

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL NO. 75
AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

and

MILK PRODUCTS, INC.

Case 1

No. 65971

A-6225

(Neuber Suspension Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, by **Attorney Yingtao Ho**, 1555 North Rivercenter Drive, Milwaukee, Wisconsin 53212-0993, appearing on behalf of the Union.

Littler Mendelson, by **Attorney Mark W. Schneider**, IDS Center, 80 South 8th Street, Suite 1300, Minneapolis, Minnesota 55402-2136, appearing on behalf of the Company.

ARBITRATION AWARD

The Teamsters, Chauffeurs, Warehousemen and Helpers, Local 75, Affiliated with the International Brotherhood of Teamsters, hereinafter referred to as the Union, and Milk Products, Inc., hereinafter referred to as the Employer or the Company, are parties to a collective bargaining agreement (CBA or Agreement) which provides for final and binding arbitration of certain disputes, which Agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the Union's grievance regarding the suspension of Matt Neuber, hereinafter referred to as the Grievant or Neuber. The undersigned was appointed as the Arbitrator and held a hearing into the matter in Chilton, Wisconsin, on November 14, 2006, at which time the parties were given the opportunity to present evidence and arguments. The hearing was transcribed. The parties filed post-hearing briefs by February 23, 2007 at which time the record was closed. Based upon the evidence and the arguments of the parties, I issue the following decision and Award.

ISSUE

The parties stipulated to a statement of the issue as follows:

Did the Company violate the expressed terms of the Labor Agreement when it suspended the employment of Matt Neuber for one day without pay?

If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

SECTION 5 - MANAGEMENT RIGHTS

- 5.1 Except as otherwise provided in this Agreement, the Company retains all the rights and functions of management that it has by law.
- 5.2 The Union will not encourage, aid or condone action or inaction on the part of any employee interfering with the objective of achieving the highest level of employee performance and efficiency.

SECTION 6 - DISCHARGE

- 6.1 After thirty (30) working days of employment, no employee shall be discharged except for dishonesty, intoxication, smoking in other than designated areas, failure to observe reasonable safety rules and regulations or other just cause. At least one (1) warning notice shall be given in writing to the Union and to the employee before discharge or suspension can be made except in cases of dishonesty or drunkenness or other serious offenses. The normal progression for disciplinary action will be verbal, written, suspension and discharge unless circumstances warrant otherwise. A warning notice shall be effective for a period not exceeding nine(9) months. Any employee, after thirty (30) working days of employment, claiming discharge in violation of this Agreement, may process his/her grievance through the Grievance Procedure as set forth in this Agreement. Such grievance must be filed in writing within three (3) days of the date of discharge.

SECTION 27 - ARBITRATION

...

- 27.2 Within ten (10) working days after receipt of written notice of intent to arbitrate, the Company and the Union shall jointly request the Wisconsin Employee (sic) Relations Commission to select an arbitrator who shall be a member or employee of the Board.
- 27.3 The authority of the arbitrator shall be limited to the interpretation of this Agreement and to the arbitration of grievances and disputes which may arise as to the meaning and interpretation of this Agreement. The arbitrator shall, in each case, be bound by the provisions of this Agreement and shall not have the authority to change, amend or modify the provisions of this Agreement.
- 27.4 The findings and decision of the arbitrator shall be binding upon both parties to the dispute. The expense of the arbitrator shall be divided equally between the Company and the Union.

OTHER RELEVANT PROVISIONS (IN PERTINENT PART)

Employer Exhibit 1:

Milk Products Standards of Conduct: Safety, Respect, Honesty and Common Sense

...

Be Honest

Keep honest records
Report your time/attendance accurately and fairly
Don't take anything you haven't paid for

Be Here

Come on time
Work your assigned time
Honor our sick leave and PTO policies
Stay awake while you're here

BACKGROUND

The Company operates a plant in Chilton, Wisconsin which produces an "instantized" milk replacement formula for the consumption of livestock. It operates on a 24 hour basis with three shifts: 6:00 a.m. to 2:00 p.m.; 2:00 p.m. to 10:00 p.m. and 10:00 p.m. to 6:00 a.m. Each shift has approximately 10 employees and is supervised by a production shift supervisor.

Matt Neuber, the Grievant, is employed by the Company as a bagger operator and is assigned to work the first shift, 6:00 a.m. to 2:00 p.m. His shift production supervisor is Randy Waack. In March of 2006 Neuber suffered a work related injury to his shoulder and began physical therapy under a doctor's supervision. He had an undetermined number of physical therapy sessions, some of which were scheduled outside of his normal work hours and others which were scheduled during his normal work hours. His physician placed certain restrictions on his activities which resulted in the Company placing him on light duty. On April 28, 2006, his light duty consisted of placing stickers on square pails of product and placing sleeves over the pails. This work was repetitive and caused some pain to his injured shoulder.

On April 28, 2006, Neuber began work at 6:00 a.m. as scheduled. As he worked the pain in his shoulder increased and by 9:00 a.m. he determined that he would not be able to finish his shift due to his shoulder pain. He went to Waack's office to advise him that he would not be able to complete his shift and that he wanted to leave at noon. It is at this point that the issues leading to this grievance arise.

Neuber maintains that he told Waack that he needed to leave at noon because of the increasing pain in his shoulder. Waack believes, and his notes so reflect, that Neuber told him he had to leave because he had a doctor's appointment. If Waack is correct, then Neuber lied to him about having the doctor's appointment. If Neuber is correct, then Waack either misunderstood him or Waack lied about the entry in his notes.

Later that day, and after Neuber had left the plant, Waack instructed his administrative assistant to call Neuber's doctor to check to see if Neuber actually had an appointment. He did this because he knew that Neuber had a scheduled doctor's appointment the following week and thought it was unusual that he would have another one so close together in time. Upon checking with the doctor it was discovered that Neuber did not have a doctor's appointment on April 28th. On the following Monday, May 1, 2006, at 1:55 p.m., five minutes before quitting time, Waack approached Neuber and requested a doctor's excuse for Neuber's absence on the previous Friday. Neuber said he would try to get one. Neuber did not advise Waack at that time that he, Neuber, had not actually seen the doctor on Friday, nor did Waack tell Neuber that he had checked with the doctor's office and knew that he had not had an appointment. That evening Neuber called Mr. Billman, the Operations Manager, and explained that he had not seen the doctor on Friday and that he had left work because of his shoulder pain. He told Billman that he felt a doctor's note was unobtainable since he had not seen the doctor.

On the following morning, Tuesday, May 2, 2006, Waack again approached Neuber and asked for the doctor's excuse. Waack again failed to tell Neuber that he (Waack) knew Neuber had not seen the doctor. Neuber testified that he told Waack that he was still working on it. Waack testified that he asked if he could call Neuber's doctor directly and that Neuber refused saying that he did not have to provide an excuse because it was "privileged". Neuber denies saying this. Later that day Neuber was able to speak with his doctor and did obtain an excuse which he provided to the Company. (Employer Exhibit 3)

On May 4, 2006, after discussing the situation with Waack, Billman decided to terminate Neuber for dishonesty. Neuber was presented with a termination letter dated May 4, 2006, and was walked out of the plant. On or about May 11, 2006, the Company and the Union met to discuss Neuber's termination. As a result of this meeting, and further consideration by the Company, the termination was withdrawn and replaced with a one-day suspension without pay. The Union did not agree to the suspension even though it represented a significant reduction in the severity of the discipline, and this grievance followed.

THE PARTIES' POSITIONS

The Union

The standard by which Neuber's discipline must be measured is one of just cause since nothing in the Collective Bargaining Agreement states otherwise. Since the Company has failed to show by clear and convincing evidence that Neuber is guilty of dishonesty, it has failed to demonstrate just cause for his discipline. Also, if the Arbitrator finds that Neuber was not guilty of dishonesty then Section 6.1 of the CBA requiring at least one warning prior to discharge or suspension (except in cases of dishonesty, etc.) has been violated, and the Union must prevail, because no such warning was given.

This case revolves around the issue of credibility. If Neuber is to be believed, then Waack is not credible. If Waack is to be believed, then Neuber is not credible. In resolving the issue of credibility the Arbitrator should not assume Neuber to be less credible simply because he is the grievant. Here, Neuber should be considered more credible because Waack had a strong motive to lie. By letting Neuber go home simply because he was having pain Waack violated a Company policy which required him to determine whether there was any other available work for Neuber to do. Waack's notes also refer to an entry suggesting that Neuber threatened to file harassment charges against him in January, 2006. The Arbitrator "should give consideration to a supervisor's possible motive in getting rid of a troublesome employee."

Waack may have simply been confused about the doctor's appointment because within 15 minutes of his conversation with Neuber another employee told Waack about having to leave the plant early for a doctor's appointment. Waack was busy with production schedules and may have had a radio on at the time and, given the distractions, may have become genuinely, but wrongly, convinced that Neuber had mentioned a doctor's appointment. In any event, had Waack asked for the medical excuse on Friday when Neuber told him he was leaving early the whole thing would have been resolved at that time. Instead, Waack waited until Monday to ask for the excuse after he (Waack) already knew that Neuber had not actually gone to the doctor. Neuber assumed Waack needed the excuse to justify his time off, not to prove that he actually saw the doctor. Waack's actions were done to discredit Neuber evidencing his animosity toward Neuber.

Waack's notes are suspect. They are likely *post-hoc* fabrications. They appear incomplete and fail to contain entries which one would expect to be included. Several include routine instructions to employees and mundane issues (soda cans on the floor) as opposed to records of work restrictions, vacations and other sick leave call-ins, as Billman testified should have been included. Further, Waack's claim that he only recorded events which "may come back" to him is not credible. If this were the case he would have recorded information concerning lost time from work and shift transfers to cover those events, authorized overtime payments and efforts he made to make up production. He failed to record another situation involving an employee who called in late, and he failed to record any reference to his conversation with her when she did come in to work, contrary to his testimony at the hearing. It is more likely that Waack's notes have been reproduced with false details adding references to Neuber. The Union believes it is odd that 13 of the total 16 entries in Waack's log, some which curiously included a reference to the exact time of certain key conversations, related to Neuber. This log covers roughly a six month period of time and no other entries include references to the times of the entries. Also curious is the fact that the Company only produced a single page of Waack's log instead of the entire log in order to show that the page was genuine.

Neuber's explanation regarding his departure due to his pain was clearly explained. Because he knew how his pain progressed over time as he exerted himself, he knew approximately how long he would be able to work on the day he left early. He knew that by noon his pain would have increased to the point that further work would have been difficult. More importantly, no evidence suggests that Neuber knew the Company might deny his request to leave early simply because of his pain. Hence, Neuber had no reason to lie about his reason for leaving early.

The CBA implicitly requires just cause for suspension and a just cause analysis requires due process. Due process requires a full and fair investigation prior to the imposition of a suspension and the Company failed to conduct such an investigation. Billman only spoke to Waack before his decision was made. He should have spoken to Neuber as well. Billman should have interviewed Neuber with an open mind. By the time the meeting was held to advise Neuber of his termination, the Company's position had become solidified and Neuber had no opportunity to give his side of the story. For this reason alone the Arbitrator should set this discipline aside.

The Company

The CBA does not require just cause for suspension. The CBA, Section 6.1, states that "no employee shall be discharged except for dishonesty ... or other just cause." This is the only reference in the CBA to just cause. Just cause is, therefore, required only for discharge. As a result, the Arbitrator's determination should be limited to a preponderance of the evidence standard. Further, the determination of the penalty for misconduct is a function of management and an arbitrator should hesitate to substitute his or her judgment for that of management.

The Company's actions in suspending Neuber were in accordance with the CBA. The Union has failed to identify any violation of the CBA relating to Neuber's suspension as a result of his leaving the plant under false pretenses. Further, the Company's standards of conduct required Neuber to be honest and to work his assigned time. He failed to comply with these standards and the Company showed great restraint in reducing his discipline from termination to suspension.

Even if the Arbitrator applies a just cause standard here, the evidence produced by the Company, coupled with Neuber's improbable version of the events, supports a just cause foundation for suspension. Just cause for discharge exists where: (1) the grievant commits a serious offense; or (2) the discharge is the result of a full and fair investigation. In this case both are present.

The ultimate determination of whether Neuber told Waack he had a doctor's appointment on April 28, 2006 requires the Arbitrator to balance the credibility of Neuber against that of Waack and Billman. An objective view of the record demonstrates that the Company's witnesses were far more reliable than Neuber. The Arbitrator should credit the Company's witnesses more favorably here because it is generally held that, in resolving conflicts in testimony, "a grievant's testimony is considered less credible because of the personal interest in the outcome of the proceedings." Citing BUTTREY FOOD & DRUG CO., 110 LA 641, 644-45 (Prayzick 1998) (citing Hill and Sinicropi, *Evidence In Arbitration*, 122 (2D ed. BNA Books 1990) ("An accused employee is presumed to have an incentive for not telling the truth and when his testimony is contradicted by one who has nothing to gain or lose, the latter is to be believed"). Neuber has the burden of overcoming the inherent credibility presumption operating in the Employer's favor.

Even without this presumption Neuber's testimony is unbelievable. The most suspect of Neuber's testimony was his failure to explain how he would know at 9:00 a.m. that his pain would become intolerable at noon. His implausible explanation, that he could tell his discomfort would progress over the course of the morning, is unpersuasive. It is equally implausible that Waack would have accepted such a claim. Neuber's evasive and illogical responses to Waack's requests for medical documentation are also suspect. Neuber failed to explain to Waack that he had really not been to the doctor even after it became clear that the Company thought he had. Neuber's vague responses to Waack about the medical documentation suggest that Neuber was making an effort to put off the Employer's request in hopes that the issue would "blow over."

The Employer's witnesses were credible and offered substantial evidence that Neuber left under false pretenses and Neuber failed to rebut this evidence. Highly probative are Waack's contemporaneous notes of his discussion with Neuber reflecting the doctor's appointment. As for the Union's attempts to suggest that Waack was confused about the conversation with Neuber, there is no record evidence to support that conclusion. Waack's testimony was credible and forceful about his lack of confusion.

The record fails to support the notion that the Company misrepresented the facts. Neuber concedes that he knows of no reason the Company would do that, nor does he believe Billman would have such a reason to do so. On the other hand, Neuber's failure to offer an explanation for his actions at the May 4th termination meeting suggests that his defense was concocted after the fact.

Neuber's discharge (subsequently reduced to the one-day suspension) was the result of the Employer's good faith, reasonable and fair investigation and should not be disturbed. But in the event the Arbitrator determines that a reduction in the severity of the discipline is appropriate back pay should not be awarded. Such an award would punish the Company unnecessarily for its good faith efforts and would unjustly enrich Neuber.

The Union's Reply

The collective bargaining agreement requires a just cause standard for discipline because the Agreement is silent on this issue. The Arbitrator should "fill the gap" and infer this standard.

Neuber should not be presumed to be less credible. Such a presumption can exist only if the Employer's witnesses are genuinely disinterested in the outcome of the litigation, and here they are not. Further, Neuber was not dishonest following the April 28th conversation with Waack or Billman. He neglected to tell Waack he did not have a doctor's appointment because he had no reason to suspect he needed to do so. He thought the doctor's excuse was intended to prove he was too injured to work. Neuber's testimony should be given credit, his suspension should be stricken from his record, and he should receive a day's wages as a make whole remedy. Such a remedy would not unjustly enrich Neuber.

The Company's Reply

The terms of this Agreement do not require a just cause standard for suspension and the Union ignores the plain language of the Agreement when it argues that it does. The only reference to "just cause" is expressly confined to employee discharges. In any event, the Company has sufficient cause under a just cause standard to support the suspension herein.

Any attack launched by the Union against Waack's shift log should be rejected because they are unavailing and were not raised at hearing. The Union should have questioned Waack about any inconsistencies at the hearing, but failed to do so, thus preventing the Employer from addressing the issue at the time.

The material issue is not why Waack requested a doctor's slip, but whether Neuber falsely claimed he was seeing a doctor on April 28th. If Waack asked Neuber for a doctor's slip on May 1, why would Neuber not have corrected Waack at that time and explained that he had not seen a doctor on the previous Friday?

The Employer suspended Neuber only after considering all the evidence and affording Neuber multiple opportunities to explain his version of the events. Hence, due process was afforded him and the Union's argument to the contrary must fail.

DISCUSSION

The Union forcefully argues that Neuber's actions were honest and that his testimony was credible. According to the Union, it is the Employer's witnesses who have distorted the facts, produced and introduced false documents and given untruthful testimony in its attempt to unlawfully discipline Neuber. On the other hand the Employer argues, just as forcefully, that it is Neuber who is shading the truth here and lying about the events leading to this grievance. For each party it is essentially an all-or-nothing proposition.

Each side urges the undersigned to place more credibility upon its witnesses and to discredit the testimony of the witnesses produced by the opposition because of their respective interests in the outcome of this case; the Union because the opposing witnesses are agents of the Employer and the Employer because the opposition witness is the grievant. Each side has an interest in the outcome of this matter and so I have given each witness the benefit of equal footing, regardless of any potential benefit to any particular witness or party affiliation, and I have examined the testimony of each witness on its own merits and closely observed the demeanor of each during the testimony.

After hearing the evidence and carefully evaluating the testimony and demeanor of each witness, the undersigned concludes that the truth lies somewhere in between the extremes advanced by each party. It is understandable that both sides may be somewhat influenced by personal predilection and perhaps some antipathy, hence my focus is upon the evaluation of the testimony of the witnesses on their own merits and the evidence as a whole in an effort to determine the best view of the entirety of the facts.

Neuber's Actions

If Neuber had a motive to lie to Waack about the doctor's appointment on April 28, 2006, it was to allow him to leave the plant two hours early on that date. However, there is no evidence that Neuber had any reason to suspect that Waack would not have let him go early if he had told Waack the truth. Prior to April 28, 2006, the Employer had never given Neuber any indication that it would prevent him from leaving the plant early because of pain in his shoulder. The evidence clearly demonstrates that the Employer had always supported Neuber's efforts to care for his work related injury. Thus, there was no motive for Neuber to lie about seeing his doctor. If Neuber truly intended to lie about the appointment with his doctor he surely must have considered the fact that the Employer would request some evidence from the doctor relating to any further restrictions the doctor may have imposed as a result of his visit. Given this, Neuber must have known that he would eventually be caught in the lie and potentially disciplined. He was already on light duty at the time and knew that the Employer maintained a record of the restrictions imposed by his doctor. Further if, during the

initial conversation between Waack and Neuber on April 28, Waack had requested that Neuber produce a doctor's note following his visit, Neuber would have been forced to admit that he did not have an appointment with his doctor. He would have been caught red-handed.

These things all cut against the argument that Neuber told Waack that he had an appointment to see his doctor and support Neuber's assertion that he told Waack he had to leave early because of his pain.

Unlike the Employer, the undersigned does not find a great deal of mystery in the fact that Neuber felt he could work until noon. He knew his pain threshold and was quite aware of the nature of his shoulder pain, having lived with it for almost two months. The fact that he wanted to work as long as possible in order to mitigate the loss of his wages is also understandable. On the other hand, I can understand the Employer's suggestion that Neuber's testimony in this regard is suspect and should be carefully considered. The Arbitrator has done so and has concluded that, on balance, Neuber's explanation is sufficient. I consider Neuber's testimony to be credible.

Waack's Actions

The Arbitrator believes that Waack was mistaken when he concluded that Neuber told him he had a doctor's appointment and entered that notation in his log. The fact that another employee had informed Waack about a doctor's appointment just fifteen minutes or so after Neuber's conversation with him; the fact that Waack was busy with production schedules and perhaps listening to the radio when Neuber came to see him; and the fact that Neuber told him he had to leave at a time certain, twelve noon, I believe, worked together to cause Waack to confuse the issue and to make an erroneous entry in his log. The log itself, Employer Exhibit 2, appears to have been created after the fact, perhaps in preparation for hearing, but I believe it sets forth Waack's honest recollection. Waack's assumption that Neuber was to see a doctor explains why he failed to assign other available work to Neuber that afternoon, as the Employer asserts would normally be the case in the event an employee became unable to do his or her regular job. Unlike the Union, I do not ascribe an evil motive to Waack or to the Employer in this regard; only an honest mistake. I think Waack's testimony was honest because I believe Waack was truly convinced that Neuber told him he had a doctor's appointment. I simply believe Waack was mistaken.

The events which followed on Monday, May 1 and Tuesday, May 2 flow from the erroneous belief on the part of the Employer's supervisor, Waack, that Neuber had lied to them. Waack knew, on May 1 when he asked Neuber for a doctor's excuse, that Neuber had not actually seen a doctor. Waack had checked with Neuber's doctor on Friday and verified this. Waack's assumption on May 1 was that Neuber had lied about his appointment on the previous Friday and Waack was, at that point, committed to the development of evidence to support Neuber's discipline for dishonesty. Neuber did not tell Waack, during their conversation on Monday, that he had not seen a doctor because Waack, for reasons the Arbitrator fails to understand, did not confront him with the supposed lie. Consequently,

Neuber had no reason to think that he was the subject of investigation. If Waack had told Neuber that he needed the excuse to prove Neuber had seen the doctor on Friday, Neuber could have set the record straight at that time. Instead, Neuber thought Waack needed a note from the doctor in order to excuse his absence on the previous Friday, not to prove he had actually seen a doctor. This was Neuber's testimony and I do not find it to be unreasonable in light of the fact that he was unaware that he was being investigated and unaware that Waack secretly harbored the thought that he had lied about the doctor's appointment. Neuber eventually provided an excuse from his doctor just as Waack had requested.

Billman's Actions

Billman acted on the information he received from Waack. In the only conversation he had with Neuber concerning this incident, Neuber told him that he had not seen a doctor and that he left work early on April 28 because of his shoulder pain. Thus, everything Neuber told Billman was true. Essentially, Billman made his decision to issue discipline to Neuber based solely on Waack's entry in his log. As mentioned above, further inquiry might have shed light on the matter, but that did not happen. Instead, on May 4, 2006, Neuber was disciplined (initially terminated and subsequently suspended for one day) and escorted out of the plant. The undersigned places little weight on the Employer's argument that because Neuber failed to plead his case on May 4 his defense must have been concocted after the fact and in preparation for this hearing. Neuber testified credibly that he thought he had to go through the grievance process and reasonably could have presumed that he would be given an opportunity to plead his case at a later date, which, of course, he has.

Conclusion

The disciplinary action against Neuber stems from the presumption on the part of the Employer that Neuber lied about his reason for leaving the plant early on April 28, 2006. This presumption was based upon an erroneous entry in Waack's log. Hence, the basic premise in support of the Employer's disciplinary action against Neuber is flawed and unfounded. The Employer reasonably believed that Neuber had lied to them because Waack told them he had, and the Employer had every reason to rely on the word of its supervisor. Because the Employer wasn't aware that Waack was mistaken about his log entry, it acted in good faith when it pursued discipline against Neuber. A more in-depth investigation, one with forthright communication, would have brought this misunderstanding to light and derailed the grievance train. That did not occur though. Here again, the undersigned does not ascribe an evil motive to the Employer for pursuing discipline against Neuber under these circumstances.

The finding above renders moot the need to consider the issues of just cause and due process argued by the parties.

In light of the above, it is my

AWARD

1. The Company did violate the expressed terms of the Labor Agreement when it suspended the employment of Matt Neuber for one day without pay and the grievance is granted.

2. The Company shall make the Grievant whole for one day's wages and benefits as a result of this matter and shall remove all references in his record arising therefrom.

Dated at Wausau, Wisconsin, this 26th day of February, 2007.

Steve Morrison /s/

Steve Morrison, Arbitrator

