BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**TEAMSTERS LOCAL UNION NO. 43,
UNION LOCAL 150**

and

SUPERVALU, INC.

Case 102
No. 64145
A-6139

(Jeff Brau Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Andrea F. Hoeschen,** 1555 N. RiverCenter Drive, Suite #202, Milwaukee, Wisconsin, appeared on behalf of the Union.

Michael, Best & Friedrich, LLP, by **Attorney Jonathan O. Levine,** 100 East Wisconsin Avenue, Suite #300, Milwaukee, Wisconsin, appeared on behalf of the Company.

ARBITRATION AWARD

At all times pertinent hereto, Teamsters Local Union No. 43, Local 150 (herein the Union) and Supervalu, Inc. (herein the Company) were parties to a collective bargaining agreement dated April 25, 2001, covering the period June 18, 2000, to May 28, 2005, and providing for binding arbitration of certain disputes between the parties. On November 9, 2004, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration concerning the termination of Jeff Brau and requested a panel of the WERC staff from which to select an arbitrator to decide the issue. The Undersigned was subsequently selected to hear the dispute. The hearing was conducted on May 11, 2005 and the proceedings were transcribed. The transcript was filed on May 31, 2005. The Union filed its brief on July 26, 2005 and the Employer filed its brief on August 29, 2005, whereupon the record was closed.

ISSUES

The parties stipulated to the following framing of the issues:

Was Jeff Brau terminated for just cause?

If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 – CORRECTIVE ACTION

5.01 The Employer shall not discharge or suspend an employee without Just Cause. The employer will normally, however, not always (e.g., dishonesty), use the following steps of discipline, one (1) verbal warning, one (1) written warning, one (1) suspension, then discharge. Verbal and written warnings will remain in effect for six (6) months from the date of issue. Suspensions will normally last no longer than one (1) work week, and shall stay in effect for nine (9) months from the date of issue.

5.02 Any employee desiring to protest his/her discharge or suspension must do so in writing to both the employer and the union within four (4) working days from the time of notification of discharge or suspension, or his/her claim is invalid. Should an investigation prove that an injustice has been done to an employee, he/she shall be reinstated and compensated as agreed.

5.03 The attendance policy shall be separate and apart from the warning notice time frame as specified in 5.01

5.04 When requested by the employee, (s)he can have a steward or, if not available, another designee available when the Company meets with the employee to discuss discipline.

OTHER RELEVANT LANGUAGE

COMPANY RULES & REGULATIONS

The orderly and efficient operation of the Company requires that employees maintain discipline and proper personal standards of conduct at all times. Discipline and proper standards of conduct are necessary to protect the health and safety of all employees, to maintain uninterrupted service to the customer and to protect the company's good will and property.

To that end, the company sets forth its established rules, which together with observing all other proper standards of conduct, employees are required to obey.

The rules and regulations are divided into two categories: Group I, which are considered the most serious violations and these violations are subject to immediate discharge; the second group, Group II, are less serious, and supervisors are encouraged to follow the normal disciplinary procedure of verbal warning, written warning, suspension, and discharge. An employee's record must, of necessity, dictate the appropriate penalty.

While this disciplinary procedure is recommended to supervisors, it should be emphasized that the Company's philosophy of discipline is of a corrective nature, which treats employees as persons and promotes cooperation, trust, and confidence. It attempts to correct the people who go astray – to build and improve them. It's nothing more than good leadership.

However, even with the best of leadership, some people will not respond. Therefore, some guidelines of action must be established so that supervisors can affect corrective discipline.

GROUP I: EMPLOYEES SHALL NOT:

. . .

4. Misuse or remove from the premises without proper written authorization company property, records, merchandise, or other material.

. . .

10. Restrict operations or interfere with others in the performance of their jobs or engage or participate in any interruption of work or operations.

. . .

GROUP II: EMPLOYEES

. . .

6. Shall not violate any safety rules of common safety practices or engage in any conduct which tends to create a safety hazard.

. . .

8. Shall not abuse or destroy Company property, tools, equipment, or merchandise.

BACKGROUND

Supervalu, Inc., herein the Company, is a retail grocery company, which operates a distribution center in Pleasant Prairie, Wisconsin. Teamsters Local Union No. 43, Union Local 150, herein the Union, represents a bargaining unit of employees who work at Supervalu's Pleasant Prairie facility and also transport grocery products to and from the facility. Supervalu also contracts with other non-union common carriers, including Brisk Transportation, Inc., to transport some of its goods to and from the Pleasant Prairie facility. Historically, there had been conflicts between bargaining unit members and Brisk employees, partly due to the fact that Brisk was doing work that would otherwise be done by bargaining unit members and partly due to the impression that Brisk employees routinely were uncooperative and refused to observe standard protocols for storing trailers and fuelling refrigeration units.

Jeff Brau, the Grievant herein, was employed by the Company and was a member of the bargaining unit for over fourteen years, beginning in May 1990. At all times pertinent hereto, he was working at the Pleasant Prairie facility as a yard driver, primarily responsible for moving semi trailers to and from the loading docks. On April 1, 2004, the Grievant received a written warning as a result of an incident on March 30, 2004 wherein the Grievant raised several loaded trailers inordinately high as an act of retaliation against the Brisk drivers, thereby creating a safety hazard. The warning provided that any future similar violation could result in termination. The Grievant signed the warning under protest, but did not grieve it. The Union was provided a copy of the discipline and likewise did not grieve.

Early on the afternoon of September 23, 2004, two Brisk drivers arrived at the Pleasant Prairie facility, parked their tractor/trailer units across the parking lot from the loading docks and then engaged in conversation for approximately 30 minutes. During this time, the tractor/trailers partially blocked the loading area and made it difficult for other units to come and go from the docks. One of the Supervalu drivers mentioned this to the Grievant, who was working in the yard that day. The Grievant approached the Brisk drivers and told them to move their trucks and to do their "bullshitting" somewhere else. The drivers took exception to the Grievant's comments and did not immediately move. At that point the Grievant unhooked the trailer he was hauling in the middle of the parking area and pulled another trailer partially into the parking area in order to block the Brisk drivers in. In so doing, he did not hook up the service lines on the second trailer, which meant that the brakes on the trailer remained locked and the tires left skid marks on the pavement when the trailer was pulled out. The Grievant then left the area and reported his actions to two supervisory personnel, Dennis Gramins and Rob LaFortune.

The Brisk drivers left their vehicles and complained about the Grievant's actions to the General Manager of Supervalu's distribution center, Stephen Creed. Creed inspected the area and met with the Grievant, the transportation supervisor and two Union Stewards to discuss the situation. Creed then ordered the Grievant to move the trailers, which he did, whereupon the Brisk drivers unhooked their trailers and left. Subsequently, Creed conducted an investigation of the incident and met with Human Resources Director Paul Zeeck and Transportation Manager Jeff Wink, at which time the decision was made to terminate the Grievant's employment. On October 1, 2004, the Grievant was notified in writing of the termination decision. A grievance was filed on October 5, 2004 requesting reinstatement, which was subsequently denied. The matter was pursued through the contractual process without resolution, resulting in this arbitration. Additional facts will be referenced, as needed, in the discussion section of the award.

POSITIONS OF THE PARTIES

The Company

The Company contends that the Grievant engaged in self-help on two occasions in order to punish Brisk drivers, rather than avail himself of the contractual grievance procedure. After the first incident he was given a final warning, which he disregarded, therefore the discharge should be upheld.

The Grievant was aware that there were Company work rules that applied to this situation, specifically prohibiting interfering with the work of others, creating a safety hazard, or abusing Company equipment. These are reasonable rules, which he was given and acknowledged in writing.

By dropping two trailers in the yard on September 23, the Grievant violated the rules, which the Union does not seriously dispute. Other drivers were prevented from entering or leaving the area while the trailers were there. Several other employees had to leave their regular duties due to the situation. Emergency vehicles could not have entered the rear portion of the yard, creating a safety hazard. One of the trailers was dragged without previously attaching the brake lines, causing undue wear and tear on the trailer.

The Grievant was aware that his actions jeopardized his job. Five months previously he had received a final warning for engaging in self-help in order to harass the Brisk drivers. He was told then that any repeat of similar conduct in the future would result in termination. He did not grieve the warning. He knew on September 23 that he was not permitted to take action personally against the Brisk drivers and that if he did so he would be fired.

Under the circumstances, discharge was the appropriate response to the Grievant's conduct. It has long been held that an employee who has union representation and access to a grievance procedure cannot engage in self-help to resolve disputes in the workplace. (citations omitted) In this case the principle of "obey and grieve" required that the Grievant accept the

status quo unless and until the situation was rectified through the grievance procedure or at the bargaining table, especially since he had already received a final warning due to the previous incident. The seriousness of the Grievant's misconduct is underscored by the fact that three Union witnesses, who were fellow employees, testified that the Grievant had behaved improperly.

The Union does not dispute that some penalty is appropriate, but feels the Grievant's behavior was mitigated by other factors and did not merit discharge. This is a specious argument given the fact that the Union struck a deal to get the earlier final warning, in lieu of a suspension, and that the Grievant knew he was violating the work rules and the consequences for doing so. Further, it is the Union's burden to establish that any leniency is warranted in that the Company's action was arbitrary, capricious or discriminatory, not the Company's to justify its action.

The Union argued that Article V of the contract required progressive discipline, which required the Company to suspend the Grievant before terminating him. In fact, the contract does not require progressive discipline. This was conceded in testimony by the Union representative. The violation of the work rules by the Grievant after receiving a final warning warranted his dismissal.

The Union argued that the Grievant's misconduct was mitigated because the trailer he dragged wasn't road worthy. This argument is specious. Several witnesses testified as to the road worthiness of the trailer. Further, the proper procedure for hooking up a trailer is the same regardless of the condition of the trailer. To not attach the service lines, as the Grievant did, puts extra strain on the tractor as well as the trailer. No evidence was offered to show that any other employee ever engaged in such behavior intentionally and several witnesses testified that they would expect to be disciplined for doing so.

The Grievant's conduct was also not excused or mitigated by the actions of the Brisk drivers. The contract has a grievance procedure, which is to be used when employees aren't able to resolve workplace problems. Self-help is not an option unless there is an immediate threat to health or safety. There was none here. The Grievant was merely upset due to a history of conflict. The Brisk drivers weren't being provocative. They merely parked their trucks in an inconvenient place. If the Grievant wanted them to move and they wouldn't, he should have told a supervisor, but he didn't. Other Supervalu drivers didn't even feel the Grievant's reaction was justified. If anyone was being provocative, it was the Grievant by his aggressive approach and abusive language directed toward the Brisk drivers. He took matters into his own hands instead of following proper procedure, just as he had before, because he did not like the Company's use of Brisk drivers.

The Company had in the past received complaints about Brisk drivers and had followed up. Much of the tension had to do with the fact that Union drivers felt that Brisk was taking their work, but some was not. When complaints were made they were investigated and if there was a basis for them action was taken. It is notable that despite the Union argument that the

Company was unresponsive to past complaints about Brisk drivers, there is no evidence of any grievance ever having been filed on this basis.

Finally, The Grievants' own dishonesty should preclude him from prevailing in this case. It is a cardinal rule that employees have a duty to cooperate with company investigations and that lying is subject to discipline. Nevertheless, the Grievant testified that he deliberately withheld the name of a supervisor who supposedly authorized his actions in order to protect him. He also lied in his Unemployment Compensation proceeding by testifying that he did, in fact, hook up the service lines on the second trailer, when he didn't, which was perjury. He acknowledged this lie at the hearing.

In sum, the Company made a valid business decision to terminate the Grievant based on substantial evidence. The Grievant and the Company have moved on and the Arbitrator should not now second guess the Company, even if he would have issued a less severe penalty. The Company had just cause for its action. The Grievant had previously been disciplined for a similar action without any apparent change in his attitude or conduct. The Company had given him a final warning and determined that further discipline short of termination would be of no use. The decision was justified and should be upheld.

The Union

The Union asserts that the Grievant's conduct did not warrant termination. He did not damage company property as alleged. The trailer he dropped was not roadworthy and the Company has not claimed that it was damaged. The trailer continued to be used after the incident without the necessity of repairs, so either it was not damaged or the Company continued to use regardless of damage, suggesting that it didn't care. Even if the Company shows that the Grievant acted intentionally, without evidence of significant damage or intent to do damage, it cannot justify the discharge.

The Grievant's actions did not impede production. The Company was inexplicably unconcerned about whether the Brisk drivers were interrupting work and never interviewed the Supervalu drivers on the video about whether they were obstructed by the Brisk trucks. There is no rational explanation for why the Company allowed the Brisk trucks to block the yard for over half an hour without complaint, but fired its own employee for blocking the yard for a few minutes. There were no grounds for termination on this basis.

By terminating the Grievant without first suspending him, the Company did not follow progressive discipline. The Union did negotiate a previous discipline down to a written warning, but did not agree that it would be a last chance agreement. There was no discussion between the Company and the Union about a last chance agreement or foregoing a suspension in the future, so it was a departure from progressive discipline to discharge him under these circumstances.

The Grievant's actions were mitigated by the Brisk drivers' conduct. They impeded work on September 23 for at least half an hour and prevented at least one other driver from dropping his trailer. When asked to move they refused, even though they were just discussing directions. Arbitrators have held that discharge is not appropriate where there are mitigating circumstances that provoke the Grievant's actions. (citations omitted) The Grievant was frustrated because the Brisk drivers were impeding work and would not move when asked. He could have complained to management, but had good reason to believe that nothing would be done, as evidenced by the testimony of other drivers whose past complaints had been ignored. After taking his actions, he told two supervisors what he had done. He was thus not trying to impede work, but trying to quickly resolve the situation. If the Company wants to discourage self-help, then it should confront problems in the workplace instead of ignoring them. Terminating the Grievant was inappropriate and sends then wrong message to the rest of the workers.

DISCUSSION

As indicated by the parties, the facts in this matter are, for the most part, undisputed and are recorded in the background section above. The Company's contention is that the Grievant's conduct constituted a violation of several work rules, including restricting operations, creating a safety hazard and damaging or abusing company property, as set forth in the termination notice. (Jt. Ex. #3) Given the seriousness of the rule violations, and in light of the fact that the Grievant had received a written warning, which the Company characterizes as a last chance agreement, five months earlier for similar conduct (Jt. Ex. #6), the Company felt justified in terminating the Grievant's employment.

The Union concedes that the Grievant's conduct was wrongful and merits some level of discipline, but contends that termination was unwarranted under the circumstances. It argues that the Grievant did not damage Company property by dragging the trailer, nor did he intend to. He further did not impede production, at least in any degree greater than the Brisk drivers did. The Union further denies that the previous warning constituted a last chance agreement and argues that by terminating the Grievant without first suspending him, the Company failed to use progressive discipline, in violation of the contract. Finally, the Union asserts that the Grievant's actions were mitigated due to the provocation caused by the Brisk drivers.

As to the damage issue, there is no evidence that the Grievant actually damaged the second trailer by dragging it into the yard without first hooking up the service lines, although the tire marks on the pavement do indicate undue wear on the tires and one can assume that pulling a trailer for any distance with its brakes locked would place undue strain on both the brakes and the tractor. Nevertheless, there is no evidence that the trailer required repairs or was out of service due to the incident. The operative rule, Group II – 8, however, prohibits abuse as well as destruction of Company property and one could construe dragging a trailer in such a fashion as abuse of Company property. There certainly was ample testimony from other drivers, as chronicled by the Company, that dragging a trailer in such a fashion was inappropriate and that they would not have intentionally done so. Further, whether or not the

Grievant intended to damage Company property, he certainly knew or had reason to know that damage could occur due to his actions. It is the foreseeability and likelihood of damage from the Griervant's actions, not the reality of it, that makes his conduct wrongful. I find, therefore, that the Company properly cited the Grievant for violation of the rule.

I further find that there is little dispute that the Grievant did impede operations in the yard by dropping the trailers as he did. The video of the event clearly shows that while the trailers were in the yard, not only were the Brisk drivers blocked in, but all other traffic was also prevented from getting to the back of the area. Also, as noted by the Company, while the incident was transpiring numerous Company management personnel were pulled away from their regular duties to handle the situation. It may be true that the Brisk drivers were impeding operations, as well. However, the video indicates that the yard tractors were able to get around their trucks and move trailers, although with difficulty, so the obstacle was not as great. Further, the Brisk drivers worked for a different company and weren't subject to discipline by Supervalu officials. Also, there is no evidence that any management official was aware of the problem with the Brisk drivers on September 23 before the incident with the Grievant occurred. So, it is a stretch to say that management condoned the same behavior from the Brisk drivers that resulted in the Grievant's termination.

The Grievant testified, and the Union argued, that he was provoked into acting by the uncooperative attitude of the Brisk drivers and management's failure to address previous complaints. The videotape indicates that twenty-eight seconds elapsed from the time the Grievant pulled up to the Brisk trucks until he began to pull away again, so any conversation between the Grievant and the drivers would have had to be shorter than that. The Grievant testified: "I asked the Brisk drivers if they were going to bullshit, if they could do it someplace else." (Tr. 122) He then stated that the Brisk drivers took exception to his use of language, but that he continued to use profanity toward them, saying, "You guys are blocking the dock. Do your bullshittin' someplace else." This testimony was essentially corroborated by Brisk driver Glenn Lewis, who was one of those present. The Grievant testified that the Brisk drivers refused to move. Lewis denied this. In any event, immediately after the conversation the Grievant pulled his trailer around and dropped it, then dragged the second trailer out into the yard. Thus, he gave no opportunity for the Brisk drivers to leave before blocking them and it is unknown what they would have done had the Grievant not blocked them in. Another Supervalu driver, Michael Sullivan, testified to a similar confrontation with Lewis about a month previously, wherein he asked Lewis to move his truck and Lewis said he would move when he felt like it. Sullivan left the area and when he returned ten minutes later, Lewis was gone. It seems reasonable to suppose that if the Grievant had left the area instead of blocking the yard, the same result might have occurred.

It should also be noted that the Grievant only found out about Brisk drivers being parked incorrectly because another driver, Mike Biebel, told him about it. (Tr. 121) The Grievant then went back, saw the Brisk trucks parked across from the loading docks, and confronted them. Thus, however long they were there, the Brisk drivers had not been any inconvenience to the Grievant up to that point. Nevertheless, ostensibly out of frustration, he

took it upon himself to confront them in a belligerent manner and then immediately took action to punish them for their uncooperative attitude. The picture that develops is not one of the Grievant being provoked, but rather being the provocateur. This is consistent with the previous incident where he received the warning. In that case the Grievant was upset about improperly parked Brisk trucks and so admittedly retaliated by dollying up Brisk trailers in the yard to make it difficult for the drivers to hook up to them. Thus, it appears that the Grievant is someone who prefers to take matters into his own hands

This brings us to the matter of progressive discipline and the previous warning. It is conceded that the Company's first inclination after the previous incident was to suspend the Grievant, but it reduced the penalty to a written warning after intercession by the Union. (Tr. 31, 207-208) According to the Company witnesses, the *quid pro quo* for reducing the suspension to a warning was the understanding that another incident would result in termination. The Union disputes agreeing to this. In any event, the warning contained the statement, "…any future event of like behavior would be grounds for immediate termination of your employment, without any further warning." The Grievant signed the warning "under protest," but did not grieve it. The Union also received a copy of the warning, but did not grieve it.

To my mind, this language may be construed as a last chance agreement. It clearly states that any future similar violation would be cause for immediate discharge. Further, both the Grievant and the Union were aware of the terms of the warning and did not grieve it. [1] Ordinarily, last chance agreements must specify a time frame after which they expire. This one does not, but, pursuant to contract, written warnings are effective for six months from the date of issue and I construe the last chance agreement to have had a like term. Notably, too, under the Company work rules, Group I violations, which were alleged in both cases, are subject to immediate discharge. So, the Grievant was aware, because of the nature of the violations and the fact of the last chance language in the warning, that he was at risk of discharge if there were any future altercations similar to the March incident. Nevertheless, in audacious fashion, the Grievant acted out in a similar way, announced what he had done and why to management, was once again cited for a Group I violation and then was surprised when he was, in fact, terminated.

One can, perhaps, sympathize with the dilemma of workers who have to deal on a daily basis with people who are unpleasant and uncooperative, but it defies common sense to continue to personally take punitive action against them when discipline has resulted in the past and discharge is the stated next step. This is especially so when the Grievant failed to seek intervention by management beforehand. He expressed doubt that management would act effectively, but also testified that he was aware of his ability to use the grievance procedure to seek redress if it did not. On this record, it is clear that the Grievant acted willfully on September 23, 2004 in full awareness that he was violating work rules that he knew or should

[1] The Grievant signed the written warning "under protest," but he did not specify, nor does the record otherwise show, what this meant. Thus, it is unknown whether he was objecting to the Company's finding of wrongdoing, its issuance of any discipline at all, or its statement that any future violation would be grounds for termination.

have known would lead to his termination. The work rules themselves have not been challenged as being unreasonable, and thus I do not address that question. Having determined that the Grievant violated his last chance agreement and had committed another Group I rule violation, as well, the Company was within its discretion to discharge him. Having determined that there was just cause for discipline and that termination was one of the available options, I will not set the Company's decision aside. Thus, for the reasons set forth above, and based upon the record as a whole, I hereby issue the following

AWARD

Jeff Brau was terminated for just cause. The grievance is denied.

Dated at Fond du Lac, Wisconsin this 6th day of December, 2005

John R. Emery /s/

John R. Emery, Arbitrator

JRE/gjc
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