Labor Arbitration Awards: 1986 - Present, French Paper Co. and United Steelworkers, Local 2-430., 24-2 ARB ¶8498, (Jul. 16, 2024)

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24-2 ARB ¶8498. LEE HORNBERGER, Arbitrator. Selected by the parties. Case No. FMCS 240318-04548. Hearing held in Niles, Michigan, via Zoom, on May 13, 2024. Post-hearing briefs were filed. Award issued on July 16, 2024.

Headnote

Confrontations: Termination: Fighting.–
An employee filed a grievance contesting his termination for pushing an co-worker out of the way and starting an altercation. The arbitrator denied the grievance. The evidence clearly established that the employee "initiated a physical assault" on the co-worker. Their culpability was not equal, even if the co-worker fought back and was not disciplined. The investigation was thorough, the employee knew that fighting was prohibited, and the penalty imposed was consistent with other similar instances. The employer, therefore, had just cause to terminate the employee.

Dean F. Pacific, Attorney, for the Employer. Ed Leary for the Union.

[Text of Award]

INTRODUCTION

HORNBERGER, Arbitrator: This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between the French Paper Co. (Employer) and United Steelworkers, Local 2-430, (Union). The Union contends that the Employer violated the CBA when it discharged Grievant. The Employer maintains that it did not violate the CBA when it discharged Grievant.

Pursuant to the procedures of the Federal Mediation and Conciliation Service, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on May 13, 2024, in Niles, Michigan, via Zoom. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for the introduction of relevant exhibits. The dispute was deemed submitted on July 5, 2024, the date the last post-hearing submission was received by me.

The parties stipulated that the grievance and arbitration were timely and properly before me and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

Both advocates did an excellent job in representing their clients. All involved in the arbitration were courteous and professional.

ISSUES

Was there just cause for the discharge of Grievant?

If not, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE IV - GRIEVANCE PROCEDURE …

SECTION 4. … The decision of the arbitrator shall be final and binding upon all parties concerned. …

ARTICLE IX - SUSPENSION AND DISMISSAL

… [T]he Arbitrator if layoff or discharge is processed to this level, may modify the discharge to a lesser penalty or reinstate the employee with the same seniority and with pay in full for the time lost at his or her regular rate of pay.

ARTICLE XVI - MANAGEMENT RIGHTS

… [I]t is Management's Prerogative to determine when to increase or decrease the working force, to hire, promote, demote, transfer, discharge for cause, lay off for failure to meet Company Standards of Performance, and to maintain discipline, efficiency of employees. Nor shall it be deemed to exclude other Prerogatives not enumerated, except specifically abridged, delegated, granted or modified by this Agreement.

ARTICLE XXII – COMPANY RULES …

6. Fighting, assaulting or threats of violence toward any employee is forbidden.

Violation of the above rules will result in immediate discharge. CBA, p. 42.

FACTUAL OUTLINE

Introduction

The hourly workers of the Employer at its Niles, Michigan, plant are represented by the Union. CBA, p. 1. This case involves the discharge of Grievant for allegedly violating the fighting/assaulting rule on February 2, 2024. CBA, p. 42.

Testimony of HR Manager

The HR Manager's duties include employee discipline. The incident in question was on February 2, 2024. There was alleged fighting. The HR Manager received a phone call from the Plant Superintendent. The HR Manager walked to the Plant Superintendent's office. KP was there in the office. The HR Manager talked with KP. He asked KP what happened. KP said Grievant had tried to shove KP away from the machine.

JH was a witness to the situation. JH said Grievant walked up to KP. Grievant tried to push KP out of the way. The HR Manager got written statements from KP and Grievant.

KP's statement says:

> To the best of my recollection,
>
> I was taking the roll up out of the stand. [Grievant] saw me doing it and said he would do it because I don't put it in the cart.
>
> I asked him what he said. He clarified. I told him about no costing us 30 dollars before he talks shit. We started arguing back and forth. He said something bitch here and now. I responded something to the effect of why don't we go somewhere then bitch. He then shoved me in an effort to take the roll up off the reel. I pushed him off me and said don't touch me. Then we both went to the foreman's office as he talked about calling the cops. Jx. 5.

Grievant came in while the HR Manager was talking with KP. The HR Manager separated them.

The HR Manager talked with Grievant. Grievant showed the HR Manager that he had scraped his knee. The HR Manager told Grievant he could contact the police. Grievant said he had walked up to KP. They had argued. KP “had pushed him.” It was not part of Grievant's job to supervise KP.

Grievant's statement is consistent with what Grievant orally told the HR Manager. Grievant's statement said:

> Was heading towards Rollup as Backtender was turning up. Me and [KP] both arrived at the old rollup about the same time. I told him “I'll take care of it, don't worry about it, I'll fold it and get it in the hay cart.” He went to get new rollup as I took care of the old rollup and made sure A+F is ready to run. I then went to where I'm suppose to grab the new rollup so I can inspect it. [KP] asked “what I meant by the rollup.” I said “I like to fold the row ups to push down the hay.” He caught me off to say “well I followed them.” I continue to say “sometimes when they grab the cards and they are bouncing up and down loose hay falls out in the long section, and then I got to pick it up.” He interrupted with “I can tell him stuff when I don't cost the company $30,000 dollars.” I responded with “Whatever, Fuck you.” He responded with “Fuck you.” He then left his job post to approach me enough to brush against me. He then said “if you wanna go somewhere quiet to settle this we can.” I responded with “I ain't going nowhere, if you're going to do something do it.” He responded with “you're just scared because you know I'd beat your ass.” I said “whatever, I got a job to do.” I then reached for the rollup as nothing else can be done until we get it. At which point [KP] struck me to the ground and continued to pursue after me acting threatening even as I went into the office. Jx. 6.

The HR Manager talked with JH who was a witness. JH said Grievant walked up to KP. Grievant tried to push KP out of the way. JH's written statement is consistent with what JH told the HR Manager.

JH's statement says:

> At turn up getting the roll up [Grievant] tried to push past [KP]. [KP] said don't fucking touch me. [Grievant] was in his face said fuck you bitch do something about it. Tried to push past [KP] again and [KP] pushed [Grievant] to the ground. He got up said he was calling the cops and went to the office. Jx. 4.
>
> The HR Manager's notes from his interview of witness JH indicates as follows:
>
> JH _____ 2/2/24
>
> -[Grievant] and [KP] were arguing about roll up
>
> -[Grievant]said he would put it in because
>
> -[KP] said he didn't call the company $30,000 like [Grievant] did
>
> -[Grievant] attempted to push [KP] out of the way
>
> -unsure if [Grievant] “swang or powed” at [KP] or if that was part of the push
>
> -While [Grievant] was pushing [KP], [KP] grabbed [Grievant] and throw him to the ground then stood over [Grievant]
>
> [Grievant] jumped up ran towards Foreman's office, almost getting hit by a forklift[.] Jx. 11.

Employee AL said he could not hear anything but he reported what he saw. AL did not provide a written statement. The HR Manager's notes from his interview of witness AL indicates as follows:

> AL _____ 2/2/2024
>
> -did not hear anything
>
> -saw [KP] and [Grievant] arguing
>
> -states he saw [Grievant] push in front of [KP]

-states [KP] then pushed [Grievant] to the ground

-[Grievant] ran to supervisor office[.] [KP] followed

-declined to give written statement[.] Jx. 11.

The HR Manager asked if there were any other witnesses. There were no other witnesses.

The investigation was then complete. There was an assessment done of the Grievant versus KP situation. The HR Manager did not believe KP violated the fighting/assaulting rule. KP was protecting himself.

There was a termination notice issued on February 8, 2024. The termination notice indicated, in part:

> You are being terminated for violation of Article XXII, Sec. D-6 (fighting/assaulting any employee)[.] Jx. 8.
>
> A grievance was filed on February 13, 2024. The grievance said, in part:
>
> Wrongful termination. Inequitable punishment being issued for similar infractions. [Grievant] be reinstated at his full seniority with back pay to be made whole. …. Jx. 2.

The grievance went to Step Three. The Step Three meeting was on approximately February 28, 2024.

JP says the video showed KP trying to protect himself. KP is in black with short sleeves. Grievant is in the aisle to the north. JH is in white.

At the Step Three meeting, the Union talked about a prior incident with employees DL and BM. These two employees had had an exchange of words. They were separated by the supervisor. There was an investigation. There had been headbutting. According to the HR Manager, the Employer could not prove beyond a reasonable doubt who the aggressor was. The HR Manager's notes concerning DL-BM situation indicates as follows.

> [BM] 1/26/24
>
> -states does know how phone ended up in dye kitchen. Stated DL had pizza and maybe grab by mistake
>
> -states only when up front once while DL was there to smoke. Says was GG _____.
>
> -states DL insulted him over radio + he said the same back; has happened for some time
>
> -states DL was given bad info that he took DL's phone by [JM]
>
> -states was walk by DL called him the same. He turned and step towards DL, DL turned and step towards him, the lunged + headbutted him, push DL out of instinct
>
> -wants an apology.
>
> [DL] 1/26/24
>
> -state [BM] has insulted him over the radio for years
>
> -spent 2 hour looking for phone
>
> -taylor found in dye kitche
>
> -asked JM, PC + DP previously
>
> -stated [BM] came at him + head butted him; Not sure if it was a reaction or intentional
>
> -states did not step towards him [.] Ex. 12.
>
> The Employer's February 28, 2024, Step Three Answer indicated:

The union argues that [Grievant] was terminated unjustly and should be reinstated to his previous possession due to “inequitable punishments being issued for similar infractions.”

[Grievant] was observed by a security camera and by witnesses being the aggressor to an assault of a fellow employee. The union referenced a previous incident between two different employees where there was no proof of an assault or a fight as a similar incident.

[Grievant] claimed that he was the victim of assault in this incident. [Grievant] was witnessed making the initial contact with the victim.

[Grievant] was terminated under article XII section D-6 of the Labor agreement for fighting/assaulting another employee. This section results in the immediate termination of employment. Jx. 2.

Testimony of Embosser KP.

Embosser KP testified that on February 2, 2024, Grievant told KP that KP did it incorrectly. This continued back and forth. Grievant shoved KP. KP shoved Grievant. Grievant was not KP's supervisor.

Testimony of Tender JH

Tender JH is at the bottom of the video with his hood up. KP always does the roll up. Grievant said to KP “fuck you bitch.” Grievant pushed KP twice. Grievant pushed KP way into him.

Testimony of Chief Steward

The Chief Steward is actively involved in the grievance procedure. The Chief Steward watched the video. There was not a fair and equitable distribution of discipline. The Chief Steward saw the video the day that the Plant Superintendent and shift foreman JB called him into the office to tell him about the situation. The Chief Steward did not see the February 2, 2024, incident in person at issue in the arbitration before me.

The Chief Steward testified about the DL incident with BM. The incident was about an argument over a radio/ stolen cell phone. There was no disciplinary action taken as a result of the DL-BM situation.

Testimony of Union Recording Secretary DL

Union Recording Secretary DL testified about the incident between DL and BM. They went to the break area to eat pizza. It was a long shift. They ate pizza. A phone was missing. There was questioning around about the missing phone. BM and DL had an altercation. DL head butted BM. DL filled out a statement. Both employees were sent home. The next day DL gave another statement. No discipline was issued. The Supervisor was there when the headbutting occurred.

DL was not at the site when the February 2, 2024, incident occurred. DL got called in later. DL was shown a video of what happened. According to DL, both participants in the situation should have got in trouble based on the video.

Testimony of Grievant

Grievant had been a machine tender for two years. He was coming down from the tender area. KP was at the roll up. Grievant came up the aisleway when the video starts. Grievant was trying to do his job. KP threw Grievant to the ground. Grievant went to the office. Grievant told management that Grievant's knee was bleeding. The video was played at the hearing. Grievant testified that he did not have a duty to retreat. In the Michigan Jury Instructions there is “stand your ground” principle.

According to Grievant, KP brushed up to Grievant. Grievant called the police after he was sent home.

CONTENTIONS OF THE PARTIES

a. For the Employer

According to the Employer, this is a straightforward discharge case. Grievant physically assaulted his co-worker KP. The Employer has an express rule prohibiting fighting or physical assault, which was collectively bargained for. And the remedy for violation of this rule is “immediate discharge.” There is no doubt that Grievant violated the rule – it was captured on video. The rule is clear, the violation is clear, and the remedy is clear. This is not a case where similarly-situated employees were treated differently or where any disparate treatment was involved. Grievant was not similarly situated to KP, who acted only in self-defense after Grievant initiated an assault on him. There is no disparate treatment in the fact that Grievant was discharged but KP was not disciplined. “A non-aggressor in a fight may receive more lenient discipline or escape discipline if it can be shown that after the fight began the non-aggressor merely defended him or herself.” *Simeus Foods Int'l*, 114 LA 436 (Moreland IV, 2000).

Grievant's discharge was proper and the challenge to it should be rejected.

b. For the Union

According to the Union, the grievance before me is not a complicated case. It is an altercation between Grievant and KP. The Employer tried to paint that Grievant was the aggressor. Through witnesses and testimony, the Union showed Grievant did try to push past KP to simply do Grievant's job, but it was Grievant that was hit and knocked to the ground. The Union also showed that the Employer does not issue or administer discipline fairly, but with disparate treatment. The Employer inconsistently applied its policy concerning physical altercations and discharged Grievant without just cause. For these reasons, the Union respectfully requests that I uphold the Union's grievance and return Grievant to work and make him whole of all losses and seniority.

DISCUSSION AND DECISION

Introduction

The CBA provides that an employee cannot be disciplined without just cause. It is well established in labor arbitration that where, as in the present case, an employer's right to discipline an employee is limited by the requirement that such action be for just cause, the employer has the burden of proving that the discipline was for just cause. “Just cause” is a term of art in CBAs. “Just cause” consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he was disciplined. Other elements include a requirement that an employee know or could reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline; the existence of a reasonable relationship between an employee's misconduct and the punishment imposed; and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

For the following reasons, I conclude that the Employer did not violate the CBA when it discharged Grievant.

Discipline

Grievant was discharged for allegedly violating CBA, Art. XXII, Sec. D-6, which says: “ **Fighting, assaulting or threats of violence toward any employee is forbidden. Violation of the above rules will result in immediate discharge**.” Emphasis added.

Burden of proof

The Employer has the burden of proof in a discipline case. Elkouri & Elkouri, *How Arbitration Works* (8 th ed.), pp. 15-26 to 15-32; Abrams, *Inside Arbitration* (2013), pp. 206-209.

Grievant knew of the fighting/assaulting rule

Grievant knew or could reasonably be expected to know that there could be first offense discharge for violating the fighting/assaulting rule. This rule is embedded in the CBA. The Employer gave Grievant forewarning of the consequences of Grievant's conduct.

The fighting/assaulting rule was a reasonable work rule

Management has the right to establish reasonable work place rules not inconsistent with the CBA. Elkouri & Elkouri, pp. 13-144 to 13-145. Assuming there is a proven violation and the other requirements of just cause, the rule is reasonable. Abrams, p. 261. The rule is embedded in the CBA. The rule was reasonably related to the orderly, efficient, and safe operation of the Employer's business.

There was a fair and objective investigation

There was a fair and objective investigation. Grievant was given a meaningful opportunity to tell his side of the story before discipline was imposed. There was an adequate check against the possibility of an incorrect decision. The Employer, before administering discipline to Grievant, made an effort to discover whether Grievant violated the rule. During the investigation, the Employer obtained substantial evidence that Grievant violated the rule.

The disparate treatment issue

The Union argues that there was disparate treatment. It is the Union's burden to establish inconsistent treatment. Elkouri & Elkouri, pp. 15-83 to 15-86. In order to prove disparate treatment, a union must confirm the existence of both parts of the equation. It is not enough that an employee was treated differently from others. It must also be established that the circumstances surrounding his/her offense were substantively like those of individuals who received more moderate penalties. *Genie Co*., 97 LA 542, 549 (Dworkin, 1991) [Elkouri & Elkouri, p. 15-84]. “Discrimination is an affirmative defense and, therefore, the union generally has the burden of proving that the employer improperly discriminated against an employee.” *Id*. at p. 15-84.

A recognition that not every employee is treated exactly the same does not justify a charge of invidious discrimination against any employee or any other intentional discrimination. To show disparate treatment strong enough to overcome the Employer's decision requires the Union to show by clear and convincing evidence purposeful discrimination. *Ohio Department of Rehabilitation and Corrections*, 93 LA 1186 (Rivera, 1990) (denying grievance and explaining that each employee's total work record, longevity, and past discipline are important considerations, particularly where there is no indication that the employer was out “to get” the employee). *City of Alton*, 121 LA 1288 (Pratte, 2005) (denying grievance and rejecting instances of alleged disparate treatment lacking evidentiary support and without evidence regarding the prior disciplinary records of others).

“Where a reasonable basis for variations in penalties does exist, variations will be permitted notwithstanding the charge of disparate treatment.” Elkouri & Elkouri, p. 15-83.

The Union argues that KP was more culpable than Grievant, and yet KP was not disciplined. This argument does not control. Grievant initiated a physical assault on KP. Grievant put his shoulder into the chest of KP and attempted to push him back and away from the paper roll. In the case before me, the defender is not a comparable employee to the aggressor. The incident was on the workroom floor in the immediate vicinity of machinery and a fork lift.

The Union argues that, in another situation, DL engaged in more severe physical conduct toward fellow employee BM and neither employee was disciplined. This argument does not control. According to DL's testimony, the situation with BM was primarily an exchange of words. DL testified that BM moved toward him quickly and that because of that DL made contact with BM. This testimony is consistent with the statement that DL gave to the HR Manager when the incident occurred, stating that he was not sure “if it was a reaction or unintentional.” Ex. 12. According to DL, after the incident, he and BM met, together with the Plant Manager, the

Supervisor, and the HR Manager. DL testified that he and BM shook hands and everyone considered the matter closed. The incident was in a breakroom. In the prior incident, both employees were equal actors. In the case at bar before me, Grievant was the instigator employee who assaulted the other employee on the workroom floor. Grievant was the aggressor in the February 2, 2024, assault on KP. Grievant made the initial contact with KP. Grievant pushed in front of KP. Grievant attempted to push KP out of the way. Grievant shoved KP. There were witnesses to this situation between Grievant and KP. The Employer applied its rules and penalties evenhandedly.

There is a preponderance of proof that there was a violation of the fighting/assaulting rule

> Neither Employer nor Union witnesses should be given higher deference.
>
> [S]upervisors should not necessarily be given greater credibility …. [It has been suggested that] neither the discharged employee, the steward, nor the supervisor who made the [discipline] decision [is] inherently more credible …. Elkouri & Elkouri, p. 897.

I have considered all the circumstances of all the witnesses when assessing testimony. I have considered the totality of the circumstances. Abrams, pp. 189-192; Elkouri & Elkouri, pp. 8-93 to 8-98.

Furthermore:

> The arbitrator's decision in discharge and discipline cases must reflect the parties' values and interests, not the arbitrator's personal conception of how the workplace should be run." Abrams, p. 202.

"[A]rbitrators frequently give employers significant latitude in disciplining employees who … have jeopardized workplace safety." Elkouri & Elkouri, p. 16-3. It has been indicated that "[a]n arbitrator is mindful of the context of the employee's work. … Concern about safety is essential in the workplace for every employee and for the employer." Abrams, p. 220. Elkouri & Elkouri, pp. 15-28 to 15-29.

St. Antoine, *The Common Law of the Workplace*, indicates:

> … Some rules and expectations are so obvious, however, that employees are presumed to know them. These include prohibitions on **… fighting …. Because these "capital offenses" are so well known and so serious, they do not require express rules to support discipline, and may not require the use of progressive discipline** …. Emphasis added. *Id*., p. 178.
>
> The arbitrator must also consider affirmative defenses such as provocation to fighting or insubordination, disparate treatment, and condonation. *Id*., p. 186.

The degree of discipline administered by the Employer in this case was reasonably related to the seriousness of Grievant's violation of the rule. The degree of discipline is embedded in the CBA.

The Union argues that the penalty of discharge did not fit the proven offense. This argument does not control. The penalty of discharge is imbedded in the CBA and authorized by the CBA. I do not have the authority to remove this imbedding and authorization.

> **Absent a specific provision establishing that violation of a provision [of the CBA] results in discharge**, the arbitrator has broad leeway to determine whether the discipline imposed fits the

charge of misconduct." Farrell, "Due Process/Just Cause Issues," *References For Labor Arbitrators* (American Arbitration Association, 2005), p. 32. Emphasis added.

Conclusion

The crucial points in this case include:

1. the Employer has the burden of proof;
2. the fighting/assaulting rule is embedded in the CBA;
3. the penalty of discharge for violating the fighting/assaulting rule is embedded in the CBA;
4. Grievant was the aggressor and instigated the situation;
5. clear and unambiguous language that is interpreted consistent with the parties' intent as reflected by clear and explicit terms;
6. ordinary meaning given to words unless they are clearly used otherwise;
7. the totality of the circumstances; and
8. the CBA.

This decision neither addresses nor decides issues not raised by the parties.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I deny the Grievance.

July 16, 2024

Lee Hornberger

LEE HORNBERGER

Arbitrator

Traverse City, Michigan