FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration between		
International Brotherhood of Teamsters,	)	
Chauffeurs, Warehousemen, and	)	
Helpers of America, Local No. 135,	)	
Union,	)	FMCS Case No. 13-0723
-and-	)	
East Side Jersey Dairy, Inc.,	)	
Employer.	)	

Arbitrator's Decision

The grievant, Hosea "Tony" Johnson, was employed as a Cooler Builder by Eastside Jersey Dairy, Inc., at its diversified dairy processing plant and distribution center in Anderson, Indiana. On April 18, 2013, Johnson was terminated for committing a fourth violation, resulting in his third suspension in a 9-month period which, under the collective bargaining agreement, warrants termination. The last violation sprang from his performance and events that happened on the day before, April 17, 2013. The union filed a grievance[1] on behalf of Johnson on April 20, 2013, alleging that Johnson was improperly terminated and should be reinstated and made whole for losses. The union and employer were unable to reach a resolution of the dispute through the contract grievance procedure. The matter was submitted to the Federal Mediation and Conciliation Service for arbitration. Donald G. Russell was selected and appointed to serve as arbitrator in the dispute and accepted the appointment. The arbitrator and attorneys for the parties conferred and agreed to set the case and an arbitration hearing was held on November 19, 2013, at the Holiday Inn Express Hotels and Suites, 6720 S. Scatterfield Road, Anderson, Indiana, from 9:00 a.m. to 2:15 p.m. Fred O. Towe, attorney, represented the union and the grievant. Andrew J. Martone, attorney, represented the employer. The parties stipulated that the arbitrator has jurisdiction to determine this case and also stipulated that there is no issue with respect to the arbitrability of the issue. Each party was given a full opportunity to present evidence and witnesses, cross-examine witnesses, pose objections and make arguments. All witnesses testified under oath. The proceedings were taken down in shorthand notes and reduced to a typewritten transcript by Donna T. Thor, Notary Public. The parties agreed to submit

[1] Joint exhibit 1.

post-hearing briefs 30 days after receipt of the transcript, January 8, but twice mutually agreed to extend the time to file briefs to January 28, 2014. Upon receipt of the briefs on February 1, 2014, the arbitrator closed the hearing effective February 1, 2014, and cross-served the briefs. The matter is now before the arbitrator for decision.

The Case

Eastside Jersey Dairy, Inc., is a diversified dairy processing plant. The company has been in business since 1924 and the plant in this case has been in operation since 1942. The products range from infant formula to simple white milk. In addition to milk, butter, cream, yogurt, and other standard dairy products, the company also brews tea, makes mix for Dairy Queen and infant formula for Nestle Gerber, and provides cartons of milk to Central Indiana schools. The products are perishable and after they are processed, they are stored in a cooler, a big cooler. This operation is the cooler department.

The grievant, Tony Johnson, started with the company as a part-time employee in the cooler department in March of 2011. Johnson was hired for full-time work on July 9, 2012, and discharged on April 18, 2013. He was a very short-term employee.

The IBT, Local Union No. 135, represents the hourly workers at the Anderson facility. The union and Eastside Jersey Dairy have a collective bargaining agreement[2] which was in effect at all times relevant in this case. The grievant was a member of the bargaining unit and was subject to the terms and conditions, rights and duties, of the collective bargaining agreement.

The entry level job at the facility is that of "cooler builder." The cooler builder may "pick" products that appear on an order from the cooler and assemble the items for the order. When the items are put together in an order, the products are then loaded onto a truck. So, simply, a cooler builder might be a "picker" or a "loader" in the department. Usually there are five employees in the cooler department. Four of them are "picking" the orders, filling the orders, while one is "loading" the truck. While they share the same job title, cooler builder, the specific task they perform is decided by each of them by seniority. Johnson, being the new man and short on seniority, spent most of his time as a "loader." The witnesses seem to agree that "picking" is more desirable than "loading."

The company charged Johnson with four major offenses. The first one, September 14, 2012, was when he was "loading." His second major offense, October 3, 2012, again occurred while he was "loading." He filed grievances on these two alleged offenses, but the grievances were not advanced by the union. When these offenses for loading mistakes were not advanced, there was an agreement between the union and company that the company would retrain Johnson. Shortly after the second major offense, Johnson was off due to carpal tunnel surgery. He returned to work on February 4, 2013, to a job he had bid on, but was disqualified by the

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[2] Joint exhibit 1.

company after 10 days. So, he worked as a cooler builder from February 18 through April 18, 2013. He successfully picked product on 39 days during that time frame with no major mistakes.

Johnson's third major offense was March 1, 2013, while he was picking.[3] The company charged that he failed to exercise proper care in the performance of his duties while he was picking. Under the Rules and Regulations[4] the penalty for three major offenses in a nine (9) month period is that the employee is "subject to discharge." Everyone involved agrees that when the third major offense occurred the company could have discharged the grievant. However, the rule does not require termination, and the grievant was not discharged.

The grievant committed the fourth major offense on April 17, 2013.[5] The grievant failed to pick the items he had circled on his pick sheet resulting in the items being left off the truck and necessitating special deliveries to the customers after they complained that their orders were short. On the face of it, it is a major offense. The grievant's defenses were (1) that the company failed to train him on how to pick orders; (2) that the training he did get, which grievant says was very little, was not proper training; (3) that a supervisor instructed him to give the pick sheet to another employee, Tyler Williams, while Johnson went on break. When Johnson returned from break, he was sent to another area to pick orders.

Johnson did not name the supervisor who instructed him to turn over page two of his pick sheets to Tyler Williams. Tyler Williams did not testify. Mark Cobb, the company supervisor who testified, was not Johnson's immediate supervisor.

When the company learned that the orders were short because the items on page 2 of the three page order were not picked, they terminated Tony Johnson for a fourth major violation. The grievance was filed, but the company and union were unable to resolve it. The union informed the company that it was proceeding to arbitrate the grievances, No. 5360A and No. 5361A,[6] pursuant to Article 9 of the collective bargaining agreement. The arbitration hearing was held on November 19, 2013, and the dispute is now before the arbitrator for decision.

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3 The company brief says "March 13" but company exhibit 5, the discipline report, is dated "3-1-13" and the grievance, company exhibit 5, on it was filed March 5, 2013. Whether it was March 1 or March 13, it was not used as one of the three major offenses in the termination Document, company exhibit 8.

4 Joint exhibit 2, pages numbered 79 through 85 between Appendage A and Attendance Policy in the agreement.

5 Company exhibit 8. He was terminated on April 18, 2013.

6 The union filed one grievance for failure to train Johnson and a second for termination without just cause.

Issues

There are two issues. First, did the company fail to properly re-train the grievant causing him to be unable to perform the picking function of the job? Second, did the company have just cause to discipline and terminate the grievant?

Discussion

East Side Jersey Dairy, Inc., in this discipline case, must prove by the evidence that the grievant, Tony Johnson, committed the alleged violation of the work rules. That the grievant actually committed the violation is one of the seven tests for just cause.[7]

Arbitration precedent dealing with "just cause" is immense. There are thousands of cases. However, as a practical matter, looking to just cause, the seven tests, as set out by Arbitrator Carroll Daugherty in *Enterprise Wire Co. and Enterprise Independent Union,* [8] provides a very useful blueprint for judging whether just cause is present in a case.

The seven tests appear in the *Enterprise Wire* case and require (1) notice to the employee of a (2) reasonable rule or order (3) with an investigation that is (4) a fair investigation with (5) proof that the employee committed the acts charged and (6) the employee was treated equally with other employees and (7) the penalty fits the seriousness of the offense. The rules are thoroughly discussed in *Just Cause, The Seven Tests, Third Edition,* by Adolph M. Koven and Susan L. Smith, Revised by Kenneth May, The Bureau of National Affairs, Inc., copyright 1992, 2006, ISBN: 1-57018-549-6. East Side Jersey Dairy's burden is to prove all of the tests were met, not just some.

Here is what the employer proved. First, the grievant knew that he was to pick all the items on his pick sheet and that they all needed to be on the truck or the orders would be short. As the employer points out, the grievant had successfully picked order many times, for sure on the days of his initial training in March and April of 2011 and on the 39 days he performed satisfactorily in February, March and April of 2013. His third major offense, committed March 13, 2013, was for failure to exercise proper care while picking, not loading, which the earlier offenses were for. Because of his seniority, grievant, more often loaded rather than picking, and it is safe to say he was likely slower because he did not know the location of the items being picked. He was not disciplined for slow picking, he was disciplined for not picking the items on the pick sheet. He understood that part and even testified to what was required. The company proved he was knowledgeable about the picking and filling the order. He was also aware, or should have been, that the Work Rules[9] provide that a third major offense in a nine-month period

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7 "The Company shall not discharge or discipline any employee without just cause ..." Joint exhibit 1, Article 13, Section 13.2, p. 32 of collective bargaining agreement.

8 46 LA 35 9, Daugherty, March 28, 1966.

9 Joint exhibit 1, p. 84.

could result in a penalty of discharge. The evidence shows that grievant was aware of the rules and what was expected of him.

The rule, three major offenses may result in termination, is a reasonable rule. There is no issue about that in this case. In fact, the company did not terminate grievant until he committed a fourth major offense.

The company's investigation of the shortages on the route was reasonable and fair. The grievant was interviewed, and his defenses, which will be discussed later, were not raised by him during the investigation or grievance procedure.

The company proved that he committed four major offenses. The first three major offenses were subjects of grievances filed to contest them. The contract between the parties provides that when the union does not advance the grievance it is denied and closed on the basis of the company's denial. That eliminates any need to look into the first three major offenses. The only one in question is the last one, the April 17 failure to pick the complete order.

There is no dispute that grievant failed to pick the complete order. The items missed seem to have been on page two of the computer printout pick sheet. The union and grievant raise these following defenses.

The union argues that the company did not list the March 1 suspension as a reason for the discharge. The company's disciplinary note[10] shows that Johnson was disciplined (reprimanded) for "Miscellaneous 5 b. Penalty for three major offenses in a nine (9) month period. A major offense is defined as one for which the penalty is disciplinary time off. Note – mistake made with load selection for Rte. 502, 303 and 302, Wednesday April 17, 2013, which is Tony's fourth offense (5 day suspension) This is the third major offense in nine (9) months. "

The dates of infraction on the right hand column shows 4/17/13 (the last one), 10/3/12, and 9/14/12. There you have it, while noting this was the fourth major offense, the company used three offenses set out here. Three majors is sufficient under the rule. What the company did about March 1, or March 13 if that is the date, or any other, is not relevant. There were three in nine months. Two proven by the failure to advance the grievance, and the final one on April 17 by the evidence and testimony in this hearing.

The union and grievant argue that grievant was not properly trained and, therefore, should not be disciplined for poor performance on something he was not trained to do. This defense fails for two reasons. First, grievant was actually trained. Back in March of 2011, he was trained by Jimmy Hamm, Dave Griswold, and Robert Lawyer. The company's load out tickets, according to Mark Cobb, Warehouse Supervisor, show that Johnson successfully picked loads many times over his time on the job. Johnson's testimony was that he was not actually taught

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10 Company exhibit 8.

the picking job, because he did not know where the items were. He did not pick as often as others, so he was in the dark about the location of items he was to have picked.

This could be problematical if the company had disciplined him for slow performance because he did not know where the items were located due to seniority resulting in him loading more often than picking. However, the company did not discipline him for slow performance. He was terminated because he did not pick and place the items on his pick sheet for loading, most missed were on page two. His testimony and his performance on the pick sheets shows that he understood the picking task. He was to pick those items, however he was able to find them. Presumably if they were difficult to find, a picker would get as many as possible and then, sometime in the pick, he would get help from other employees in finding them. In fact, grievant admitted that other employees helped him find items. Johnson knew, or should have known, what was picked on that list.

The company could train him endlessly, but due to the way the cooler works, the items are going to be in different locations from time to time. The usual items, whole milk for example, would pretty much be in the same place one would think. Chocolate buttermilk, if there is such a thing, might be most anywhere. If an item is on that pick sheet, the picker has to find it by hook or crook, help from another employee or management. Johnson knew this.

The union and grievant argued that the grievant was working on the pick sheet and when it came time for his break another employee named Tyler Williams came to Johnson and said that the supervisor told him to take the pick sheet from Johnson and work on it while Johnson went on break. When Johnson returned from break, Johnson worked on a different order in another part of the cooler. This explanation lacks credibility because (1) the supervisor telling Williams to work the pick sheet is hearsay and Tyler Williams did not testify about this; (2) the name of the supervisor was never given to management or the arbitrator to check into this; (3) the middle sheet, page 2, of the pick sheet was still attached to the first and third sheets and had never been torn out as one might do if it were given to another employee to pick; (4) Johnson never mentioned this handoff of the pick sheet during the grievance meetings; and, finally (5) mentioned it for the first time at the arbitration hearing. There is no evidence this happened except for grievant's parole evidence.

The union and grievant argue that the March 1, 2013, three-day suspension could not be used against him as one of the three major offenses. The discipline (reprimand) sheet[11] clearly shows that Johnson was being disciplined for three major offenses in a nine (9) month period and sets them out as 9/4/12, 10/3/12, and 4/17/12. The company noted that this was actually his fourth major offense, but did not include the 3/1/13 suspension as one of the three majors. The company had waived the suspension on the 3/1/13 offense, but the offense remained on the

[11] Company exhibit 8.

record. It is immaterial, however, since the company had sufficient grounds to terminate without its inclusion.

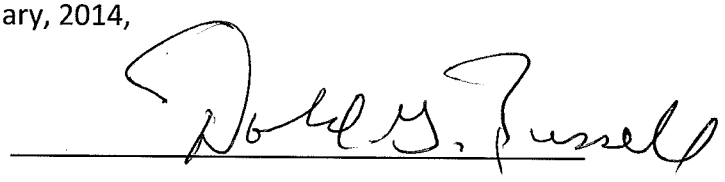
The grievant and union argued that grievant had never been trained to pick orders and, therefore, could not be disciplined for picking orders poorly. The company's training of grievant is discussed above in this discussion where it was noted he was disciplined for something he understood as well as having been trained.

The grievant and union argue that the grievant would be retrained. This was part of a discussion in which two grievances were settled, or dropped, involving Johnson's performance on the loading functions. The retraining the company agreed to do was for loading, not cooler work. The union witness admitted the collective bargaining agreement does not require the retraining of grievant, but that there was a union-company agreement to retrain. The retraining was for loading functions, not for the cooler. More importantly, the lack of retraining, if there was a lack of retraining, was not the proximate cause of Johnson's rule violation. As stated before, he understood how pick sheets worked, he knew how to pick and check it against the pick sheet, he had done it numerous times before. He knew what he was supposed to do and did not do it.

Did he know the placement of all the items in the cooler? The arbitrator thinks the evidence shows he did not and likely never would know the locations as well as the employees with more seniority who performed picking more often. However, as stated before, he was not disciplined for slow performance or not knowing where items were, but he was terminated because the items on the pick sheet he was given were not included in the load that was sent on the route. He was trained well enough on what he failed to do.

For all the foregoing reasons, the arbitrator finds that there was just cause for the termination of the grievant and that grievant was trained for the picking function for which he was disciplined, and that the grievances should be, and hereby are, DENIED and DISMISSED.

Respectfully submitted this 7th day of February, 2014,

By: 

Donald G. Russell, Arbitrator