

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ALTO-SHAAM, INC.

and

UNITED STEELWORKERS OF AMERICA, LOCAL UNION 9040

Case 4

No. 68872

A-6367

Appearances:

Randy Avrit, W164 N9221 Water Street, Menomonee Falls, Wisconsin 53052-0450, appearing on behalf of Alto-Shaam, Inc.

William Breihan, 1126 South 70th Street, Suite N509A, West Allis, Wisconsin 53214, appearing on behalf of United Steelworkers of American, Local 9040.

ARBITRATION AWARD

Alto-Shaam, Inc. (“Company”) and United Steelworkers of America, Local Union 9040 (“Union”) are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union, with the Company’s consent, requested that the Wisconsin Employment Relations Commission designate a commissioner or staff member to serve as arbitrator of a dispute concerning the discharge of the Grievant, an Alto-Shaam employee. The undersigned was so designated. A hearing was held on July 31, 2009, in Germantown, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. No stenographic transcript of the proceeding was made. The parties submitted arguments orally at the conclusion of the proceeding, whereupon the record was closed. On August 5, 2009, the parties stipulated to the issuance of an expedited, abbreviated award.

Now, having considered the record as a whole, the Arbitrator makes and issues the following award.

ISSUE

The parties stipulated to the following statement of the issue to be considered by the arbitrator:

Did the Company have just cause to terminate the employment of Grievant on March 19, 2009? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

SECTION 12 – GRIEVANCE PROCEDURE

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12.2

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Step 4: Within fifteen (15) days after the Company’s 3rd step answer, the Union may submit the grievance to arbitration.

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b) The Wisconsin Employment Relations Commission shall appoint the arbitrator. The Arbitrator shall set a time and place for the hearing subject to the availability of the Company and union representatives. The award of the Arbitrator shall be final and binding.

BACKGROUND

In early 2009, the Company had introduced into its product-line the “combi-oven”, an industrial steam cooking unit. At some point, Company representatives discovered that there were problems with the combi-oven that required completed units to be sent through the manufacturing process again. Such reworking would require employees in the Company’s shipping department to unpack and remove from pallets the combi-ovens that already had been prepared for shipping. On the morning of March 19, the manager of the shipping department assembled a small group of department employees, including the Grievant, to discuss the process by which such unpacking would be accomplished. The discussion took place around a packaged combi-oven unit that stood on the shop floor. As the conversation was winding down, and the shipping manager was turning to walk away, the Grievant caught the attention of a fellow employee who had also been involved in the discussion and the Grievant raised his middle finger toward the combi-oven unit that had been the focus of the conversation. The shipping manager saw this action and told the Grievant it had been inappropriate. The shipping manager then reported the incident to the Company human resources generalist and the human resources manager. Over the course of several hours that followed the incident, these three individuals conducted an investigation into the incident, conferencing with one another and speaking to both the Grievant and the employee who witnessed the incident. Ultimately, they concluded that it was appropriate to terminate the Grievant’s employment with the Company,

which they did immediately. The disciplinary report issued to the Grievant indicates that he was discharged for violating the work rule prohibiting the following conduct:

Any immoral or indecent conduct or unlawful or improper conduct, whether on or off company premises or on or off working time, which casts discredit upon the company reputation or image or which adversely affects the employee's relationship with his fellow employees, supervisors or customers or adversely affects company products, property or goodwill.

Pursuant to the Company's work rules and procedures, a single violation of this "Group IV" rule can result in the immediate discharge of the offending employee.

When the Grievant was discharged, he had been employed by the Company for twenty-one years. In evaluations, his performance has been rated as average or above-average. His attendance record is outstanding. In February of 2008, less than one month before the incident that led to the Grievant's discharge, he received a written warning for having damaged company property in the process of operating a fork lift and for having failed to report the accident as required.

DISCUSSION

I have concluded that the Company did not have just cause to terminate the Grievant's employment. First, I am not persuaded that the Grievant's actions constituted the kind of conduct prohibited by the work rule under which the Grievant was discharged. No one outside of the work-group was present, so the Grievant's action could not have affected the public image of the Company or its products in any way contemplated by the work rule. Further, I am not persuaded that the incident had any real adverse affect on the Grievant's relationship with his co-workers and supervisors, as contemplated by the work rule. The Grievant's behavior clearly was inappropriate, but it represented only a momentary lapse. Although the shipping supervisor happened to see the act, the evidence suggests that it was carried out relatively discreetly, as the meeting on the shop floor was ending and others were walking away. Moreover, the gesture was not directed at any person. Although Company representatives apparently believed, initially, that the Grievant's gesture was aimed at a fellow employee who had been involved in the discussion, the testimony at hearing established that it was not – it was directed toward the inanimate oven unit sitting on the shop floor. Indeed, the employee who witnessed the action testified at hearing that, while he was surprised by the Grievant's gesture, he did not perceive it as threatening or hostile. The Grievant credibly testified that the gesture was simply an expression of the frustration he felt after having learned that he would have to undo work that had been completed, when his department already was behind schedule. All of these factors minimize the severity of the Grievant's conduct such that the Company was not able to meet its burden to show that it had just cause for his discharge.

In addition to arguing that the Grievant's actions constituted a Group IV violation under the Company rules and, therefore, warranted immediate discharge without regard to any prior

offenses, the Company also argues that its decision to discharge the Grievant was appropriate under the principle of progressive discipline, given the fact that the Grievant had received a written warning the month before his discharge for an unreported fork lift accident. I disagree. Considering the minor nature of the offense at issue here and Grievant's long tenure with the Company and otherwise clean record, even the fact of the previous discipline did not provide just cause for discharge.

It is clear that the Grievant's behavior was not in keeping with the positive atmosphere Company managers intend to cultivate. It is also clear that the Grievant has been noted from time to time – in passing and on his evaluations – for having a somewhat negative attitude or demeanor at work. Certainly this decision is not intended to suggest that the Grievant can engage in such behavior and display such attitudes and expect to be shielded from discipline. Rather, it is only intended to indicate that the specific behavior at issue here – a kind of behavior for which the Grievant never had been disciplined before – did not provide just cause for the Grievant's discharge.

CONCLUSION

The grievance is sustained. The Grievant shall be reinstated to his position immediately. Further, he shall be made whole for any loss of earnings incurred. Such back-pay shall be reduced by the Grievant's actual interim earnings. I remand to the parties the task of computing the back-pay award, and I retain jurisdiction for sixty days following the date of this award for the purpose of resolving any dispute that arises regarding that issue.

Dated at Madison, Wisconsin, this 7th day of August, 2009.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator

DLC/gjc
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