

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EAU CLAIRE PRESS COMPANY

and

GENERAL TEAMSTERS UNION LOCAL 662

Case 18
No. 70147
A-6421

(Clifton Vollendorf Termination Grievance)

Appearances:

Stephen L. Weld, Weld, Riley, Prenn & Ricci, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, WI, 54702-1030 appearing on behalf of Eau Claire Press Company.

Yingtao Ho, Goldberg, Previant, Uelmen, Gratz, Miller & Brueggman, S.C. appearing at hearing on behalf of General Teamsters Union Local 662 and **Scott Soldon** and **Kyle A. McCoy**, Soldon Law Firm, LLC, 3541 N. Summit Ave., Shorewood, WI 53211 appearing on behalf of General Teamsters Union Local 662 on the brief.

ARBITRATION AWARD

Eau Claire Press Company, hereinafter Employer or Company, and General Teamsters Union Local 662, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission provide a list of five WERC commissioners/staff arbitrators from which they could jointly request an arbitrator to hear and resolve a dispute between them. Commissioner Susan J.M. Bauman was selected.¹ A hearing was held on January 11, 2011, in Eau Claire, Wisconsin. The hearing was not transcribed. The record was closed on May 16, 2011, upon receipt of all post-hearing written arguments.²

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

¹ The parties initially selected WERC staff arbitrator Coleen Burns from a panel to serve as the impartial arbitrator in this dispute. Due to Ms. Burns' retirement, the parties requested a new panel from which the undersigned was selected.

² The briefing schedule was significantly modified by mutual agreement of the parties.

ISSUE

The parties were unable to agree to a statement of the issue, but agreed that the arbitrator could frame the issue based upon the parties' proposed issues and the evidence presented. The Union frames the issue as:

Did the Grievant commit gross insubordination? If not, what should be the remedy?

The Employer frames the issue as:

Was the Grievant discharged for just cause? If not, what is the appropriate remedy?

Based upon the evidence and arguments presented, the undersigned adopts the following statement of the issue:

Did the Employer have just cause to terminate the Grievant? If not, what is the appropriate remedy?

BACKGROUND AND FACTS

The Employer, Eau Claire Press Company, prepares and distributes the *Eau Claire Leader-Telegram*, a daily newspaper, in addition to printing other newspapers and commercial products. The Grievant was employed by the Employer as a long haul driver from July 23, 2003 until his termination on July 28, 2010.

The distribution system used by the Employer to distribute newspapers includes mailing directly to customers, delivering to retail stores, and direct delivery to customer homes. Long haul drivers deliver papers to retail outlets, to motor route drivers, and to carriers. Motor route drivers deliver newspapers to households by car and carriers deliver newspapers to residences on foot. The role of the long haul carrier is to move the papers from Eau Claire to another distributor; it is generally not to deliver newspapers directly to customers.

Long haul drivers are part of the circulation department and report to the Long Haul/Motor Route Manager as their supervisor. According to the position description dated September 22, 2006, the objective of the position is "Delivery of newspapers to our subscribers, carriers, and single copy outlets in a safe and timely manner." The responsibilities of the position are:

- Arrive at the production facility as your scheduled load time
- Retrieve your manifests for the day's activities
- Deliver to all active subscribers, carrier drop sites, and single copy outlets on the route
- Have a good sense of direction to make deliveries in a timely fashion
- Maintain a coding system on the paper tubes
- Keep track and record return papers from single copy outlets

The job description also describes the essential job functions: “The position will require long periods of driving. Must be able to load multiple bundles of paper weighing up to 25 lbs.” The working conditions are described as: “The position will require inserting papers into motor route tubes outside in rural areas. A copious amount of reaching across your vehicle and outside the passenger window is required. Must be able to get in and out of vehicle multiple times during the route.”

The *Eau Claire Leader-Telegram*, like many newspapers in the age of the internet, has experienced a decrease in profits, largely due to falling advertising revenue and declining circulation. The Union and its members, as well as the Employer, are concerned about the decrease in revenues and the potential impact of those losses on jobs. Over recent years, the Employer has made significant modifications to its system of delivering newspapers such that some individuals who used to have same day delivery to their residences now receive the newspapers in the mail, arriving a day after publication.

One technique often utilized by the Employer to encourage more people to subscribe to the paper is called sampling, a process that provides newspapers to individuals on a trial basis for free or a nominal cost such as \$1 for a fixed period of time. At the end of that time period, the individuals are contacted to see if they are interested in subscribing. The Employer has developed a sophisticated process for sampling of different geographic areas in order to increase the number of subscribers.

The Grievant once worked as a paper boy for the Employer and, at that time, would provide free newspapers to individuals on his route in an attempt to increase the number of subscribers. In early 2010, he decided that this would be a good method to increase the number of subscribers on his long haul route. He asked Pete Sandborg, Long Haul/Motor Route Manager, about the possibility of sampling. He was referred to Mark Haas, Circulation and Marketing Manager, who referred him back to Sandborg. Vollendorf was not given permission to sample in any manner. He did so anyway. In a letter to Pieter Grasskamp, President of the Eau Claire Press Company, postmarked July 26, 2010, the Grievant wrote as follows:

Dear Pieter Grasskamp

I would like to bring up the subject of sampling to bring the Leader-Telegram more customers. When I worked here as a paper boy from the ages of 13-16 in 1991-1994 I always sampled to bring in more customers and it was a success. When I started as a Long Haul driver in 2003 I had the blessing of then Long Haul manager Dave Lewis to sample the 250 or so non-subscribers on my route between Lake Wissota and Thorp in order to get more customers, I was able to get about 40 or so new customers and with the perfect customer service I provided I was able to maintain those customers. I wanted to sample once a year but the following year or two I was stopped and told by the new

Long Haul Manager Dave S. sampling was not my Job and I was no longer allowed to do it and letters on the subject were sent to Ken Hanson with no success on my part to be allowed to sample again. In 2007 I gave up the Thorp route because it was turned into 3 separate routes and over the years it went through many transformations and last December when I lost my Baldwin route I took back the Thorp route after Pete Sandborg told me it had been restored to it's former glory as one route. After getting the Thorp route back I noticed over the past three years as it had been transformed into several different routes I noticed entire sections of customers that I drive by have totally disappeared. While all my other customers were still there I found entire 10 mile or 20 mile stretches of customers on county road X and county road MM were all gone and mainly near the Cadott area. My research into the matter found that the Cadott area had been a motor route for about 2 years but since has disappeared so now I drive right by my old customers 7 days a week and do not deliver to them. I have about 40 old customers in the effected area I would like to try to get back. When I asked Pete to sample a few months ago I was given the run around and told to ask Mark Haas and then Mark told me to ask Pete because that was his job but I told him that Pete said to go to him. I knew I would get the run around again from my department and so on my own I decided that since Mark Haas had been putting sample fliers in the Sunday papers the last few weeks I used the sample fliers in those unsold Sunday papers and gave a free paper to about 20 old customers in the last few weeks in hopes of getting them back. I suspect that some of those people called in to subscribe because someone dug through my company van on Friday July 23rd for the sole purpose of finding and removing the sample fliers I was able to collect from unsold Sunday papers and there would have been no other way of knowing I had them. Why is the Long Haul/Motor Route department so set on not getting more customers? My personal feeling is that they get bonuses for saving money and to save money they cut cost by saving on employee time but what good are those savings if they are costing the company more in profits by eliminating customers and the refusal to get more customers. You have to spend money to make money and yes more customers will cost time to deliver to but are the extra profits not worth the time and effort and if not why be in business? Perhaps they should get bonuses based on profit if they do not already. I currently get to Thorp at 4 am and even if I had 40 extra customers I would still be in Thorp by 4:15 am or 4:30 am which is still a half hour before my Thorp carrier wakes up and the first gas station opens up at 4:30 am as well and I would still be under 40 hours a week. I always seemed to have the blessing of the sales department to pick up customers but it is only the Long Haul department that treats customers as a disease and it makes no sense other then they think they are saving the company money but at what cost? I would think picking up customers would be a top priority and if not why is Mark Haas doing so much to pick up customers? I do not know why I should even try being treated the way I do but it seems to me

that we all should be helping the company sell papers and I would like to see all the Long Haul/Motor Route drivers sample there routes to pick up customers. In my opinion the best way to get a customer is with a free copy of the paper with a sample flier with the subscription information sitting either at their door stop, driveway or by their mailbox. Even if drivers do not want to sample there routes the company has the right to tell them they have too and as the acting Union Steward I see no problem with that and neither does our business agent. Even though I am the Union Steward and I represent my co-workers I also am a Leader-Telegram employee and my business agent and I agree we all have to work together to keep the struggling newspaper business afloat and I believe I have just given you a great idea that would help accomplish that goal. Another cost saving idea I have involves taking away something that was done to me as retaliation. I was told last December if I took back the Thorp route I would be starting at Gordy's in Lake Wissota and go to Thorp just as it did when I had the route a few years ago. Last December I also had to later on in the month file a grievance on behalf of my co-workers for the elimination of 6 routes and on the next day or two I got an angry call to tell me the 3 Lake Wissota stores will not be mine but are going on a motor route. This was retaliation and makes no since at all because I have a van that can handle all those papers and on Sundays the little motor route car that does the Lake Wissota tubes and those nearly 175 store papers has to make a trip or two back to the plant for all those papers depending on the paper size and to me this seems very foolish when I can do it all in one run. Also I had about 5-6 tubes taken from me in the first month with the excuse they were too far off the beaten path even though they had been customers for decades but because they were my customers and the management was mad at me they were not good enough to deliver to anymore. Seems they punished the customer to punish me. Sometimes the childish retaliation in Hallie really gets old because I am only doing my job and what is right. The Union later dropped the grievance with the company after it was agreed upon that no other route would be cut and the company promised to expand the current routes to make them more profitable and I believe I have just given a great idea to accomplish this and it is called sampling. Whether you agree with me or not it is only a suggestion and do we not all have the right to peacefully submit suggestions without getting someone angry and facing retaliation from our departments? Since you are the person who runs this company I figured I would write you about this issue because you can look at the whole picture and see if it benefits's the company as a whole and not just a single department. Thank you for your time and consideration of this matter and feel free to contact me if you wish because I would really like to sample and see the others sample as well to see the Leader-Telegram grow.

Prior to receipt of this letter the Company had received a call from an individual who had been receiving the newspaper by mail. Her residence was not on the long haul route that the Grievant was supposed to drive, but he had left a paper at her home with an insert that implied that she was now eligible to receive same day home delivery of the newspaper. She was excited about that, as she used to have home delivery and, naturally, found that to be preferable to mail delivery. She was quite upset to find out that she had received the paper and the insert in error and that her home was not on a carrier or motor route and she could not receive the type of delivery that she was "promised" by the insert in the free paper.

The Company, through its Director of Human Resources, Debra Hayden, conducted an investigation into what had occurred. It was determined that the Grievant had engaged in unsanctioned sampling, utilizing the insert that was supposed to be used in Sunday papers sold in stores. A decision was made by Steve Svihovec, Plant Manager, Ken Hansen, Assistant Plant Manager, Pete Sandborg and Hayden to terminate the Grievant.

By letter dated July 28, 2010, Pete Sandborg, Long Haul/Motor Route Manager, advised the Grievant of his separation of employment:

This is notice of the termination of your employment.

In a recent letter to Pieter Graaskamp, you admitted that you delivered samples to potential customers after requesting the right to do so and being denied. The reason for the denial, as explained to you, is that sampling is being handled by another department.

Your unauthorized sampling caused a current customer to get very agitated, put the Circulation/Marketing Department and its Manager in an awkward position, and totally disregarded the directive to not sample. Your action constitutes insubordination; therefore, your employment is severed effective July 28, 2010.

Your final paperwork will be mailed to you regarding this separation.

A timely grievance was filed by Mr. Vollendorf in which he contended as follows:

I was terminated because the Press Company did not follow proper procedures as outlined in the contract. A employee must be orally reprimanded then written up then suspended and then discharge is last. In the last 3 and a half years I had only one oral reprimand and that was on 12/15/09 which I also contested. If anything, today should at most have been a written warning if the company followed the labor agreement.

I was fired for complaining about the company not adhering to the Memorandum of Understanding signed 4/27/10 in which the Press Company agreed in paragraph #3 to attempt to grow the remaining routes and the Union dropped a grievance in return. This document is enclosed. The only way to

grow the routes is to get more customers and the Press Company was giving me the runaround on the subject and other drivers told me as well that they have had customers approach them asking why the Leader-Telegram would not let them subscribe even though Leader-Telegram vehicles drive by there houses. When Pete Sandborg rode with me about 3 months ago for an audit I digitally recorded the entire 4 hour trip and I brought up sampling and he said it sounded like a good idea but I needed to ask Mark Haas but Mark said I needed to ask Pete Sandborg. Everyone said good idea but blew it off on someone else. I must also add that while listening to the recording I made I mentioned to Pete I was going to write Pieter Graaskamp about sampling because paragraph #3 in the Memorandum of Understanding³ in which the Press Company agreed to grow the remaining routes but I wanted Pete Sandborg's advice first. I wonder if this is why I got the runaround because no one wanted to tackle the subject directly knowing full well I likely would write Pieter Graaskamp if the Memorandum of Understanding was not adhered to. The last part of this is that we are given one extra paper on our routes daily and I was told on many occasions that was our paper to do with as we please, Ken Hanson even joked with me once and said you could sell it if you want. In the last few years that Pete Sandborg has worked here I told him a few times that my extra paper I had if I was not shorted would be bagged and thrown by someone's mailbox as a sample or when I had the Baldwin route I just put the extra paper in my last vendor box but on the Durand and Thorp route they know that one paper was sampled and they were ok with it until now. This was my extra paper and according to the company I could do with it as I please and I just chose to sample it to bring in new business. In conclusion Mark Haas told me that sampling sounded good but he said he could not authorize me to sample if it took extra time because I originally wanted to sample 50 a day until I finished the 250 or so houses and he said Pete Sandborg needed to authorize the extra half hour or so I said it may take. When I asked Mark can all the other routes sample then too? He said that would have to go through Ken Hanson. My sampling of one paper a day took no extra time and therefore did not go against what Mark Haas said and I have Pete on tape telling me sampling was Mark Haas's department and once again Mark only said he could not approve the extra time needed but was OK with sampling. Nothing was a problem until I simply asked the company president Pieter Graaskamp to allow a mass sampling of all the routes.

The grievance was processed through all of the steps of the grievance procedure and is properly before the undersigned. Additional facts are included in the Discussion, below.

³ The Memorandum is included in the Relevant Contract Provisions section, below.

RELEVANT CONTRACT PROVISIONS

ARTICLE 6: MAINTENANCE OF STANDARDS AND MANAGEMENT RIGHTS

Section 1. The Employer agrees that all conditions of employment relating to wages, hours of work, and general working conditions put into effect during the term of this Agreement shall become minimum standards for all employees covered by this Agreement unless otherwise mutually agreed.

Section 2. Except to the extent specifically abridged by specific provisions of this Agreement, the Employer reserves and retains solely and exclusively all of its common law, statutory and inherent rights to manage its own affairs as such rights existed prior to the execution of this Agreement.

Except as expressly modified by other provisions of this contract, the Employer possesses the sole right to operate its business and all management rights repose in it. These rights include, but are not limited to, the following:

- A. To direct all operations of the business;
- B. To hire, layoff, promote, transfer, schedule and assign employees in positions within the bargaining unit;
- C. To maintain efficiency of operations;
- D. To take whatever action is necessary to comply with State or Federal law;
- E. To introduce new or improved methods or facilities;
- F. To change existing methods or facilities, including but not limited to the right to alter, rearrange, add or delete a route from any driver's route.
- G. To determine the kinds and amounts of services to be provided and the number or kind of classifications to perform such services;
- H. To determine the methods, means and personnel by which the Employer's operations are to be conducted;
- I. To take whatever action is necessary in situations of emergency.

ARTICLE 7: GRIEVANCE AND ARBITRATION PROCEDURE

A grievance is defined as any difference or dispute regarding the interpretation, application, or enforcement of the terms of this Agreement.

Grievances must be filed by the employee or the Union within ten (10) days of its occurrence, or the time the employee became aware of the grievance. In case any grievance relative to the provisions of this Agreement shall arise; it shall be handled in the following manner:

- A. An employee with a grievance shall report such grievance to the Supervisor designated by the Plant Manager, who shall thereupon make a determination within a reasonable length of time, not, however, to exceed five (5) working days.
- B. In the event that no mutually satisfactory decision has been reached by the end of the said period, the employee shall then refer the grievance to the Union on the written form furnished by the Union. The Union shall thereupon bring in written form, a clear concise statement of the issue in the Agreement that is in question, before the Plant Manager, who shall provide a decision, in writing, within a reasonable length of time, not to exceed ten (10) working days.
- C. If the Employer and the Union cannot reach a mutually satisfactory decision within ten (10) working days, an arbitrator shall be selected upon application to the **Wisconsin Employment Relations Commission** from its staff. The decision of the arbitrator shall be final and binding on both parties. The arbitrator shall have no right to amend, modify, nullify, ignore or add to the provisions of this Agreement. The decision of the arbitrator shall be based upon his/her interpretation of the “express language” of the Agreement.

The provisions of this Article, with respect to filing grievances, shall be available to the employees, to the Union and to the Employer. No work stoppages shall occur on issues subject to the grievance procedure.

ARTICLE 10: DISCIPLINE AND DISCHARGE

Section 1. The Employer may discipline and discharge employees with just cause. Discharge or suspension will be by written notice to the employee, with a copy to the Union.

Section 2. Procedure. The normal procedure for discipline and/or discharge shall include only the following:

- A. Oral reprimand
- B. Written warning
- C. Suspension
- D. Discharge

The number of written warnings and the length of suspension shall be determined by the Employer in accordance with the gravity of the violation, misconduct, or dereliction involved; taking into consideration that such steps are intended as corrective measures.

Section 3. Personnel Records. Personnel records including remarks, warnings and disciplinary measures taken shall be dated. Employees may request to see their own personnel record and reasonable access to same shall be made available. Notice of disciplinary action shall be removed from the employee's record after a one (1) year period, except that any notice shall remain on file, if there is an active disciplinary measure for a like or similar offense.

MEMORANDUM OF UNDERSTANDING

The Eau Claire Press Company ("Employer") and Teamsters, Local 662 ("Union") hereby agree as follows:

1. Union hereby agrees to withdraw the grievance filed challenging the December 2009 elimination of six (6) long haul/motor routes with prejudice;
2. Employer agrees that between now and the end of the existing collective bargaining agreement (December 31, 2011), no existing long haul/motor route will be eliminated;
3. Employer agrees that it will continue to attempt to grow the remaining long haul/motor routes in order to make them more economically viable and, thereby ensure the job security of those driving the routes; and
4. This Memorandum shall become effective on the date of execution of the second party.⁴

EXCERPTS FROM EMPLOYEE HANDBOOK (February 1992)

FORWARD

This is an informational booklet for employees of the Eau Claire Press Company. It explains the basic practices and procedures of the Company, as well as your benefits while employed here. . . .

(Note on page 2) This booklet is not a contract, but is intended to give employees a short description of working conditions. If at any time there should be a conflict between a description in this booklet and a labor contract, personnel policy, or both, the terms of the actual contract or personnel policy will govern in all cases. Personnel policies are applied at the discretion of management and may be withdrawn, applied or modified at any time.

⁴ The date of execution by both parties was April 27, 2010.

UNION EMPLOYEES

Work conditions for Union employees, over and above those published herein, are specified in their respective contracts.

OFFICE RULES

The following office rules are posted to assure and maintain orderly working conditions and standards of conduct by employees.

1. The Public is our customer! All employees shall exercise the highest degree of courtesy, patience and tact when dealing, by phone or in person with the Public.
2. News, Advertising and Business Information available to employees by virtue of employment here is confidential. Disclosure of such confidential information is prohibited.
3. Drinking intoxicants or use of other intoxicating substances during working hours, appearing for work under the influence of, or bringing intoxicants of any nature into the building or on the premises is positively prohibited.
4. Disorderly conduct such as profane, loud or indecent language, boisterousness, quarreling, wrestling, physical violence, or threat thereof, to a fellow employee shall be grounds for immediate dismissal.
5. Gross insubordination to a department head or properly designated supervisor shall constitute cause for dismissal.
6. Employees shall not leave such place of work during working hours without permission of the department head or foreman, except in performance of regularly assigned duties, or for specific designated break or lunch period.
7. Conduct of private business in the plant is prohibited. Use of the telephone shall be restricted to business purposes, except in personal emergency.
8. Standard rules of sanitation shall be observed throughout the building. Defacing or otherwise damaging office property, buildings, walls, furniture, machinery or other equipment is prohibited.
9. Accidental injury while on duty shall be reported immediately to the foreman or department head.
10. Defacing or altering of an authorized notice on department bulletin boards is prohibited.

THE ABOVE OFFICE RULES HAVE BEEN APPROVED BY THE VARIOUS LABOR ORGANIZATIONS IN OUR CONTRACT NEGOTIATIONS WHERE CONTRACTS EXIST BETWEEN THESE PARTIES.

The foregoing rules, if violated in whole or part, may result in disciplinary action ranging from temporary leave without pay to permanent dismissal.

DISCUSSION

The Grievant herein, Clifton Vollendorf, had worked for the Employer as a newspaper carrier during his teen years and as a long haul driver for seven (7) years at the time of his termination. The Employer and the Union are in agreement as to the basic facts of this case, but they diverge dramatically as to how those facts should affect Vollendorf's continued employment at the Eau Claire Press Company. For the reasons discussed below, the undersigned has concluded that Vollendorf's behavior warranted termination.

The Issue

The Employer contends that the issue to be decided is "Was the Grievant discharged for Just Cause? If not, what is the appropriate remedy?" The Company takes issue with the Union's statement of the issue: "Is Cliff Vollendorf guilty of gross insubordination? If not, what is the appropriate remedy?" The Employer argues that the issue stated in the grievance filed by the Union states that Article 10, Section 2 of the collective bargaining agreement and the April 27, 2010 Memorandum of Understanding were violated. It does not mention "gross insubordination" or "Office Rule #5" and, accordingly, the question before the Arbitrator must be limited to the terms of Article 10, Section 2 of the collective bargaining agreement and the Memorandum of Understanding.

Article 10 establishes a just cause standard for discipline and discharge. It does not make reference to gross insubordination. The Union has made reference to a 1992 Employee Handbook that states that "gross insubordination to a department head or a properly designated supervisor shall constitute cause for dismissal." From its statement of the issue, one must infer that the only possible basis the Union believes exists for immediate termination is gross insubordination. The undersigned does not believe that such is the case⁵ and, therefore, rejects the Union's statement of the issue. That is, while gross insubordination as described in Rule #5 constitutes grounds for immediate termination, it does not limit the Employer to demonstrating gross insubordination to effectuate immediate dismissal.

⁵ In fact, at hearing the Employer introduced evidence of terminations without progressive discipline having been applied.

Accordingly, the issue to be decided is whether the Employer had just cause to dismiss Mr. Vollendorf. Although both parties have applied a seven-part just cause analysis (and reached opposite conclusions), the analysis that follows examines whether the Grievant engaged in conduct that warranted discipline and whether the appropriate discipline under the circumstances is termination.

The Grievant's Actions

There is little disagreement about the essential facts of this case, but the parties view these facts in a diametrically opposed fashion. The Employer and the Union share a common objective of growing the business of the Company and entered into a Memorandum of Understanding (MOU) in April 2010 that expresses that shared interest. In particular, item #3 of the MOU states "Employer agrees that it will continue to attempt to grow the remaining long haul/motor routes in order to make them more economically viable and, thereby, ensure the job security of those driving the routes..." At the core of the current dispute is the fact that the Grievant is of the opinion that the Employer failed to abide by this commitment and, therefore, Mr. Vollendorf took it upon himself to grow the long haul route to which he was assigned.

The Employer argues strenuously, and correctly, that it is its burden to grow the routes, as well as the ways and means of doing so. As part of a larger scheme of marketing its product, the Company has developed a rather sophisticated method of providing sample newspapers, "sampling", to non-subscribers for a period of time, and then following up with those households to determine if they are interested in subscribing, as well as obtaining other feedback. These sampling efforts are developed based on the Eau Claire Press Company's ability to provide newspapers to those who do opt to subscribe. In addition, the Employer utilizes inserts of various types in newspapers that are available at sales outlets. These inserts are tailored to the geographic location of the sales outlet, and may differ depending on whether the newspapers in which they are to be inserted are weekday or Sunday papers and whether the sales outlet is in a rural or urban area. Consideration is given to the manner of distribution of free newspapers and inserts so that the Employer is able to provide the offered service to the recipient of the offer.

Although as a youthful newspaper carrier the Grievant may have distributed free papers to households along his carrier route (with the permission and encouragement of his supervisor), the role of a long haul route driver differs significantly from that of a newspaper carrier. In addition, the economics of the newspaper business differs significantly today than it did years ago. A carrier dropping a paper on the lawn of a house next to an established customer could be sure that the sampled household was on that carrier route. A household that is passed by a van or truck on a long haul route may, or may not, be eligible for home delivery. Adding households to a long haul route will, of necessity, add time to that route which may not be economical for the Employer. It is the Employer's job, not the employee's, to determine how the routes are to be grown, how the business is to be expanded. The fact that the Employer agreed with the Union that it would attempt to grow the long haul routes does not mean that the Company has agreed that employees, including the Grievant, shall determine how this will be done.

To be sure, the Grievant attempted to obtain the permission of his supervisor, Pete Sandborg, before he began a campaign of giving away newspapers in an attempt to lure “fallen away” subscribers to subscribe to the daily paper and to encourage new people to subscribe to the paper. Sandborg told Vollendorf that he needed to discuss this with Mark Haas, the Circulation and Marketing Director. According to Vollendorf, Haas sent him back to Sandborg.⁶ Rather than discuss the matter with Sandborg again, or to acknowledge that he did not have permission to engage in sampling, Vollendorf proceeded with his plan to sample. According to Vollendorf, he got the “runaround” and, therefore, he was entitled to act as he saw fit, regardless of the concerns expressed to him by both Sandborg and Haas.

Vollendorf proceeded to leave newspapers at the homes of non-subscribers. He argues that he only gave away the “extra” newspaper that he received each day, a newspaper that, to be sure, he can utilize in any manner that he wishes provided, however, that he has distributed all the required papers on his route and that the “extra” was not needed to replace a paper that had been rendered unsuitable for sale or distribution. In addition to the papers that he utilized in his own sampling endeavor, Vollendorf inserted a flyer that had been provided by the Marketing and Circulation department for inclusion in Sunday papers that were left at outlet stores for individual sales. These flyers clearly stated, “Thank you for purchasing the Leader-Telegram.” Clearly, these flyers were inappropriate for inclusion in papers that were provided for free to individuals on or near Vollendorf’s long haul route.

The Eau Claire Press Company became aware of Vollendorf’s actions when Mark Haas was contacted by a customer currently receiving her newspaper by mail who called and indicated her delight that she was, once again, eligible for home delivery of the newspaper. Haas checked the individual’s address in Cadott and found that she was not in a home delivery area. During the investigation of this incident, it was also determined that the address was not along the Grievant’s long haul route and, accordingly, he must have deviated from his route in order to drop the newspaper at the house in question. Additionally, the home in question would not be at the end of the route, so even if Vollendorf was leaving his “extra” paper, it would have been before his route was done and he was certain that he did not need the “extra” paper to fulfill his route requirements.

In his letter to Company President Graaskamp, Vollendorf admits that he distributed newspapers to non-subscribers which included the aforementioned flyer. Vollendorf justifies his actions by contending that he wanted to grow the company and management representatives Sandborg and Haas were giving him the run around, basically getting in his way. Although the Grievant’s intentions may have been good, his attitude demonstrates a callous disregard for the decisions of the Employer, decisions that appropriately should be made by the Employer. It is clearly within management’s discretion to determine the best ways to increase its business.

⁶ For purposes of this discussion, the undersigned is looking at the evidence in such a manner as to give credibility to the Grievant’s view of the discussions with Sandborg and Haas. While I do not view the Grievant’s testimony as wholly credible on these points, I find that Vollendorf acted without permission of his superiors and in a manner which conflicted with his position description.

Vollendorf should have sent his letter and “idea” to President Graaskamp prior to initiating his sampling⁷ process, not after having engaged in this activity without the consent and permission of his supervisor and the designated marketing personnel.

The Discipline

In its letter of termination, the Employer advised Vollendorf that his actions in delivering samples to potential customers after having a request to do so denied, together with the fact that his actions caused a current customer to become agitated, put the Circulation/Marketing Department and its Manager in an awkward position, and disregarded a directive to not sample, all constituted insubordination. Such insubordination was sufficient for the Employer to sever the employment relationship with Mr. Vollendorf.

The Union, while denying that the Grievant’s actions constitute wrongdoing, argue that at most his actions warrant discipline at a low rung of the disciplinary ladder, a written warning. The Union argues that Vollendorf’s actions do not constitute insubordination; that he never received a direct order to not sample; that the Employer never stated that engaging in newspaper give-away could result in discipline, let alone discharge; that the investigation did not result in a finding of substantial evidence of the Grievant’s guilt; and that the discharge was not reasonably related to the seriousness of the employee’s offense. Additionally, the Union argues that the Employer’s reliance on the employee’s past record was inappropriate inasmuch as any prior discipline issued to Vollendorf was, in accordance with the terms of the collective bargaining agreement, “stale.”

While generally sympathetic to the fact that a termination is the equivalent of industrial capital punishment, the circumstances of this case lead the undersigned to the conclusion that termination is an appropriate disciplinary measure here. To be sure, the Employer could have imposed less severe discipline upon Mr. Vollendorf. Though I clearly recognize the ability of an arbitrator to modify the penalty imposed upon an employee, this case is one in which the undersigned does not feel it is appropriate to substitute her judgment of the correct punishment for that of the Employer.⁸

⁷ At hearing, and in its brief, the Union argues that Vollendorf’s activity was not “sampling” inasmuch as he was merely giving away one paper (“his”) each day in a somewhat organized fashion. However, in his letter to President Graaskamp, Vollendorf clearly refers to his activity as sampling.

⁸ As a general rule, I do not subscribe to the view that an arbitrator must uphold the discipline meted out by the Employer if misconduct as alleged is found. Here, however, while in the first instance I might not have terminated the employee, I find the conduct complained of to be sufficiently egregious to warrant upholding the termination.

Although the Union does not disagree with the facts as presented by the Employer, it does emphasize different aspects of the behavior and concludes, erroneously, that the actions of the Grievant do not constitute misconduct. There is no question, as discussed above, that Mr. Vollendorf acted outside of his prescribed job and performed activities that he was not authorized to perform. There is also no question that Vollendorf requested permission to perform sampling. In response to his initial request to Mr. Sandborg, he was directed to Mr. Haas. Mr. Haas did not give him permission to sample. While Haas might have made some comments that seemed, to Vollendorf, to be supportive of the concept of sampling, Haas told Vollendorf to talk, again, to Sandborg. Vollendorf disobeyed this directive and, instead, began distributing sample newspapers to non-customers. This action was clearly in violation of the directive that Haas gave Vollendorf; it was insubordinate.

The Union argues that the Employer never stated that engaging in newspaper give-away could result in discipline. Vollendorf's termination was not because he gave away his free copy of the newspaper. It was because Vollendorf "gave away" newspapers that contained an insert thanking folks for purchasing a newspaper they never purchased, encouraged them to subscribe to the newspaper with the clear implication that they would get daily home delivery (even though they did not live on a motor route or a carrier route). Furthermore, at least one of these newspapers was left on the lawn of a house that is not on the Grievant's long haul route indicating that Vollendorf deviated from his route in order to engage in unauthorized activity. It is true that there is no express rule that says employees cannot engage in such activity. There is no need for such a rule. Employees are hired to do a job, and if they want to do something in addition to their assigned tasks they must receive permission to do that. The record in this case makes it clear that Vollendorf knew he needed permission to sample. He asked for that permission. He was denied that permission. He did it anyway. He was insubordinate.

Due process is a part of the just cause analysis. The Union contends that the Employer did not have just cause to terminate Vollendorf because the investigation did not result in a finding of substantial evidence of the Grievant's guilt, an element of the due process/just cause analysis. The Union would have the undersigned ignore the content of Vollendorf's letter to President Graaskamp, a letter that was in the possession of the Employer prior to making its decision to terminate the Grievant. In that letter Vollendorf acknowledges that the flyers were in his van and he was using them to insert in the newspapers that he was giving away. At hearing Vollendorf made no attempt to deny the statements in his prior letter to Graaskamp.⁹ There is a nexus between the flyers that were found in the van and the call from the woman in Cadott who was delighted that she'd be able to get home delivery as promised in the flyer that Vollendorf left on her property along with the newspaper.

⁹ At hearing Vollendorf attempted to make it seem that the only papers he used in his sampling operation were the ones he got as an employee, one per day. This is not spelled out in the letter to Graaskamp, but is questionable when one compares the number of papers that he says he gave out and the period of time over which such activity took place.

Finally, it is the Union's contention that the degree of discipline imposed is not reasonably related to the seriousness of the Grievant's behavior. The Union also argues that the Employer's reliance on prior, stale discipline is inappropriate. As a general rule, reliance on "stale" prior discipline is inappropriate. There is no question that "stale" discipline cannot be used to increase the level of discipline to be assessed along the progressive discipline continuum. The Employer has not used Mr. Vollendorf's prior negative behavior in such a manner. The Employer has used this "old" discipline to establish a context for why, in the opinion of the Employer, termination is the only appropriate action to take under the circumstances presented. That is, the record is being used to demonstrate that the Grievant is not the "by the book" employee that he attempted to portray in a different hearing. Mr. Vollendorf appears to be an employee who is willing to behave in whatever manner he feels is appropriate, no matter the circumstance. He clearly attempted to paint a more favorable picture of himself and his actions than is warranted. The Employer's presentation of prior discipline is in no way inappropriate, other than to establish that this is an employee who, perhaps, should not be given the benefit of the doubt in this instant case.

Article 10 of the collective bargaining agreement makes it clear that the purpose of the normal progressive disciplinary procedure is to encourage improved behavior: the steps are intended as corrective measures. When, as here, it becomes clear that corrective measures will not affect the employee's behavior, there is no reason to utilize progressive discipline – termination is appropriate.

The undersigned has reached the conclusion that discharge is an appropriate action in this case based not on the Grievant's prior disciplinary record but, rather, on the fact that he appears to have no remorse for his actions, that he continues to feel that what he did was appropriate, and that it is within his province to establish the manner in which the Employer should operate his business. If Mr. Vollendorf had credibly testified to any comprehension that he had engaged in wrong doing, termination would not be the outcome herein. However, Mr. Vollendorf decided to take matters in his own hands so as to avoid a "run around". He wanted to sample, and he sampled. He did not care that what he was doing did not fit into the Employer's plans for sampling and attempting to grow its business. He did not care if potential customers received incorrect information or if he caused embarrassment to his supervisors and the Eau Claire Press Company.

Based on the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

Yes, the Employer had just cause to terminate the Grievant.
The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 19th day of May, 2011.

Susan J.M. Bauman /s/
Susan J.M. Bauman, Arbitrator

SJMB/dag
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