

**IN THE MATTER OF ARBITRATION BETWEEN:**

<b>ROBERTS DAIRY,</b>	)	
	)	
<b>Company,</b>	)	<b>FMCS 13-59131-A</b>
	)	
<b>and</b>	)	<b>Grievant: Sam Edwards</b>
	)	
<b>INTERNATIONAL BROTHERHOOD</b>	)	
<b>OF TEAMSTERS LOCAL NO. 554,</b>	)	
	)	<b>Arbitrator: Gerard A. Fowler</b>
<b>Union.</b>	)	

**Appearances:**

**For the Company:**

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**Adam C. Doerr**  
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**St. Louis, Missouri 63131**

**For the Union:**

**W. H. Weinberg, Esq.**  
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**Omaha, Nebraska 68114-3320**

**OPINION AND AWARD**

**ISSUE**

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

**STATEMENT OF THE GRIEVANCE**

Roberts/Hiland Dairy Company (the "Company") is a producer and distributor of a wide variety of dairy products. This Arbitration arises under the terms of Article 7 of the Master Dairy Agreement between Roberts Dairy Company Omaha, Nebraska (hereinafter "Company" or

“Employer”), and Teamsters Local Union #554 (hereinafter “Union”), effective May 1, 2009 to April 30, 2014.

Grievant was discharged for dishonesty after he was observed on videotape leaving work early without clocking out and for having a co-worker clock out for him at the end of his shift. The Agreement makes dishonesty a dischargeable offense and the Company's written rules state that an employee who allows another employee to use their timecard will be discharged. The Union protested the discharge, claiming that the Company lacked just cause to terminate Grievant.

After failing to resolve the grievance through the initial stages of the grievance process, the Union requested arbitration on this matter. A hearing was conducted in Council Bluffs, Iowa on April 18, 2014. Both parties received a full opportunity to present witnesses and evidence. A court reporter attended the hearing and prepared a verbatim transcript. Subsequent to the arbitration, the parties submitted briefs of law and fact to the Arbitrator and the hearing was declared closed.

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE 7**

#### **Grievance Procedure and Arbitration**

##### **Section 7.1**

Disputes or grievances arising under this Agreement shall be divided into the following categories:

(a) Disputes or grievances arising out of the interpretation of Agreement, exclusive of any Addenda.

### **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 a copy of the 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 or in the possession of illegal drugs, or the illegal use of dangerous drugs while on duty, or recklessness resulting in serious accident while on duty, or serious just cause.

### **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 would 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.

### **STIPULATIONS**

Stipulation Number 5 is that... Sam Edwards left the Roberts premises in Omaha, Nebraska, at 8:18 a.m. on July 26, 2013, dressed in street clothes without clocking himself out at that time or subsequently. His shift ended at 8:30 a.m. on July 26, 2013. His shift began on July 25, '13.

Stipulation Number 6 is that Zyeair Smith clocked himself out first at approximately 8:30 a.m. That's approximately because the clock was six minutes off by stipulation. Then approximately seventeen seconds later Zyeair Smith clocked Sam Edwards using Sam Edwards' swipe card, okay? At that time Sam Edwards was not on the premises.

### **POSITION OF THE COMPANY**

The Company maintains that they had just cause to discharge Grievant. Evidence and testimony was introduced indicating that Grievant was discharged for dishonesty after he was caught on video surveillance leaving work early without clocking out and having a coworker clock out for him at the end of his shift. The Agreement makes dishonesty a discharge offense and the Company's written rules state that an employee who allows another employee to use their

timecard will be discharged. The Company also has a written work rule that states that allowing a co-worker to use your time card is a discharge offense. Evidence established that Grievant received a copy of the work rules and signed for them.

Testimony by the Company's Quality Assurance Manager, Scott Powell, indicated that on the morning of July 26, 2013 he was looking for Grievant in order to give him a letter dealing with an overtime issue. The letter was in fact a written reprimand. It was important that the letter be delivered that day because the policy required that it be delivered within seven (7) days of the incident giving rise to the discipline.

Because Powell was unable to locate Grievant, he and Manager Metzger checked with the Company's payroll department, which reported that Grievant had not yet clocked out. They then waited to intercept Grievant before he left for the day, but they never saw him come by or clock out. However, when they checked the Company's timekeeping system, it showed that Grievant clocked out at 8:30, which they knew was not true because they were waiting near the time clock and they never saw him in the area.

Powell and Metzger then proceeded to review the video tapes from the Company's surveillance cameras. They discovered that Grievant had left work nearly 15 minutes early, already dressed in his street clothes and that another employee, Zyeair Smith approached the time clock at the end of the shift, clocked himself out, looked around and waited about seventeen (17) seconds, and then clocked Grievant out.

Testimony established that the Company has never failed to discharge an employee who leaves early and has a co-worker subsequently clock out for him.

Accordingly, the Company requests that the grievance be denied in its entirety.

## **POSITION OF THE UNION**

The Union contends that the Company lacked just cause to discharge Grievant. The Union maintains that the Company's charges against Grievant for dishonesty are not supported by the evidence. The Union argues that Grievant is entitled to a just cause determination because he was not dishonest. The Union points to testimony by the Company acknowledging that it does not automatically discharge employees for swiping card violations. The Union also emphasizes that Grievant had no discipline in his four years of employment with the Company.

Although Grievant did not testify in this matter, the Union introduced his statement indicating that he left the main building and proceeded to the credit union, which is an adjacent facility on the premises at 8:18 a.m. on July 26, 2013. During the investigation Grievant acknowledged that prior to leaving he asked Zyeair Smith to swipe him out with his swipe card at 8:30 a.m. Evidence indicated that Smith did check Grievant out 17 seconds after he swiped his own card out at 8:30 a.m. The card was returned to Grievant in the parking lot of the premises after work.

The Union argued at the hearing that Grievant was entitled to breaks which justified his leaving the premises early. The Union presented evidence indicating that Grievant worked at least 10.75 hours on his shift from July 25, 2013 through July 26, 2013 and thus was entitled to a third 15 minute break on top of two other breaks to be taken in each four hour segment of his assigned eight hour shift. The Union contends that Grievant took that break from 8:18 a.m. until he was swiped out at 8:30 a.m. The Union argues that since Grievant was entitled to his break he did not defraud the Company of any time. In addition the Union points out that there was no rule about wearing street clothes to check out. Since there was no dishonesty or intent to defraud, notice is required. No notice was given to Grievant or the Union prior to his discharge.

Accordingly, the Union requests that the grievance be sustained and that Grievant be reinstated with back pay and benefits less income from earnings with full seniority to his same position.

### **OPINION OF THE ARBITRATOR**

In discharge cases, arbitrators determine two factors: (1) proof of wrongdoing; and (2) whether the penalty was reasonable. Elkouri and Elkouri, *How Arbitration Works*, BNA, Wash. D.C. 6<sup>th</sup> Ed. (2003) p. 948. On the first factor, the employer bears the burden to prove that the employee committed the act deserving termination by a preponderance of the evidence. *Rock-Tenn Co.*, 127 LA 390 (Eglit, 2010) (finding that unless the conduct in question was criminal, employers must prove by a preponderance of the evidence that the employee committed the conduct in question).

The first prong of this analysis was disposed of by the parties entering into stipulations concerning Grievant's conduct. The fact that Grievant had another employee use his time card to check him is undisputed. The video surveillance along with testimony presented clearly establishes that Grievant had Smith swipe his card after Grievant exited the workplace earlier. The written work rules of the Company state that allowing a co-worker to use your time card is a dischargeable offense. Contrary to the Union's assertion, Grievant's actions establish dishonesty on his part. Arbitrators have frequently found that an employee is dishonest when he engages in time card fraud. Timecard fraud constitutes theft of company time and is a form of dishonesty that warrants discharge. *Good Mark Foods*, 112 LA 1191, 1194 (Nolan 1999). In *Good Mark Foods*, arbitrator Nolan upheld the discharge of an employee who clocked a co-worker out for lunch which allowed the co-worker to gain extra time on the clock for which he had not worked. *Ibid.* at 1192. Recognizing timecard fraud is a form of theft, arbitrator Nolan noted that the

grievant knew or should have known that the employer prohibited the use of another employee's timecard, and the company had just cause to discharge him because the grievant deliberately violated the rule.

The Union's primary argument on Grievant's behalf in the instant case is that he had been on a legitimate break when he left the plant. However, the merit of this defense is severely eroded because it was never presented until the day of the arbitration. It appears that Grievant never thought of using the break time defense at anytime during the investigation process. That is unfortunate, because as flawed as that defense might have been, it would have been far superior to denying he left the plant early and had Smith clock him out, only to be confronted with video evidence to the contrary.

During the grievance process Grievant lied to the Company during their investigation when he claimed that he clocked himself out after his July 26, 2013 shift. If in fact he had been going out on break there would have been no need for Grievant to lie during the initial investigation. Additionally, employees who are on break are not allowed to change into their street clothes and leave. This further erodes the argument of the Union that there is no Company rule about changing into street clothes.

In response to the Union's other argument that the contract did not call for immediate discharge, there was no evidence submitted to the Arbitrator indicating there was any employee who clocked in or out for, or had a co-worker clock in and out for another employee, who was not discharged. Accordingly, any argument that Grievant was treated in a disparate fashion is obviated.

In summary, the testimony and evidence in this case establishes the Agreement and Company policies establish just cause to discharge an employee on his/her first offense of time

card fraud. Article 11 of the Master Dairy Agreement establishes that dishonesty is just cause to discharge an employee on his/her first offense. The Company's Counseling Policy states that improperly handling an employee's personal timecard constitutes a "serious violation" that will result in discharge. In the instant case, Grievant committed a dishonest act and the dischargeable offense when he gave his personal timecard to co-worker Smith and asked him to clock out for him. Grievant was discharged for just cause and the grievance must be denied in its entirety. It shall be so ordered.

**AWARD**

The Grievance is denied in its entirety.

So ordered.

Signed this 20<sup>th</sup> day of August, 2014 in the State of Missouri, County of Saint Louis, by:

*Gerard A. Fowler*

Gerard A. Fowler  
Arbitrator