

IN THE MATTER OF ARBITRATION
BETWEEN

Roberts Dairy Company, Employer,)	
)	FMCS No.: 13-59134-A
And)	
)	Grievance: Discharge
)	Zycair Smith
Teamsters, Local 554, Union.)	
)	

Before: Vicki Peterson Cohen, Arbitrator

Appearances: Andrew J. Martone, Adam C. Doerr, Attorneys for the Employer.
M.H. Weinberg, Attorney, for the Union.

Dates of Hearing: March 7, 2014

Hearing Location: Omaha, Nebraska

Briefs Filed: May 6, 2014

AWARD

The grievance is denied. The Company had just cause to discharge the Grievant on July 30, 2013, for the violation of Counseling Policy 3.15.

June 9, 2014

Vicki Peterson Cohen

I. STATEMENT OF THE CASE

The Company is a producer and distributor of a wide variety of dairy products. The Grievant, Zyeair Smith, was employed by the Company for about eight months at the time of his discharge. The Grievant was discharged on July 30, 2013, for clocking out another employee who left work early on July 26, 2013.

The Union filed a timely grievance protesting the Grievant's discharge on August 12, 2013. The grievance proceeded through the grievance steps to arbitration. The grievance is properly before the Arbitrator.

II. ISSUE

Did the Company have just cause to discharge the Grievant? If not, what shall be the remedy?

III. RELEVANT CONTRACT PROVISIONS AND COMPANY RULES

Master Dairy Agreement covering the period of May 1, 2009 to April 30, 2014

Article 11 Discharge or Suspension

Section 11.1

The Employer shall not discharge nor suspend any employee without just cause, but in all respect to discharge or suspension shall give at least one (1) warning notice of the complaint against such Employee, to the employee, in writing, and copy of same to the Union except that no warning notice need be given to an employee before he is

discharged if the cause of such discharge is dishonesty, or drunkenness or drinking of intoxicating liquor on the job or being under the influence of on the possession of illegal drugs, or the illegal use of dangerous drugs while on duty, or recklessness resulting in a serious accident while on duty, or serious just cause . . .

Roberts Counseling Policy

3. Terms of Serious Violations:

While most problems can be resolved through counseling, some offenses the Company considers to be of such a serious nature as to justify discharge on the first offense. The following list is not intended to be all inclusive-it merely provides a sample of violations which could result in termination. To ensure employees are treated fairly, no employee will be terminated without an investigation of the incident.

15. Punching , lettering, altering, removing, or improper handling of own or other employee's time card.

IV. SUMMARY OF THE TESTIMONY AND EVIDENCE

Scott Powell, was employed as the Company's Quality Assurance Manager on July 26, 2013. On July 26, 2013, Manager Powell was looking for employee Edwards between eight and 8:30 a.m., to give him a written warning regarding overtime. This was the last day that the warning could be issued to Edwards.

When Edwards did not answer Manager Powell's page, he checked with payroll and

found that Edwards had not yet swiped out. Powell then went to the Plant Manager's office where there was a window where he could observe employees clocking out. When Powell did not observe Edwards clock out, he again went to payroll who told him Edwards had clocked out about 8:30 a.m.. Since Powell had not observed Edwards clocking out, he reviewed the Company video tape with the Plant Manager. The videotape did not show Edwards swiping out, yet did show the Grievant swiping out twice, with about a seventeen-second delay between swipes.

Manager Powell and the General Manager interviewed the Grievant when he next reported to work on July 30, 2013. The Grievant told management that he did not recall whether Edwards was with him when Edwards card was swiped. When Manager Powell told the Grievant they had a videotape of the incident, the Grievant admitted he swiped out Edwards. The Grievant stated that Edwards had business to take care of at the credit union which was located on the Company premises, so he had agreed to swipe him out.

The Grievant's department had a meeting at 8:00 a.m. on the morning of July 26, after working the overnight shift. After the meeting, Edwards was changing into his street clothes and asked the Grievant to clock him out because he was going to the Credit Union, located across the hall, to check on his loan. The Grievant did not see Edwards leave the building. The Grievant testified that he did not know it was a violation of Company policy to clock Edwards out as he had done it on past jobs when working as a Foreman.

During the grievance process, the Grievant admitted that in the past, he had used a piece of paper to punch in a co-worker who was running late to work. The Company allows an employee to punch in a time on a blank piece of paper, sign their name to it, and submit it to a

supervisor for authorization. The employee did make it to work on time, so the paper was not used.

Brian Breci is the General Manager for the Company. Breci prepared the Grievant's termination letter because swiping another employee's time card was a dishonest act, and the Grievant initially denied doing it.

In the past, Manager Powell recalled searching for employee Turbes on May 6, 2013, when he did not answer a page. Powell found that Turbes left the premises for lunch and had not punched out. Turbes had been recently acting as a lead man in the lab, and told Powell he thought he did not have to punch out for lunch. Turbes further understood that he was entitled to a half-hour paid lunch and did not intend to use his two-fifteen minute breaks when he went home for lunch to feed his dogs. As a result of this incident, the Company posted a memo stating that employees had to punch out if they left the premises. Powell agreed that Turbes had been gone one hour and three minutes from the time he starting looking for him, and he was entitled to a half-hour lunch. Tubes, who had been employed by the Company for about 20 years, received a written warning for the incident.

Steve Rezac, has worked for the Company for about fifteen years, and was employed as a relief person on the production floor. On or about October 13, 2013, Rezac received a written warning a written warning for sleeping on the job. Shortly after arriving at work on October 13, 2013, Rezac went to the "OJ" room where he sat down before things "got rolling." Rezac agreed that he was sitting in a non-break area taking a break, he denied that he was sleeping, yet he did not argue either point with management.

V. ARGUMENTS OF THE PARTIES

Company

The Grievant was discharged for just cause. Article 11 allows the Company to immediately discharge an employee for dishonesty. The Company's written rules strictly prohibit clocking out for another employee, and is an offense that can result in discharge. The Grievant admitted that he swiped out for Edwards using Edwards' personnel time card, and that he knew this was being untruthful.

Swiping out for another employee is dishonest. Cases cited. The Grievant admitted that he swiped out for Edwards' after the Company informed him that he was caught on videotape. The video shows that the Grievant waited 17 seconds after swiping his own card to swipe Edwards' card, as he watched his co-workers leave the room. The Grievant's calculated delay between swipes demonstrates that the Grievant intended to create a false impression that the he and Edwards clocked out separately.

The Grievant knew or should have known that Edwards was leaving early. The Grievant understood that employees were allowed to change into their street clothes after they swiped out. The Grievant acknowledged that Edwards was already in his street clothes when he asked him to swipe him out by using his personal swipe card. The Grievant had agreed to assist another employee in the past who was late to work by punching him in on a piece of paper. The Grievant has no respect for the rules or the timekeeping system, and did not think twice about assisting a co-worker in deceiving the Company as their late arrival or departure time.

The Grievant was not subject to disparate treatment.

Disparate treatment is an affirmative defense for which the Grievant bears the burden of proof. To establish disparate treatment, the Grievant must present evidence that establishes a discriminatory difference in how he was treated compared to others in factually similar circumstances. *Georgia-Pacific Corp.*, 118 LA 577 (Harris, Jr., 2003). In this case, the Union relies on two incidents where an employee was not terminated after allegedly violating different work rules. Because neither situation involved circumstances factually similar to the Grievant's situation, the Union failed to carry its burden of proof.

When employee Turbes failed to punch out for lunch, he worked in a different department and had been employed for more than twenty years. The Company believed that Turbes made a mistake, and was not being dishonest when he believed a lead man did not need to punch out when he left the building for lunch.

The Company did not discharge employee Rezac who dozed off while taking a break in the "OJ" room, because he denied he was sleeping and he was entitled to two fifteen-minute breaks.

The Grievant's failure to read and /or understand the Company's written rules does not excuse his dishonesty. An employee cannot simply prevent discipline by simply refusing to read the rules he is told to follow. *Georgia Power*. The Grievant was provided a copy of the Company's Employee Handbook, yet failed to read it because it was too long.

The Grievant's dishonesty should not be excused even though other employees may have engaged in similar conduct without being caught. The Company was not aware that the other employees were swiping in and out for other each other. Nor did the Union provide any evidence of such a practice.

Union

The Company did not meet its burden of proof that there was a dishonest act. No witness testified that the Grievant knew that Edwards was going to leave the premises early. Therefore, the Company did not establish that the Grievant knew Edwards was leaving the building prior to 8:30 a.m.. After the Department meeting, there was no work to be performed prior to clocking out. If the Grievant was not dishonest, then a warning notice for the violation was required.

The Company did not meet its burden of proof that there was a violation of Item 15 of the Counseling Policy. The electronic swiping system did not use a time card, so there can be no violation of this Item.

The Company did not charge the Grievant with a violation of Item 19 which would involve dishonesty regarding the theft of time. The Company only charged the Grievant with swiping another employee's card. If the Grievant was not dishonest, he was entitled to a written warning prior to discharge under the Master Contract.

Under the "Just Cause" standard the Arbitrator can consider mitigating factors. The Grievant did not have an intent to deceive where there was a falsification of records. *Culinary Foods, Inc.* 106 LA 801 (Nathan 1996). The Company failed to investigate whether the Grievant knew Edwards intentions when he asked the Grievant to swipe him out.

The Grievant got the Employee Handbook but failed to read it due to long work hours and kids at home, so he was not aware that swiping Edwards' card would result in an automatic discharge. Failing to read the Handbook is not an act of dishonesty.

The concept of "just cause" includes the concept of mitigation where there is evidence of inconsistent, unequal treatment by the employer. *SVT, LLC* 125 LA 172 (Betts 2008).

In the case of employee Turbes, he was entitled to a half-hour minute lunch under the parties' Agreement, and could not be located on the Company premises for more than one hour. The Company attempted to distinguish this case by stating Turbes was entitled to two additional 15 minute breaks and was a lead man/supervisor. Yet, under the parties' Agreement, the fifteen minute breaks are to be taken in each half of a shift, and Turbes was the only employee working in the lab on May 6, 2013, so he was not working as a lead man or supervisor.

In the case of employee Rezac, he was issued a written warning for "hiding or sleeping while on duty in violation of Company policy found on page 55, item 29." The room where Rezac was found was not part of his work area.

Both Caucasian employees' Rezac and Turbes violated the rules in Company's "Terms of Serious Violations," yet only the African-American employee Smith was discharged.

VI. DISCUSSION AND DECISION

The Grievant knew it was wrong to swipe Edwards time card on July 26, 2013, whether or not he had read the actual rule in the Employee Handbook. The Grievant's demeanor, as seen on the Company videotape, clearly shows the Grievant waiting until all other employees left the room to swipe out Edwards. Additionally, the Grievant surveyed his surroundings and paused for seventeen seconds before swiping the second card belonging to Edwards. Moreover, the Grievant admitted at the hearing that he understood it was wrong to swipe another employee's card. (Transcript Page 140, Lines 10 and 11)

The Company's provided the Grievant with notice of its rule/policy regarding the improper handling of another employee's time card, and the disciplinary consequences. If the

Grievant subsequently chose not to read the rules or policies, for whatever reason, he bears the burden of his lack of knowledge regarding disciplinary consequences. The Company's policy clearly indicates that the "improper handling" of another employee's time card can result in discharge for the first offense. The fact that the Company changed its time-recording system whereby employees swipe a personal identification card rather than punch in and out on a time card, does not void the clear intent of this rule/policy. The rule/policy is explicit. It does not require training due to any confusion or misunderstanding. The Grievant was not in a position of authority when it may have been proper for him to swipe out Edwards. To the contrary, the Grievant understood it was improper to swipe out Edwards on July 26, 2013, yet he chose to place his job in jeopardy, or risk discipline, when he agreed to do it.

Whether the Grievant believed Edwards was staying on the premises or leaving the premises, is of little consequence in regard to his conduct. After the Grievant and Edwards spoke to the Union Steward, the Grievant agreed to swipe out Edwards, who was already dressed in his street clothes.

At the Company's first interview of the Grievant on July 29, 2013, and at his termination meeting the following day, (Joint Ex. 10), the Grievant did not claim he swiped out Edwards so he could go to the Credit Union which was located within the same building. Instead, at the time of his discharge, the Grievant contended that since the wrongful swipe only involved five-ten minutes of work time, he did not understand why another employee who was off the premises for a longer period of time received a lesser discipline. During the grievance procedure, the Grievant first claimed he swiped out Edwards, who already had on his street clothes, so he could go to the "bank" across the hall. If the Grievant believed it was okay to swipe out Edwards under

such circumstances, there was no reason for him to act deceitfully when doing it, or not admit to his conduct when initially interviewed by the Company.

The Union is correct when stating that the Company did not specifically charge the Grievant with a violation of an “act of dishonesty” under the Master Agreement, or Employee Handbook Item 3.19. The Grievant was not the employee who allegedly stole company time as stated in Employee Handbook Item 3.19, yet his conduct was inherently dishonest. The Employee Handbook, under Terms of Serious Violations, includes many inherently dishonest offenses based on lying or cheating. Such inherently dishonest offenses, would not require a prior warning under the terms of the Master Agreement simply because the word “dishonesty” is not included in the listed offense.

The Grievant’s overall conduct was inherently dishonest and broke any goodwill he had built with the Company within his short term of employment. According to the Grievant, he intentionally and wrongfully swiped out Edwards whom he understood was planning to leave his assigned work area in his street clothes approximately fifteen minutes prior to his quit time, yet he was not forthcoming with the Company about the “justifiable” reason(s) for his conduct. The Grievant did not claim he believed Edwards was staying in the building prior to his discharge, which causes this explanation to be materially suspect. Moreover, this latent explanation does not negate his act of wrongfully swiping Edwards out, and not being honest about this conduct until faced with a videotape. Under the circumstances, the Company reasonably considered the Grievant’s conduct to be of “such of serious nature” to justify his discharge on the first offense, and the Company was not required to give the Grievant a warning for the improper handling of another’s employee’s time card under Section 11.1 of the Master

Contract.

The two cases cited by the Union, Turbes' and Rezac's discipline, in support of its argument that the Grievant was treated unequally and inconsistently by the Company, do not factually establish this allegation.

Turbes and Rezac are both long-term employees, which the Company can consider as a reasonable mitigating factor when determining discipline. It appears that the Company did not investigate the time Turbes was away from the premises, and somewhat similarly focused on the fact that he had not swiped out when he left, which would inherently chronicle his time away. The Company concluded that Turbes, who had been acting as a lead man for the lab for several months, did not intentionally fail to swipe out, and subsequently posted a memo to clarify any misunderstanding. In the Grievant's case, there was no misunderstanding which prompted the Company to post a memo stating that one employee cannot swipe in or out for another employee.

In Rezac's case, he readily admitted he should not have been where he was found even if he was taking an early break, and did not attempt to justify his wrongful actions with management. In the Grievant's case, he told the Company he could not remember if Edwards was present when he was punched out, until he learned the Company had a videotape of his actions.

For all of the reasons discussed herein, the grievance is denied.