

FEDERAL MEDIATION AND CONCILIATION SERVICE
VOLUNTARY LABOR ARBITRATION TRIBUNAL

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IN THE MATTER OF THE ARBITRATION

FMCS No. 10-03806-3
GRIEVANT: Jesse Baty, GR #1032

between

VEOLIA TRANSPORTATION SERVICES
(Dallas, TX)

OPINION

and

and

ATU LOCAL 13381
(Dallas, TX)

AWARD
.....

Heard at the Holiday Inn in Dallas, Texas, on November 16, 2010, before
F. Jay Taylor, Impartial Arbitrator, mutually selected by the parties through the
administrative services of the Federal Mediation and Conciliation Service, Washington,
D.C.

The Company and Union were professionally represented by respective
Advocates both at the Hearing and in the timely submission of comprehensive, well-
drawn post-Hearing Briefs. They stipulated that the procedural steps of the Grievance
procedures as outlined and prescribed in the Labor Agreement (Articles 14, 15, 16) have
been complied with and that the issue was properly before the Arbitrator for hearing and
adjudication.

The Advocates were afforded an opportunity to offer all relevant evidence,
both oral and documentary, and to examine and to cross-examine the witnesses, all of
whom testified under oath. At the conclusion of the Hearing, both Mr. Foster (Company)

and Mr. Watsky (Union) advised the Arbitrator that (a) they had no further proofs to offer in support of their respective contentions; that (b) subject to the objections entered into the Record, they were satisfied with the state of the Record; and that (c) the Company and the Union had each received a full, fair, and impartial Hearing.

The Grievant, Jesse Baty, testified (a) that he was satisfied with the state of the Record and (b) that he had been fully and fairly represented by his Union, ATU Local 1338, in the proceedings.

The proceedings were transcribed by Keatan Haugen, Court Reporter, and the transcript was forwarded to the Arbitrator for use in preparing the FINDINGS and AWARD in the case.

Decided January 15, 2001.

BACKGROUND

ADVOCATES:

For the Company: McMAHON-BERGER
By: Mr. James N. Foster, Jr. Attorney
2730 North Ballas Road, Suite 200
St. Louis, Missouri 63131

For the Union: GILLESPIE, ROZEN & WATSKY
By: Mr. David Watsky, Attorney
3402 Oak Grove Avenue, Suite 200
Dallas, Texas 75204

ALSO PRESENT AND TESTIFYING: (In order of appearance)

For the Company: Fidel Gonzales, Operations Manager
George Blanton, Drive Cam Adm.
Marice Bell, General Manager

For Union: Jesse Baty, Driver, Grievant

THE ISSUE:

As stipulated by the parties:

Was the Grievant, Jesse Baty, terminated for just cause and proper cause pursuant to the provisions of the Collective Bargaining Agreement? If not, what is the appropriate remedy?

STATEMENT OF THE CASE:

This case arises out of a dispute wherein the Union has protested termination of the Grievant, Jesse Baty, on February 18, 2009. On 1-27-09 the Operation Manager informed Mr. Baty:

Company expects its employee to conduct business with the highest standards and according to all applicable laws and regulations. All Company employees are required and expected to follow certain standards of conduct on the job. Deviation from the standards may result in disciplinary action up to and including termination for the first offense. Therefore, as a result of the above-referenced description and previous disciplinary action for the same violation: **on 10/31/2008 Written Warning and 12/4/2008 Suspension. Therefore Termination is warranted** due to violating the Standard of Conduct, specifically Safety Violation: "Failing to observe Company rules and rules [sic] and general safety practices and regulations as described above."

The Employee was charged with "Failure to observe safety rules and general safety practices and regulations" (vehicle seatbelt violations).

The Union countered with a Grievant dated 9-24-09 (Joint 1) wherein the ATU argued that the dismissal was "untimely." The termination should be withdrawn and Mr. Baty be made "whole in every respect."

The Company denied the Grievance at each step of the contractually prescribed grievance procedures. Thus, the issue was joined. The Union then advanced the case to arbitral review, as per the case at bar.

SUMMARY POSITION OF THE EMPLOYER:

The Company argued that, "...for reasons set forth herein, Veolia respectfully submits that the competent evidence presented at hearing clearly establishes that the Grievant was discharged for just and proper cause. Accordingly, the Honorable Arbitrator must deny the instant Grievance in its entirety."

Furthermore, "while the employer bears the burden of proof in a discharge case, this burden is met once an employer shows, by a preponderance of evidence, 'that (a) the standard being imposed is reasonable and is a general accepted employment standard that has been properly communicated to the Employee; that (b) the evidence proves that the Employee engaged in the misconduct which violated the standard; and that (c) the discipline assessed is appropriate for the offense under the just cause doctrine after considering any mitigating or extenuating circumstances... Applied here, the Company's decision to discharge should be upheld and the instant Grievance denied.'"

In support of these contentions, the company offered the following evidence and conclusions:

(a) Mr. Baty had the benefit of progressive discipline, all to no avail. This involved repeated failures and/or refusal to wear a seatbelt while operating a Company vehicle. Repeated violation of Employer rules and regulations occurred. Also, Texas State Law was repeatedly violated.

Mr. Baty was assessed a written warning, a suspension, a Last Chance Letter in lieu of termination, a written warning for using a cell phone while operating a Company vehicle, and finally, at wits end, dismissal.

The evidence has clearly proven that Mr. Baty engaged in the cited misconduct which violated safety standards as well as Texas State Law. These were serious allegations which supervision could by no means ignore.

Finally, the grievance is totally without merit. It should be denied and removed from the files of arbitration.

SUMMARY POSITION OF THE UNION:

In defense of the Grievant, Jesse Baty, the ATU contended, "On September 23, 2009, the Company terminated Baty for allegedly violating the seatbelt policy when he did not have his seatbelt on when he was pulling up in the Kroger grocery store parking lot to prepare to pick up a passenger. As with the other prior incidents, the Company's decision to terminate Baty for this offense is tainted based upon the fact that this was only the fourth violation of the seatbelt policy within the last twelve months. Accordingly, Baty's termination should have been a suspension without pay, and clearly not a termination.

"The Company has wholly-failed to establish that it had just cause to terminate Baty for not wearing a seatbelt. The Company completely ignored both its policy on progressive discipline and the one-year clean record provision of Article 28 of the Contract. A termination is especially inappropriate in this case since Baty was merely pulling up closer in the Kroger parking lot in preparation for picking up a passenger when he did not wear his seatbelt.

“The company has simply failed to meet its burden of showing that it had just cause to terminate Baty. Accordingly, the Union respectfully requests that the Arbitrator award reinstatement with full back pay and benefits to Baty.”

In support of this position the Union offered the following evidence and conclusions:

(a) It was the burden of Veolia to prove just cause for the termination of Jesse Baty. Just cause simply has not been proven in this case, “nor did it even come close.”

“The particular incident that resulted in Baty being terminated was different than the other prior incidents in which he was not wearing a seatbelt. He did not have a passenger. He was in a holding pattern. He was in a parking lot waiting for a passenger. He had stopped at the back of the parking lot waiting for his passenger to come out of the grocery store. As the time approached where the passenger was going to emerge from the grocery store, Baty merely pulled up to go closer to the store. During that short time period, he admittedly did not put on his seatbelt. To give the ultimate industrial death penalty of termination in this situation is not in any way keeping with just cause. It was and is a clear overreaction.”

Furthermore, “It was undisputed that the initial discipline that Baty received for not wearing a seatbelt occurred on December 20, 2006. Un. Ex. 1. In that disciplinary action, he was given the first step in the disciplinary process, counseling. The next disciplinary action that Baty received as a result of not wearing a seatbelt was not until October 31, 2008, well over one year from the prior incident in December 2006. Employer Ex. 2. Despite the fact the Company could not consider the prior 2006 incident

in the October 31, 2008, discipline, the company nevertheless gave Baty a Written Warning, which is the third step in the progressive disciplinary action policy.”

The Grievance, therefore, is certainly meritorious. The remedy prayed for by ATU should be granted in its entirety.

FINDINGS AND AWARD

It is the finding of the Impartial Arbitrator after carefully reviewing and weighing the voluminous testimony, both documentary and verbal, as well as a transcript of the Arbitration Hearing, the cogent and well-reasoned arguments advanced by Mr. Watsky on behalf of the Grievant, Jesse Baty and Mr. Foster on behalf of Veolia, the well-ordered post-Hearing Briefs timely filed, all lead to the conclusion that the weight of the evidence logged into the Record by the parties falls on the side of the Employer. And I shall so rule. The rationale and reasoning supporting this decision are as follows:

In analyzing the Employer’s burden of proof the Arbitrator certainly does not take his charge lightly. Termination, to use a trite expression, is the equivalent of capital punishment in the industrial world. Mr. Baty and his family can also well suffer from loss of livelihood.

The Arbitrator’s tasks, therefore, absent any specific Contract language, “are to weigh evidence, [make a determination], and fashion an award consistent with that determination; in discipline case, grievant is entitled to certain presumptions of innocence, and employer is obligated to substantiate that the disciplinary action it took was premised upon reasonable, just, and sufficient cause.”

The parties have charged the Arbitrator with analyzing the creditable evidence (Labor Agreement, p. 86) and to make a judgment concerning the termination

of Mr. Baty invoking the just cause principle. Was the Grievant discharged for just cause?

In my experience terms like "cause," "good cause," "proper cause," "sufficient cause," unless otherwise agreed upon are synonymous for just cause. In this case there was no contention that discipline would be assessed other than for just cause. Employees under the just cause principle are protected against the assessment of discipline arbitrarily or capriciously.

It is well-established in the world of Arbitration law that the burden of proof rests with the Employer in proving just cause for discipline. In Common Law of the workplace, pp. 164-165, the editors have enumerated reasons constituting just cause:

1. **The essence of the just cause principle is the requirement that an employer must have some demonstrable reason for imposing discipline. The reason must concern the employee's ability, work performance, or conduct, or the employer's legitimate business needs.**
2. *Ability and performance.* An employer may discipline an employee for failure to meet reasonable work standards.
3. *Conduct.* An employer may discipline an employee for violations of stated or generally known and reasonable work rules and expectations.
4. *Business necessity.* Reasons relating to an employer's legitimate business needs include lack of work for persons with the employee's skills, technological or market changes, and business reorganizations.
5. Just cause is not synonymous with "fault." An employee may violate work rules and merit discipline even if the employer cannot prove the employee actually intended the violation.

Included within these provisions is a fundamental understanding that an Employee will provide satisfactory work, the Employer must provide a safe workplace, competent supervision, appropriate training, as well as reasonable work rules. In the Grievant's case, it was not established that his problem was intentional. It was simply a lack of competence and negligence.

The Company Advocate cited one of this Arbitrator's prior cases wherein the just cause standard was analyzed. The principles cited are just as pertinent today as they were in Sterling and bare repeating.

Just or proper cause imposes on Management the burden of showing by clear and convincing (a preponderance of) evidence that (a) the standard being imposed is reasonable and is a generally accepted employment standard that has been properly communicated to the Employee; that (b) the evidence proves that the Employee engaged in the misconduct which violated the standard; and that (c) the discipline assessed is appropriate for the offense under the just cause doctrine after considering any mitigating or extenuating circumstances.

Which may be defined as that degree of relevant evidence which a reasonable mind, considering the Record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

In applying the "just," "proper" cause doctrine, did the Employer put the test of reasonableness in applying a rule, consistent with Texas Law, requiring seat belt restraint in the operation of Company vehicles. Certainly so!

The oral and documentary evidence is conclusive. The rule requiring the use of a seatbelt while driving a Company vehicle was not a remote safety requirement but was certainly his responsibility in its application.

Considering progressive discipline, it is a mystery to this Arbitrator why Mr. Baty had such an aversion to wearing a critical safety devise as required. He had ample opportunities to abide by the Company safety rules, but he failed to do so on more than one occasion.

I am reminded of one of my favorite old western movies, "The Magnificent Seven." A small group gathered their meager savings, crossed the Rio Grande, hired seven Texas gunmen to enter Mexico, rain bullets, and save the village from the ravages of an outlaw chieftain and his men. The battle raged and in the end the chieftain was fatally wounded. As he lay dying, he asked the Texans, "Why? Why? Why?" Why protect these destitute Mexican villagers?

And the same can be said to Mr. Baty. He had many opportunities to correct these misgivings, but to no avail. Progressive discipline was meaningless.

Was the discipline assessed appropriate for the offense under the just cause doctrine after considering any mitigating or extenuating circumstances?

A careful review of the Arbitration Record reveals no mitigating or extenuating circumstances which would weaken or vacate Management's termination decision. The Union argued that Mr. Baty's progressive discipline steps were not in order; that Mr. Baty should have reverted to a lower level of progressive discipline rather than dismissal.

This contention is rejected. Mr. Baty had his opportunity (many opportunities) to correct his seatbelt violations which certainly could not have been an undue burden. This is the price he must pay for his misconduct.

It has long been recognized in arbitral "case law" that a poor past work record can aggravate an offense while a good past work record may ameliorate an offense. The Record adduced at the Arbitration Hearing revealed that Mr. Baty had been employed at Veolia for six years and that he had an unclean work record. Safety violations are a most serious offense. They cannot ameliorate a deserved disciplinary penalty.

The Union Advocate did an admirable job in defending Mr. Baty. But the creditable evidence was with the Company and I shall so rule.

Therefore, after due consideration, and for the reasons set forth above, the undersigned, duly designated Arbitrator makes the following

AWARD

The grievance is denied.

Grievant, Jesse Baty, was terminated by Veolia Transportation Services for just and proper cause.



F. Jay Taylor, Arbitrator

Dated at Ruston, LA
this 15th day of January, 2011