MARPLE & DAVENPORT

Attorneys at Law

Memorandum

Re: Value Fresh Markets

To: Alex Associate

From: Sidney Haley

Value Fresh operates seventeen grocery stores in Iowa, Missouri, and Nebraska. Until last month, no employees of Value Fresh were unionized. Last month, following an earlier election, the National Labor Relations Board ruled that the employees of the Lincoln, Nebraska, Value Fresh are represented by the Amagamated Grocery Workers' Union.

Value Fresh is about to commence negotiations for a collective bargaining agreement with the union. The president of Value Fresh has asked for a memorandum on two issues:

1. Unions universally ask for three things in any collective bargaining agreement: just cause for discharge or discipline, promotion and layoff by seniority, and mandatory arbitration of grievances. The president wants us to advise her on what the effect, if any, is likely to be on the company if she agrees to any or all of these three items. In other words, would agreement be any great disaster? The company currently does not discharge workers on whim and caprice, she says, and loyal service by an employee always counts.

2. The company's Vice President for Employee Relations has written a memo suggesting that if good cause for discharge is granted to the Lincoln employees in a bargaining agreement, it ought to be extended to employees at other locations as a part of their employment contract. This, he contends, will make the union less attractive at other store locations. The president wonders if we see anything wrong with that idea.

Memorandum

Re: Value Fresh Markets

To: Alex Associate

From: Perry Paralegal

The best that I could think to give you are some illustrations of how arbitrators and courts approach these issues in the context of collective bargaining. I don't know whether anything would be different if this were purely contract, as distinguished from collective, bargaining.

H & K DALLAS, INC.

108 Lab. Arb. (BNA) 600 (1997)
May 9, 1997

MOORE, ARBITRATOR.

The Issue is:

Did the Company violate Article X (Seniority), Section 3 (Layoff), of the Collective Bargaining Agreement on February 7, 1997, when the Grievants were laid off while employees with less seniority were retained on the payroll? If so, what is the remedy?

Facts

The Company manufactures sheetmetal fixtures for fast food establishments. The Grievants are classified as Finishers "B" and were assigned to the first shift. In February 1997, the Company laid off twenty-two employees for a three-week period due to a reduction in work. Two employees with less seniority than the Grievants were retained. The Grievants maintain that they had more experience and better attendance records than the less senior employees who were retained.

Pertinent collective bargaining agreement provisions

> ARTICLE VIII Management Rights, Paragraph 1 [In part]
>
> It is agreed that the operation of the plant and the direction of the employees, including, . . . to layoff for lack of work, are vested exclusively in the management of the company, except where made subject to the right of appeal through the grievance procedure in this contract.
>
> ARTICLE X Seniority, Section 3. [In part]
>
> In all cases of . . . layoff, . . . the following factors shall be considered:
>
> (a) SENIORITY.
>
> (b) SKILL, ABILITY, AND ATTENDANCE.
>
> When factor (b) is deemed equal in the case of the respective employees in question, SENIORITY shall govern. The company shall have the sole and exclusive right to apply and determine factor (b) provided, however, that the Union may proceed through the grievance and arbitration procedure upon the issue of whether the Company's application of factor (b) was arbitrary.

Union's Position

The Union points out that ability is not a precise measurement for a worker's accomplishments. In the case of one of the less senior employees retained, the Grievants had a better attendance record. Therefore, the Company did not take into consideration attendance which is specified in Article X, section 3(b). They also point to the testimony of Plant Manager Kearns and Supervisor Holmes who testified that attendance was not a factor in their determination as to who would be laid off.

In the situation of the second retained less senior employee, the Union argues that he had only been on the payroll for three months while Grievant Evans had 12 years with the Company and Grievant Fletcher had 13 years experience. Also, the Union points out that the retained employee was the son of the Leadperson who participated in the decision making process.

The Union's arguments may be characterized as asserting that the Company disregarded the attendance element called out in Article X, Section 3, and that nepotism played a role in the decision process. This amounts to arbitrary conduct on the part of the Company, and they are requesting the arbitrator to so find.

Company's Position

The Company argues that Article X, Section 3, gives the Company the sole and exclusive right to apply and determine Skill, Ability, and Attendance when determining who is to be laid off. In this case the Company went through an evaluation process to arrive at the decision to layoff the Grievants and retain two less senior employees. They point out that the initial decision was made by Supervisor Holmes, who had the advice of Leadperson Leejay and the concurrence of Plant Manager Kearns.

The Company also argues that the attendance problem of the retained employee was due to his clocking in merely seconds late. However, his productivity was superior to the two Grievants. The Company witnesses testified that Grievant Evan's work was extremely slow in comparison to others, and that the quality of Grievant Fletcher's work required a substantial amount of rework. Plant Manager Kearns summarized the decision by saying, "Personalities did not come into play. We looked at it like a football team. The best man for the job. Looking for the best players on the team."

Concerning the retention of the Leadperson's son the Company points out that he is classified as a less paid "C" employee while the Grievants are classified as higher paid "B" employees. The Company has the right to determine the number of employees in a classification so long as they properly assign the work.

The Company concludes its argument by pointing out that they engaged in a process in good faith, the Union failed to establish that this was an arbitrary decision, and that attendance was not an issue in this case.

Opinion

It is an accepted principle of labor arbitration that the Union is the moving party in a contract interpretation case, absent specific provisions of law, the past practice of the parties or provisions of the Collective Bargaining Agreement. This is based upon the fact that the employer has initiated an action that affects the relation between the parties and the Union reacts by using the Grievance Procedure available to them. (Act and React) As the moving party it is obligatory upon the Union to show that the employer violated the terms of the Collective Bargaining Agreement.

Article X, Section 3, of the Collective Bargaining Agreement specifies that in cases of layoff Seniority shall be considered along with Skill, Ability, and Attendance. This is followed by the statement "When factor (b)", which is skill, ability, and attendance, "is deemed equal" . . . "seniority shall apply." This reflects that the parties have not agreed to seniority as being the absolute determinant factor to who should be laid off.

The next sentence of Article X, Section 3, initially states: "The Company shall have the sole and exclusive right to apply and determine factor (b): . . ." Skill, Ability, and Attendance. The Company's sole and exclusive right is modified by the proviso that the Union may utilize the Grievance Procedure to challenge the Company's determination if they believe it was arbitrary.

The Collective Bargaining Agreement does not define the word arbitrary. When this occurs Arbitrators often use the normal usage or dictionary to define a term. See How Arbitration Works, Fifth Edition, Elkouri & Elkouri, 1997, The Bureau of National Affairs, Inc. Pgs. 488-492. The New Webster's Dictionary and Thesaurus of the English Language, Lexicon (1991 Ed.), defines arbitrary to be: "arrived at without allowing argument or objection; decided by chance or whim; prejudiced, not based on reasoned examination, or despotic."

The testimony and evidence presented at the hearing, along with the Grievants being given the opportunity to present evidence in their own words and on their own behalf, does not support the claim that the decision to layoff the Grievants was arrived at by chance, whim, prejudice or unreasoned examination. Nor was it despotic or totalitarian. To the contrary, two members of supervision and a Leadperson participated in the decision making process. They testified that their criteria was based upon production. In the case of one less senior retained employee, his demonstrated skills and abilities were greater than the Grievants to the point that his minor tardiness was not a detriment. The other less senior employee was not of the same classification as the Grievants. There was no showing of animosity toward the Grievants by management. The Collective Bargaining Agreement specifies that the Company has the exclusive right to make this determination unless it is done in an arbitrary manner. The Company's decision in this case cannot be said to have been arbitrary.

Award

Based upon the testimony, exhibits, and arguments presented at the hearing, I find that there was no violation of Article X, Section 3, of the Collective Bargaining Agreement when the Company laid off the Grievants on February 7, 1997. The Grievances must be and are hereby denied.

BIRMINGHAM [Ala.] SASH AND DOOR CO.

106 Lab. Arb. (BNA) 180 (1996)

BAIN, ARBITRATOR.

[The pertinent provisions of the agreement are:]

> ARTICLE IV
>
> The management of the works and the direction and arrangement of the working forces, including the right to hire, suspend, discharge for cause, or transfer, and the right to relieve employees from duty because of lack of work or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union because of union activity.
>
> The rights herein enumerated are not exclusive, but are listed among the rights of management.
>
> * * *
>
> The determination of the size of the working force, the allocation and assignment of work to workers, determination of policies affecting the selection of employees, establishment of quality standards, and judgment of workmanship required.
>
> * * *

> The right of the Company to determine and enforce reasonable standards of production is fully recognized and continued failure of an employee to produce on the basis of Company standards will be considered due cause for discipline, including discharge.
>
> * * *
>
> ARTICLE VIII Seniority
>
> * * *
>
> 2. Seniority under this contract shall mean plant wide seniority. The Company agrees that seniority shall control in lay-off, re-employment, promotions and demotions; providing that the Company has the right to assign employees to jobs, duties and classifications on the basis of ability, experience, and efficiency, and the employee can perform the work. The Company shall be the judge of an employee's ability, experience, and physical fitness. If these are equal, length of continuous service shall prevail. The Company agrees to exercise good faith in determining these factors.
>
> * * *
>
> 3. An employee's continuous service shall be deemed to be broken if: (a) The employee is discharged. (b) The employee voluntarily quits. (c) The employee retires. (d) The employee is absent for three consecutive days without notifying the Company. (e) The employee is absent for five (5) days without obtaining an approved leave. (f) The employee accepts employment during or fails to report for work at the expiration of any approved leave. (g) The employee fails to report for work after a lay-off within three (3) days of being notified to return. (h) The employee gives false statements in obtaining employment with the Company; or (i) The employee has performed the work for the Company for a period of one year, provided that the employee laid off has been employed one year or longer and employee with less than one year of service shall retain seniority for a period not to exceed the amount of time he or she has been in the employ of the Company. Provided further, that if an employee's failure to perform work for such period was caused by an occupational injury while in the active employment of the Company, the Company may, at its discretion extend such period of time, if the Union is notified.

Background

In this background, undisputed facts are summarized. Where evidence relating to the existence or non-existence of a particular fact conflicts, the evidence is summarized.

The Company is a wholesale millwork distributor of generally finished woodwork products including wooden doors, wooden units, wood and steel exterior units and moldings. It receives parts by truck, assembles them into finished products, stores them for sale, and transports them by truck to its customers. To do this it maintains a warehouse of finished products, stored in bins. Orders are filled from the warehouse to customers that include contractors, retail lumber dealers and homeowners.

The Company is part of a parent company, the Hutting Sash and Door Company of Chesterfield, Missouri.

Ronald Robinson, the Grievant, testified that he worked for the Company approximately 29 years; that he had received awards every five years; that he had been given a watch in his 25th year of service; that he had been a shop steward about 16 years; that he had been involved in negotiating the current agreement; that he was born with some paralysis in his right hand; that he had his first surgery at 15 to lengthen the tendons in his right hand and that he had gotten more strength

out of it; that he had a second operation in 1985 to strengthen the fingers and that it helped him hold objects better; that he had started in the door department for three years, that he had then moved to the warehouse for nine years where he had been a receiving clerk involved in loading and unloading trucks and boxcars and had done some paper work; that for the last 16 years he had been in shipping including the last eight years as "lead man"; that he didn't refuse work; that he had received an injury to his left elbow in October 1993 as a result of lifting a double-oak door and that he had missed two and one-half weeks of work and that he had received physical therapy; that he lifted such an item about twice a month; that he returned to full duty after one month; that the diagnosis was tendenitis; that the injury to the left elbow occurred again in June 1994 as a result of lifting approximately the same door unit; that he again received therapy; that he received a functional capacity examination and was moved to modified duty for three to four months and then resumed his normal duties; that he didn't know about his layoff until August 31, 1995 when there was a meeting at the end of his shift in the plant manager's office where his supervisor and the plant superintendent were present; that the plant manager said there would be a layoff and that he would be laidoff; that he was not given an explanation; that the plant superintendent told him that he was on permanent modified duty and that he would be laidoff [sic] because the Company needed stronger men in shipping; that he filed a grievance the next day; that Robert Minor, shop steward, was more senior to him; that six employees were junior to him in the department; that he received a physical evaluation in October 1995; that the physician who performed the evaluation had visited the plant to see how loading and unloading took place; that he saw the physician after the physician visited the plant; that in his discussion with the physician the physician told him he could do the job including lifting; loading and unloading; that at his last visit to the physician he saw a list of tasks labeled No Can Do's for Ronnie Robinson; that he is capable of doing tasks 1, 2, 3; that he has never done task 4 but can do it; that he can perform task 5 and if the molding were heavier he would get two people; that he can perform task 6 without dragging the single steel door unit; that he can balance a single door unit and would get help with a double or triple unit; that he can perform tasks 8 and 9; that he would get help with the heavier Eagle window units; that two people or more lift the double and quad units; that he can turn units; that he can perform task 13 and would get help with heavier units; that he can perform tasks 14 and 15; that he hasn't performed task 16 and was never asked to do it; that two people usually perform task 17; that he can perform tasks 18 and 19; that two people can perform task 20; that he has no problem performing tasks 21, 22, 23, 24, 25 and 26; that he has performed all the tasks on this list except task 16 and that he can perform all of them; that he is presently working part-time for the Vestavia Parks and Recreation Authority; that he sets-up and breaks-down chairs and tables for meetings, lines the ball fields and performs maintenance; that he has been doing this for 10 years; that the Company was aware of this; that he has physical limitations in his right arm; that he has no physical limitations in his left arm; that he has had physical limitations in his left arm and that he had modified duty on the left arm where he was reduced to lifting a weight of 5-10 pounds; that he did not perform all the tasks on the list when on modified duty; that he can drive a forklift truck and turn it on by crossing hands; that he can operate a rip saw by holding materials in his right hand; that he was injured while lifting a door unit in 1993; that most of the items on the list are single person tasks and would not require help in most cases; that his right arm is not as strong as his left; that he cannot pick up a pencil with his right hand but can sustain a grasp; that he understood what the physician was saying and that he disagreed with it; that he agreed with the modified duty statement at the time; that he performed normal work after the modified duty; that the letter from the physician was received two months after the layoff; that he had applied for unemployment compensation during the layoff; that he was laidoff [sic] because the Company wanted to get rid of him and that he didn't know why he was laidoff [sic]; that of the 26 items on the list of tasks he would not require anymore help than anyone else; that he had performed regular duty for one year after modified duty; that the ripsaw is operated four or five times a day, sometimes with two

people and he has used it himself; that he can pull some doors out of the overhead rack and not others; no one can lift a quad unit themselves; that there have been some complaints about his work.

Robert Minor, shop steward, testified that he had worked for the Company for 37 years; that in August 1995 the Grievant was second in seniority; that he had been shop steward for 12-15 years; that he knew the Grievant since the Grievant was employed; that he worked with the Grievant on a regular basis for the past 16 years when he came back from his driving the truck; that the tasks were done together; that some tasks required more than one person while others were one person tasks; that he was shown a letter written by the president of the parent company; that he had seen a physician in the plant after the layoff; that the Grievant can do the tasks listed in Union Exhibit No. 2; that some days he doesn't drive; that he hasn't performed task 3; that he had performed tasks 5 and 9; that when he isn't driving he is working in the warehouse just as the Grievant; that he often works by himself; that pulling doors out of the bins is usually a two man job; that he hasn't heard any complaints about the Grievant.

Tom Cain, general manager, testified that he had been employed 21 years by the parent company and seven years in Birmingham; that he was the senior person responsible for the Company; that 34 people were employed in Birmingham; that the Company is a wholesale mill work distributor of generally finished woodwork; that it is a very competitive business without tremendous profit margins; that they assemble parts and pieces such as a window frame and deliver these to the customer when needed; that it is a seasonal business; that there are approximately 16 employees in the warehouse, production, and delivery and seventeen in the office; that there are seven to eight people in shipping and receiving; that in August 1995 he was told by the president of the parent company to reduce his work force by three; that he made a decision by talking to supervisors; that he went over the letter with the Birmingham work force; that he didn't want them to think that the Company was in danger or that the layoff was due to a downturn in the business; that two people were laidoff in production and one in shipping and receiving; that he selected the Grievant for layoff because he couldn't accommodate the Grievant's limitations because of the other layoffs; that he received a report form the physician on September 21, 1994 on a functional capacity examination that was performed on the Grievant; that he was concerned about the Grievant being placed on permanent modified duty since he did not have a permanent modified duty position; that the modified duty was tied to the Grievant's first injury of his left arm; that modified duty was a recurrent problem for the Grievant; that the return to work reports of September 15, 1994, July 25, 1994, August 31, 1994, relate to an injury that occurred in June 1994 and call for modified duty; that a return to work report in November 4, 1993 refers to a left elbow strain incurred on October 10, 1993; that the decision to reduce the work force by three was made in the parent company office and the decision of who to layoff was made in Birmingham.

Kathie Glass, shipping supervisor, testified that she had been employed by the Company for 27 years and had been shipping supervisor for about 12 years; that she was responsible for supervising seven people and loading and unloading the trucks, routing the trucks and the warehouse materials; that she supervised the Grievant and appointed him to the job of "lead person"; that there was physical exertion to the job including driving a forklift truck and putting materials on the truck; that she was asked to compile the list of tasks along with two other employees; that these were tasks he couldn't do without hurting himself or the materials; that in order to drive a forklift truck the Grievant had to reach over and turn it on with his left arm; that he is not safe to drive a forklift truck which is an essential function; that two hands are necessary in order to push material through the rip saw and that she has observed the Grievant pushing the material through with his left hand which requires crossing over the blade; that she normally sends others to help the

Grievant get solid doors from the bins because of the Grievant's limitations while others can perform the task by themselves; that before the Grievant's layoff she had him doing modified duty and selected tasks; that it took him a long time to do a physical inventory which is done on a cycle every day; that other employees asked her to send someone other than the Grievant to help them; that the lead person had to fill-in for her; that the receiving supervisor reports to her; that she was concerned that the Grievant would hurt himself; that the Grievant had never hurt himself; that the Grievant had damaged materials and so had other employees; that she did not see him operate the rip saw by crossing over it with his left arm; that he couldn't pull a solid core door out of the bin himself; that he had weight restrictions for lifting in 1994; that there had been complaints by other employees about working with the Grievant during the past year; that there had been no complaints before the last year.

Sammy Tremble, warehouse supervisor, testified that he had worked for the Company for 10 years and had been warehouse supervisor for one year; that he had helped write the list of tasks that the Grievant couldn't perform; that these were everyday tasks that the Grievant couldn't perform; that these were everyday tasks that the Grievant couldn't perform; that he has been a Union member but that he is not now a Union member; that there were unjustifiable things the Union was doing to him; that all the employees complained among themselves about the Grievant; that some tasks on the list require more than one person; that he could perform all of the tasks on the list himself.

Positions of the parties

Union: The Union contends that the Grievant was able to return to full duty without restrictions after an injury in 1993.

The Union contends that the Grievant after an injury in 1994 was assigned to modified duty and then resumed normal job duties.

The Union contends that the Grievant was performing all the normal duties when he was laidoff in August, 1995.

The Union contends that another employee who worked with the Grievant did not see any deterioration in the Grievant's ability to perform all normal duties.

The Union contends that the Grievant was laidoff [sic] without just cause in violation of his seniority rights.

The Union contends that the Grievant received a functional capacity examination after his layoff.

The Union contends that a physician was provided with a list of tasks that the Grievant could not perform after the layoff and that this list was put together by employees of the Company.

The Union contends that this is a case of termination.

The Union contends that the Grievant worked a regular second job for many years prior to his layoff that required moderate to heavy physical work and has continued to do this second job since his layoff.

The Union requests that the Grievant be reinstated with back pay.

Company: The Company contends that the Grievant had always been restricted in the work he could perform because of the lack of the use of his right arm.

The Company contends that after the Grievant injured his left arm in 1993 and was released to full duty he continued to experience problems with the use of his left arm and was placed on modified duty.

The Company contends that the Grievant was on modified duty from September 1994 to the time of his layoff in 1995.

The Company contends that the parent firm required all branches to eliminate 10 percent of their employees in August 1995 because of poor sales in that year.

The Company contends that it assessed all of its employees' ability, experience and efficiency before laying off the Grievant.

The Company contends that it agreed to prepare a list of job duties that the Grievant could not perform after discussing the grievance with the Union.

The Company contends that it agreed to the Union's request and sent the Grievant for a second functional capacity examination and a physical examination after the Grievant's layoff.

The Company contends that the physician decided that the Grievant should still have modified duty and told the Grievant and Union about the physician's report.

The Company contends that under the contract it is the sole judge of the Grievant's ability, experience, efficiency and physical fitness.

The Company contends that the Grievant was selected for layoff since he was the least skilled in performing the required job functions.

The Company contends that the Grievant poses a safety threat to others if he does not restrict his work to a lower level of performance.

The Company requests that the grievance be denied.

Discussion

The issue before the Arbitrator is did the Company violate the agreement when it laid-off the Grievant on August 31, 1995 and, if it did, what shall be the remedy.

The Arbitrator grants the grievance.

The Arbitrator's reasoning follows.

The issue raises the following questions:

One, does the Company have the right to layoff employees?

Two, did the Company have the right to layoff the Grievant?

One, the Arbitrator is convinced that the Company has the right to lay off employees under the management's rights clause. The Contract Article IV says, "The management of the works and the direction and arrangement of the working forces, including the right . . . to relieve employees from

duty because of lack of work . . . , is vested exclusively in the Company . . . provided that this will not be used for purposes of discrimination against any number of the Union because of Union activity."

The Arbitrator is convinced that the Company did not lay off the Grievant because of his Union activities.

The Arbitrator is convinced that the Company was required to layoff three employees as part of a general corporate decision made by the parent company and the layoffs were not aimed at the Company or its unionized work force.

Two, the Arbitrator is convinced that the Company did not properly layoff the Grievant under the seniority clause of the contract for the following reasons:

1. Article VIII Seniority says, "Seniority under this contract shall mean plantwide seniority." The Arbitrator interprets this to mean that the Grievant was number 2 in seniority with 29 years of continuous service. Article VIII also says that, "The Company agrees that seniority shall control in layoff, . . ." The Arbitrator is convinced that this was a layoff and not a discharge. Article VIII Seniority Section 3 also lists nine conditions under which continuous service is broken. The Arbitrator is convinced that none of these conditions apply to the Grievant's activities.

2. The Arbitrator is convinced that the Grievant was returned to full duty in November 1993, after a period of limited duty that followed an injury to the left arm.

3. The Arbitrator is convinced that modified duty was recommended by a physician following an injury to the left arm in June, 1994. However, the Arbitrator is convinced that neither the Grievant nor the Union were made aware of this limitation to duty when the Grievant was returned to work in September, 1994.

4. The Arbitrator is convinced that the list of tasks titled, "No Can Do's For Ronnie Robinson," were compiled by management after the Grievant's layoff and after the filing of the Grievance. This list was not compiled during the year that the Company says the Grievant was on modified duty. This would have given the Grievant time and opportunity to respond to the list. Further, the list was not written by the physician who evaluated the physical ability of the Grievant but was presented to the physician for his reaction. The Arbitrator is convinced that the Company did not exercise good faith as required by the contract, Article VIII Seniority which says, "The Company agrees to exercise good faith in determining these factors," when it produced this list after the layoff.

5. The Arbitrator is convinced that the Company was content with the Grievant's work between September 1994 and August 1995. Article VIII Seniority says, "The Company shall be the judge of an employee's ability, experience and physical fitness." There is no evidence of complaints about his work by his supervisors and nothing to indicate that, although the Company says the Grievant was on modified duty during the twelve months, the Grievant was not able to perform in a satisfactory manner. The Arbitrator is convinced that the Company judged the Grievant's ability and physical fitness satisfactorily prior to his layoff.

6. The Arbitrator is convinced that the Company was aware of the Grievant's physical disability when he was hired and continued to employ him for 29 years, recognizing his satisfactory work during those years.

7. The Arbitrator is convinced that many of the tasks routinely require two employees and that the Grievant is able to perform his work in a satisfactory manner with the routine assistance of others. The Arbitrator is convinced that the Grievant is not unduly hazardous to himself and others.

8. The Agreement says that seniority shall control in layoff providing that, ". . . the employee can perform the work." (Article VIII Seniority). The Arbitrator is convinced that the Grievant can perform the work and therefore seniority shall control.

Award

Having heard or read and carefully reviewed the evidence and argumentative materials in this case, and in light of the above discussion, the grievance is sustained. The Grievant shall be reinstated with full seniority and back pay and benefits less substantial earnings and unemployment compensation received by the Grievant since the day of discharge.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL NO. 88 v. SHOP 'N SAVE WAREHOUSE FOODS, INC.

113 F.3d 893
United States Court of Appeals, Eighth Circuit, 1997

ARNOLD, C.J.

. . . The scope of judicial review of arbitration awards under collective-bargaining agreements is extremely limited. As the Supreme Court said in United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987) (quoting United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)):

> [T]he courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract. . . . As long as the arbitrator's award "draws its essence from the collective bargaining agreement," and is not merely "his own brand of industrial justice," the award is legitimate.

Misco goes on:

> Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.

Misco, 484 U.S. at 38, citing Enterprise Wheel, *supra*, at 599.

A court "cannot interfere with the arbitrator's award 'unless it can be said with positive assurance that the contract is not susceptible of the arbitrator's interpretation.'" Kewanee Machinery Division, Chromalloy American Corp. v. Local Union No. 21, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 593 F.2d 314, 318 (8th Cir.1979)

(quoting International Brotherhood of Electrical Workers v. Professional Hole Drilling, Inc., 574 F.2d 497, 503 (10th Cir.1978)).

Thus, "'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.'" John Morrell & Co. v. Local Union 304A of the United Food & Commercial Workers, 913 F.2d 544, 559 (8th Cir.1990) (quoting *Misco*, 484 U.S. at 38). In determining whether an arbitrator has exceeded his authority, the agreement must be broadly construed with all doubts being resolved in favor of the arbitrator's authority. John Morrell, 913 F.2d at 560, citing Lackawanna Leather Co. v. United Food & Commercial Workers Int'l Union, 706 F.2d 228, 230-31 (8th Cir.1983) (en banc).

Roger I. Abrams and Dennis R. Nolan
TOWARD A THEORY OF "JUST CAUSE" IN EMPLOYEE DISCIPLINE CASES

1985 Duke L.J. 594

* * *

II. The fundamental understanding

When a homeowner hires a neighborhood teenager to mow the lawn, there is little formality in the transaction. The two may discuss wages and hours, but only in a rudimentary way. Few other details are likely to receive even that much attention. When a factory personnel manager hires a machinist, the discussion may last a bit longer, but it is still likely to be limited to basic information about the work required and the benefits offered. Little discussion is needed because all hirings are premised upon a common understanding of the parties' interests. This understanding is fundamental to the very nature of the employment relationship. A potential employer is willing to part with his money only in return for something he values more highly, the time and satisfactory work of the employee. The potential employee will part with his time and work only for something he values more, the money offered by the employer. Each is, to some degree, aware of the other's interests.

This fundamental understanding of the employment relationship can be easily summarized: both parties realize that the employer must pay the agreed wages and benefits and that the employee must do 'satisfactory" work. 'satisfactory" work, in this context, has four elements: (1) regular attendance, (2) obedience to reasonable work rules, (3) a reasonable quantity and quality of work, and (4) avoidance of any conduct that would interfere with the employer's ability to operate the business successfully. The common phrase, "a fair day's work for a fair day's pay," attempts to capture the essence of this understanding. While the fundamental understanding is so limited as barely to constitute a bargain, it does provide the framework for the employment relationship. , , ,

V. The congruence of management and union interests

The legitimate interests of management and labor in discipline and discharge cases are reconcilable. Using the fundamental understanding, it is possible to develop a theory of just cause that is consistent with the interests of both parties.

Management can have little objection to a fair and consistent system of discipline. Similarly, a union has no cause to object to disciplinary actions occasioned by employee conduct that significantly interferes with management's legitimate concern for production. Although the parties may differ as to whether a particular disciplinary system is fair or whether a given type of behavior warrants a certain measure of discipline, they can agree that the legitimate interests of management and labor provide the standards against which management's action must be judged.

In order to establish just cause for disciplinary action, management must first show that its interests were significantly affected by the employee's conduct. For instance, when an employee has been discharged for violating a work rule, management may show that the employee's prior conduct demonstrates he is unlikely to fulfill the obligations of his job in the future. Alternatively, management may show that even though the employee is unlikely to repeat the wrongful conduct, it is important to deter other employees from such conduct and that discharge is the only effective form of deterrence. Either of these two explanations would establish a prima facie showing of just cause. In order to rebut this showing of just cause, a union must prove that management failed to give the employee industrial due process or industrial equal protection, or failed to consider mitigating factors. For example, the union may show that management took disciplinary action without adequate investigation, or singled out the employee for discipline when others had been excused for the same conduct, or ignored mitigating circumstances such as illness or provocation.

Union and management interests are fundamentally congruent, though it may not seem so to the parties. Management's objective of productive efficiency is served by industrial due process. For example, it is in the employer's interest to give employees adequate notice of their obligations. If a company wants employees to meet their performance obligations, it must, at the very least, let them know what those obligations are. Similarly, management's objective of productive efficiency is served by investigating the facts of a case before imposing discipline. A wrongful accusation undermines the integrity of the disciplinary system, creates resentment, and, in a discharge case, deprives management of a satisfactory employee, while imposing on it the costs of obtaining and training a replacement. Just as employees must know that when they fulfill their obligations they will not be disciplined, employees must also know that when they fail, they will be disciplined—but proportionately and equally. Thus, management benefits by responding to the union's interest in industrial due process.

Management also benefits from industrial equal protection. If like cases are not treated alike, employees will be confused as to the governing standards or misled into believing that substandard conduct will be tolerated.

Management's desire for efficiency is also congruent with the union's interest in individualized treatment of employees through consideration of mitigating circumstances. This congruency, however, is not obvious. The consideration of mitigating circumstances does not detract from management's interest in productive efficiency. For example, consider the employee fired for poor attendance. Though his recent attendance violates standards, his long and productive work record may indicate that he is capable of performing the essential responsibilities of his job in the future and that his wrongful conduct was atypical. In such a case, management's interest in productive efficiency might actually be furthered by retention of the employee combined with efforts to cure the problem. On the other hand, consider the employee who is fired for striking his supervisor, a "mortal sin" in the workplace. In such a case, a long and satisfactory work record should not mitigate his discharge. The broken rule is so important that firing even a senior employee can be justified as a necessary deterrent for other workers.

VI. A theory of just cause

The legitimate interests of management and labor regarding discipline are consistent both with the fundamental understanding and with each other. From this congruence, a theory of just cause can be derived, a theory which accommodates the parties' needs and reflects their mutual understanding.

A. Just cause for discipline exists only when an employee has failed to meet his obligations under the fundamental understanding of the employment relationship. The employee's general obligation is to provide satisfactory work. Satisfactory work has four components:

1. Regular attendance.

2. Obedience to reasonable work rules.

3. A reasonable quality and quantity of work.

4. Avoidance of conduct, either at or away from work, which would interfere with the employer's ability to carry on the business effectively.

B. For there to be just cause, the discipline must further one or more of management's three legitimate interests:

1. Rehabilitation of a potentially satisfactory employee.

2. Deterrence of similar conduct, either by the disciplined employee or by other employees.

3. Protection of the employer's ability to operate the business successfully.

C. The concept of just cause includes certain employee protections that reflect the union's interest in guaranteeing "fairness" in disciplinary situations.

1. The employee is entitled to *industrial due process*. This includes:

a. actual or constructive notice of expected standards of conduct and penalties for wrongful conduct;

b. a decision based on facts, determined after an investigation that provides the employee an opportunity to state his case, with union assistance if he desires it;

c. the imposition of discipline in gradually increasing degrees, except in cases involving the most extreme breaches of the fundamental understanding. In particular, discharge may be imposed only when less severe penalties will not protect legitimate management interests, for one of the following reasons:

(1) the employee's past record shows that the unsatisfactory conduct will continue,

(2) the most stringent form of discipline is needed to protect the system of work rules, or

(3) continued employment would inevitably interfere with the successful operation of the business; and

d. proof by management that just cause exists.

2. The employee is entitled to *industrial equal protection*, which requires like treatment of like cases.

3. The employee is entitled to *individualized treatment*. Distinctive facts in the employee's record or regarding the reason for discipline must be given appropriate weight.