL & UNIFORM, INC.

Case 2
No. 61920
A-6048

(Cody Brooks Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Jill M. Hartley**, on behalf of the Union.

Michael Best & Friedrich, LLP, by **Attorney Lucas J. Thomas**, on behalf of the Company.

ARBITRATION AWARD

At all times pertinent hereto, the Teamsters Local Union No. 563 (herein the Union) and Industrial Towel & Uniform, Inc. (herein the Company) were parties to a collective bargaining agreement covering the period March 30, 2002, to March 30, 2003, and providing for binding arbitration of certain disputes between the parties. On December 18, 2002, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over an alleged violation of the collective bargaining agreement in the termination of Cody Brooks (herein the Grievant), and requested a panel of the WERC staff from which to select an arbitrator to decide the issue. The Undersigned was selected to hear the dispute and a hearing was conducted on August 19, 2004. The proceedings were transcribed and the transcript was filed on September 9, 2004. The parties filed briefs on October 20, 2004, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to the framing of the issues. The Company would frame the issues as follows:

Did the Grievant engage in dishonesty on November 22, 2002, or was the Grievant's discharge for just cause?

If the answer to both is no, what is the appropriate remedy?

The Union would frame the issues as follows:

Was there just cause for the Grievant's discharge?

If not, what is the appropriate remedy?

Having taken the parties' positions under advisement, the Arbitrator frames the issues as follows:

Was the Grievant's discharge for just cause?

If not, what is the appropriate remedy?

If so, did the Company violate Article XII in discharging the Grievant summarily?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE XII

DISCHARGES

SECTION 12.01 – No employee shall be discharged, except for "just cause," and then only after a one (1) week's written notice setting forth the cause for discharge has been given to the employee. "Just cause" for discharge shall include, but shall not be limited to, the following offense: if an employee engaged in an argument or dispute with any customer(s) of the Employer, or if by his conduct the employee abuses or aggrieves any customer(s).

SECTION 12.02 – In the event the employee feels aggrieved by his discharge, he may present his grievance to the Union. The Union and the Employer shall attempt to adjust the dispute so arising, and, in the event of their failure or inability to do so, the matter shall then be referred to a Board of Arbitration to be composed of and having such duties and powers as more fully hereinafter set forth.

SECTION 12.03 – Dishonesty or drunkenness of any employee shall constitute grounds for immediate discharge. If discharged for dishonesty or drunkenness, the aggrieved employee may appeal to arbitration on demand by the Union, the only question to be arbitrated being whether the employee was or was not drunk or dishonest. If the Employer's charge is sustained, the discharge shall be affirmed, otherwise the employee shall be reinstated as of the date of discharge and shall be compensated for all time lost from the date of discharge.

SECTION 12.04 – Only the assigned cause for discharge shall be considered by the Board of Arbitration in determining whether or not "just cause" existed.

BACKGROUND

Industrial Towel & Uniform, Inc. is a private corporation engaged in the business of industrial cleaning of textile products, including floor mats, mops, roll towels and uniforms and supplying such products to various businesses. It operates a number a facilities for this purpose throughout the State of Wisconsin.

Cody Brooks, the Grievant herein, was employed by the Company between February, 1998 and November, 2002. Brooks was originally hired as a Service Representative for the Company. For a time he ceased being a Service Representative and worked for the Company as a Relief Driver, but then returned to working as a Service Representative, which was his position at the time of the events under consideration herein. As a Service Representative, Brooks received an hourly wage, as well as commission on the volume of products he delivered.

As a Service Representative, Brooks was assigned a specified route and his responsibility was to service the customers on that route by picking up soiled products and replacing them with clean products on a regular schedule. His typical schedule would be to arrive at work at about 6:00 a.m. and pick up the paperwork for the day's deliveries. He would then inspect his assigned vehicle and match the products on his delivery and tally sheets against what was loaded in the truck to make sure all the products to be delivered were loaded. 1/ He would then set out on his daily route, stopping at the designated customers' places of business delivering the specified supplies and picking up soiled materials for cleaning. He would then have the customers sign invoices for the products delivered, indicating the products by number and type, which would be used by the Company for billing purposes. After returning from his route, he would drop off the soiled products for cleaning, as well as any clean products that had not been delivered for any reason, and turn in the invoices.

1/ The Company maintains a production department separate from the service department within which the Grievant worked. The production department is responsible for cleaning the various

products supplied by the Company and loading them on the trucks for delivery according to each Service Representative's daily requirements. If products are unavailable and are not loaded on the trucks, a notation to that effect is to be made on the Service Representative's tally sheet.

On Friday, November 22, 2002, Brooks was delivering products to a number of customers, including the Ariens and Endries Companies in Brillion, Wisconsin, approximately one hour from the Company's facility in Neenah. Brooks had begun work early that day in order to attend a wedding rehearsal that evening. While in Brillion, Brooks discovered that a large number of 3x5 floor mats that were to have been delivered were not on his truck. Thus, Brooks was unable to deliver the specified mats to Ariens or Endries. Nonetheless, he had Ariens and Endries representatives sign the invoices indicating the mats had been delivered without informing them of the shortage. Shortly thereafter, Brooks was contacted by the Company's Production Manager, Bob Beyer, and informed that a tub of floor mats for his truck was sitting on the loading dock in Neenah. Brooks told Beyer that because it was a short week due to the holiday schedule, the customers did not need the mats and he could put them back in stock. After completing his route, Brooks returned to Neenah, dropped off his truck and the invoices and left for the day. He did not inform his Service Manager of the shortage, nor did he request that the customers be credited for the products they did not receive.

On Monday, November 25, Beyer had a conversation with Regional Service Manager Rod Thompson, wherein he informed Thompson of the tub of floor mats that had been left off Brooks' truck. Thereafter, Thompson conducted an investigation wherein he checked the invoices and discovered that the customers were to be billed for the mats, even though they hadn't been delivered. He checked with the customers and learned that they had not been told that the mats had not been delivered. He also ascertained that Brooks had not asked that the customers be credited for the undelivered products. As a result of the investigation, Thompson met with Human Resources Director Ronald Huegerich, who decided to discharge Brooks. On November 27, Thompson, along with Service Manager Darin Van Handel and Union Steward James Laluzerne, met with Brooks and informed him of his discharge. At that time, he gave Brooks a formal notice of discharge, stating as follows:

> This letter is to formally document the incidences leading up to, and including, the final discharge of Cody Brooks on this 27th day of November, 2002. Per Article XII of the Teamsters Local 563 and Industrial Towel & Uniform labor agreement Section 12.03 Mr. Cody Brooks is hereby terminated for "Dishonesty or drunkenness of any employee shall be grounds for immediate discharge." The specific incident as documented by exhibit A (Mat tally shortage sheet for 11-22-2002) and exhibit B (statement of conversation with Plant Manager regarding mat shortages) is specifically a blatant dishonest billing and lack of providing scheduled service to several scheduled accounts. In summation, customers were billed for services they did not receive (mats were

> not delivered and no credit requests were issued) and no effort to complete the scheduled deliveries was made by Mr. Cody Brooks. Mr. Cody Brooks in fact demonstrated an open disregard for his duties when assistance was offered by Mr. Robert Beyer to eliminate the situation.
>
> This situation is the final act in a series of documented misconduct. On October 25, 2002 Mr. Cody Brooks received a final written warning stating that it was Mr. Cody Brooks duty to "Inform customers on what (he) is doing, (and) identify billing concerns." The failure to follow this prescribed activity and demonstration of blatant dishonesty has necessitated this final act of termination effective immediately today, November 27, 2002.
>
> Employer Ex. 1 (emphasis in original)

On December 4, 2002, Brooks filed a grievance over the discharge, seeking reinstatement with backpay. The parties followed the contractual grievance procedure, but were unable to resolve the dispute. Thereafter, the matter proceeded to arbitration. Additional facts will be referenced, as necessary, in the discussion section of the award.

POSITIONS OF THE PARTIES

The Company

The Company asserts that the Grievant was discharged for both dishonesty and customer abuse and that the discharge may be sustained on either basis. If, however, the charge of dishonesty is applied, there is no reference to the just cause standard based on the language of Article XII. In other words, the Arbitrator may only inquire into whether the Grievant was dishonest and, if he was, the inquiry ends there, without further reference to just cause for the discharge. If, however, the inquiry is into customer abuse, then the just cause standard applies. Thus, the Company's framing of the issues is to be preferred. It should be noted, also that the same behavior may constitute both dishonesty and customer abuse, which is the case here. In such situations, the employee is not entitled to the one-week advance notice of discharge provided in Section 12.01.

In either event, the Grievant was properly discharged. The Grievant was aware that having a customer representative sign an invoice was an acknowledgement that the customer had received all the product on the invoice. Nevertheless, the Grievant had representatives at Ariens and Endries sign the invoices when he knew he had not delivered the floor mats and he said nothing to them about the shortage. The Grievant could have avoided the situation in a number of ways – by notifying the customers, by notifying management, by requesting that the products be delivered to him, by going back for the products, or by requesting credit receipts for the customers – but he did nothing. This was dishonest behavior toward the customers.

Under a just cause standard, the discharge should also be sustained. The record shows that the Grievant violated a reasonable and recognized work rule, received a fair investigation, was not subjected to disparate treatment and had a long disciplinary record. The Union places great store in whether the Company had a written policy telling the Grievant what to do under the circumstances, but the relevant inquiry is whether the Company had a policy and whether the Grievant knew of it and the record indicates such was the case. He knew he should have notified the customers of the shortage and contacted his manager for direction on what to do, but did neither. Instead he made a "judgment call" to do nothing, which he did not have authority to do. The Company made a thorough investigation of the incident and gave the Grievant an opportunity to explain his actions at the discharge meeting. Had he been able to adequately explain, his discharge might have been averted. Advance notice of discharge is not a requirement of due process. The Grievant also had a long prior record of discipline for similar offenses. Less than a month prior to his termination he received a final warning wherein he was instructed to go over invoices, identify billing concerns and keep customers informed. Finally, there is no evidence that the Grievant was treated disparately. Other employees have been discharged for similar offenses and, where they have not, there were mitigating circumstances to explain the decision.

The Union

It is the Company's burden to establish just cause for the Grievant's termination. Many arbitrators have held that in discharge cases, the burden of proof must be beyond a reasonable doubt, as in criminal cases, because of the severe ramifications of discharge for an employee's future work life. This is especially so where the basis for the discharge is an allegation of dishonesty, which is a charge of moral turpitude. In any event, there was no just cause for the termination.

Just cause required due process, which was not afforded the Grievant here. There was no adequate investigation of the incident on November 22 and the Grievant was not given an adequate opportunity to respond to the charges prior to discharge. Industrial justice requires that an employee be given a chance to respond to charges prior to discharge. Although the Company claims to have conducted a thorough investigation, Brooks was never questioned about the incident prior to discharge, which was a further violation of his rights.

There is also no evidence that the Grievant's actions on November 22 were dishonest. Thus, he must be reinstated with backpay. Dishonesty requires not only proof of a misrepresentation, but also a showing of willful intent to deceive or defraud the employer. There is no evidence that Brooks intended to deceive either the Company or the customers on November 22. In telling Bob Beyer that he wasn't going to replace the mats, Brooks put the Company on notice as to his actions. Further, Brooks' failure to inform the customers of the fact that he wasn't going to replace the mats, or to seek a credit for them did not constitute intent to defraud. He was unable to speak to his regular contact at Ariens and due to the

holiday schedule was unable to return to the businesses and speak to representatives prior to his termination. Brooks acted on the understanding that he was unable to adjust customers' accounts and that shorting customers on products during holiday periods, while billing the full amount was standard Company practice. Where there is no intent to defraud, the Company has failed in its burden of proving that the Grievant was dishonest.

The contract further requires that an employee receive a one week notice of intent to discharge before he may be discharged for just cause. Since the Company failed to prove the Grievant was guilty of dishonesty, it must meet the just cause standard. By failing to give Brooks the notice required under Section 12.01, the Company violated the contract when it attempted to base his discharge on just cause. Separate from the notice requirement, the Company also failed to prove just cause. The Company had no written policy for Brooks to refer to, but instead presented a number of options he could have used, highlighting the fact that there was no one way to deal with the problem. In the absence of a set policy, Brooks decided to simply leave the mats that had been delivered earlier in the week. The Company may disagree with his choice, but it cannot find just cause when it gave him no direction. He believed that he had management's approval for his action based on his conversation with Beyer and was unaware he had to also speak to his supervisor or anyone else in management.

Brooks was also subject to disparate treatment, which undercuts any argument or the existence of just cause. Several other employees have been guilty of the same infraction without being terminated. In at least two cases testified to by Union Steward James Laluzerne, employees failed to deliver products to customers and tried to hide the fact while billing the customers. In neither instance was the employee terminated. Brooks did not try to hide his actions because he thought they were justified and yet he was terminated. The disparity is obvious and negates any argument based on just cause. With no justification for discharge, Brooks should be reinstated and made whole.

DISCUSSION

Standard of Review

The parties agree that any basis for discharge under Section 12.01 of the contract requires a finding of just cause. Thus, on the Company's allegations that the Grievant engaged in conduct constituting customer abuse, all are in accord that the appropriate standard of review is whether there was just cause for the discharge.

The parties disagree as to whether the allegations of dishonesty require a finding of just cause. This is because dishonesty as a basis for discharge is located separately in Section 12.03, which makes no mention of a just cause standard. Further, Section 12.03 purports to limit the scope of the Arbitrator's inquiry to just whether the Grievant was dishonest. If there is a finding of dishonest conduct, the discharge is to be sustained. If not,

under Section 12.03 are thus not subject to a just cause standard of review. The Union argues to the contrary, largely on general arbitral principals which generally imply a just cause standard in all cases involving termination.

It is my view that a just cause standard must apply regardless of the specific allegations on which the termination was based. I am of the view held by many arbitrators that the ability to terminate without cause reduces the employment relationship to one that is virtually employment at will, which is contrary to the collective bargaining scheme. One of the basic protections provided by collective bargaining is that against discharge at the whim of the employer. Thus, just cause must exist to justify a discharge. Having said that, I do not find that opinion to be in conflict with the contract language. If, in fact, the Company establishes that that the Grievant acted dishonestly, most arbitrators would hold that such a finding would support discipline, up to and including discharge, depending upon the surrounding circumstances.

It appears to me that the significance of placing dishonesty and drunkenness in a separate paragraph justifying termination, rather than avoidance of just cause review, is the effect on procedural due process and the level of discipline. That is, under Section 12.01 any employee subject to discharge must be provided with one week's advance notice of any proposed discharge. Also, just cause usually implies a certain degree of procedural due process, such as a thorough investigation into the charges and an opportunity for an employee to be heard prior to discharge. Further, it is often the case in discharge cases, including those arising under Section 12.01, that there is a possibility that even though just cause is found the level of discipline may be reduced if deemed too severe by the arbitrator. Sometimes level of discipline is viewed as a component of a finding of just cause. In either event, Section 12.03, provides for immediate discharge in cases of drunkenness or dishonesty, precluding any right to advance notice and further precludes a review of the level of discipline by specifically requiring that the discharge be upheld if the charges are sustained. Indeed, under Section 12.03, the arbitrator's only inquiry is whether the employee did or did not commit the acts alleged. One can only assume that the parties agreed to draft and adopt the discharge language in this way precisely because they intended cases involving drunkenness and dishonesty to be subject to a separate procedure. Thus, I find that the discharge, regardless of the basis, must be based on just cause in order to be sustained, but that according to Section 12.03 there was no notice requirement to the extent that the discharge was based on dishonesty and that the section further precludes an alteration of the level of discipline should the allegation of dishonesty be proven.

Merits of the Case

The formal discharge notice issued to Cody Brooks on November 27, 2002, specifies that his termination was specifically for violating Section 12.03 of the labor agreement concerning dishonesty. Specifically, the discharge was alleged to be for "blatant dishonest

billing and lack of providing scheduled service to several scheduled accounts." Arguably, these charges could constitute either dishonesty or customer abuse under the contract language, but since the notice specifically references Section 12.03, it appears that dishonesty was the principal charge. This would also account for why the requirement of one week's advance notice of discharge set forth in Section 12.01 was forgone. Reference is also made in the notice to a final written warning issued to Brooks on October 25, 2002, approximately one month before the incident leading to his termination.

In its presentation of the case, as well as in its brief, the Company states that the discharge was in no way based on the fact that Brooks did not have the correct number of floor mats with him on November 22, nor that a tub of mats was inadvertently left on the loading dock. The Company focuses instead on Brooks' actions after he discovered that he did not have the mats needed for the Ariens and Endries deliveries. The record reveals that when Brooks discovered the shortage he decided to forego delivering mats at Ariens and Endries, in part because they had gotten deliveries earlier in the week due to the holiday schedule, so he didn't think it was urgent to provide new mats that day (Tr. 221). He did not, however, inform the customer representatives that the mats weren't delivered and had them sign invoices indicating that they were (Tr. 217, 233-34). After his stop at Endries, Brooks responded to Bob Beyer's page and learned that the missing mats had been left on ITU's dock. He told Beyer that he did not need the mats and to put them back into stock (Tr. 139, 238). Upon his return to Neenah, Brooks turned in his truck and his paperwork and forwarded his invoices to the Company headquarters in New Berlin. He did not tell anyone in management about the mat shortage or make credit requests on behalf of Ariens or Endries (Employer Ex. #12, 77-78). Management did not discover the problem until a conversation between Beyer and Rod Thompson on November 25 and Brooks never mentioned the situation to management prior to his termination (Tr. 58, 146-47).

The Union does not take serious issue with the facts as laid out above, which are principally corroborated by the Grievant's testimony, either at the arbitration or at his previous Unemployment Compensation hearing. Rather, the Union's defense is predicated on two assertions – 1) that due to the Company's lack of a definitive policy, Brook's was ignorant of what was expected of him and acted in good faith to the best of his ability and 2) that the Company's investigation was inadequate and that it violated Brooks' due process rights in its manner of discharging him. I will address these arguments separately.

As to the matter of what Brooks knew or should have known about proper procedure there is significant dispute. The Company asserts that there were several acceptable alternatives available to Brooks on November 22 and he failed to exercise any of them. He could have accepted Bob Beyer's offer to deliver the mats to him, notified the customers that the mats were missing, notified his service manager, notified the regional service manager, notified the customer service center, or requested a credit for the customers. For his part, Brooks asserted that Beyer never offered to deliver the mats and wouldn't have done so if requested. He did not notify the customers because his regular contact at Ariens was on

vacation and the substitute didn't know the procedure. Further, because it was a short week, he would have an opportunity to explain on his next call. He also claimed that the Company did not allow credit requests for customers and routinely billed customers for products that weren't delivered, so he was following standard procedure. I find these arguments unconvincing.

In the first place, Brooks' behavior on November 22 and following was patently dishonest. 2/ He admits that he billed his customers for products he did not deliver and his explanations are, to me, not credible. While there doesn't appear to have been a written procedure for Brooks to follow, I do not believe that he was unaware of steps he could have and should have taken to rectify the situation. There was ample testimony from Darin Van Handel and Ronald Huegerich, as well as documentary evidence, regarding Brooks' service related problems in the past, including issues regarding failure to deliver products, improper billing and failure to inform customers of the status of their orders and accounts (Employer Ex. 5 and 9). As recently as October 25, 2002, less than a month prior to the incident at issue here, he received a final written warning from Rod Thompson, which included the following admonitions: ". . . you will review every invoice with a contact person;" "Inform the customer on what you are doing, identify billing concerns;" "If you have any concerns or you do not know how to handle a concern you can bring them to me or a manager to correct" (Employer Ex. 9). The fact that he ignored every one of these injunctions on November 22 shows either disdain for the Employer's authority, disregard for the customer's interests, or both.

2/ The Union argues that, due to the seriousness of the charges, the Arbitrator should require proof of dishonest conduct beyond a reasonable doubt. I do not agree. In civil court cases involving allegations of dishonest conduct, the requisite standard is proof by clear and convincing evidence, which I find to be the appropriate standard here. Nonetheless, I believe the evidence in this case would probably meet the reasonable doubt standard, as well. The Union argues that there is no direct evidence of dishonest intention on the Grievant's part, but to my mind his actions speak for themselves.

Brooks' comment that he believed he had complied with his responsibilities by speaking to Bob Beyer also is unconvincing. Darin Van Handel testified credibly that all Service Representatives are instructed that service related problems are to be referred to Service Managers. Beyer was a Production Manager, whose responsibility was to provide product to the Service Representatives, not deal with customer accounts. Beyer was not Brooks' superior. Further, Brooks only told Beyer he didn't need the mats and to put them back into stock (Tr. 238). He didn't tell Beyer that he wasn't delivering the mats as scheduled to Ariens or Endries, or that he was not informing the customers or adjusting the invoices, or that he wasn't going to seek a credit for the customers. The argument that his conversation with Beyer put management on notice of his actions, therefore, is misleading. Likewise, Brooks' statement that credit requests weren't allowed is contradicted by the fact that Rod Thompson

issued credit requests for Ariens and Endries as soon as he was advised of the problem on November 25 (Tr. 218, Employer Ex. 4). All in all, Brooks' rationale for his actions and inactions on November 22 are not credible and thus do not mitigate his dishonest behavior.

Finally, the Union asserts that Brooks was the victim of disparate treatment, citing two other instances of similar employee misconduct that did not result in discharge. In one case, an employee received a three-day suspension for re-rolling clean mats, rather than delivering them, to make it appear he had completed delivery when he had not. In the other, an employee received a final warning when he failed to deliver 50 mats but billed the customer for them. I find these cases distinguishable on their facts. In the first instance, the re-rolling was the first instance where the employee was disciplined for that type of conduct, whereas here there is a long history of misconduct. In the second case, while the employee also had a spotty work record, the final warning was the first he had received and thus an incremental step in a pattern of progressive discipline. Here, the employee had already received a final warning a month prior to the incident which resulted in his termination. These incidents do not, therefore, support the assertion that the Grievant's punishment was disparate.

As previously stated, I find that the evidence supports the charge that the Grievant was dishonest in his dealings with the Ariens and Endries Companies on November 22, 2002. Further, his conduct was not mitigated by other factors, nor was his treatment disparate in comparison to that of other employees. Since Section 12.03 specifically limits the Arbitrator to that inquiry, for the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

The Grievant's discharge was for just cause and the Company did not violate Article XII of the collective bargaining agreement in discharging him summarily. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 1st day of February, 2005.

John R. Emery /s/

John R. Emery, Arbitrator

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