

In the Matter of an Arbitration Between

Teamsters Local 853

- and -

Safeway, Inc.

AWARD & OPINION

NB 3763
(Termination of Matthews)

Arbitrator: Norman Brand, Esq.

Appearances:

For Teamsters Local 853
Beeson, Tayer & Bodine APC
By **Andrew H. Baker, Esq.**

For Safeway, Inc.
Kelly, Hockel & Klein PC
By **Jonathan Allan Klein, Esq.**

Date: January 13, 2017

Background

By letter dated October 8, 2015, Safeway, Inc. ("Company") terminated Mr. Alvin Matthews ("Grievant"). Teamsters Local 853 ("Union") grieved the termination and moved it to arbitration. By agreement of the parties, the Arbitrator held a hearing in at the Union hall in Oakland, CA on November 1, 2016. Both parties were present at the hearing and represented by counsel. Each had a full opportunity to examine and cross-examine witnesses, present evidence, and argue its position. Neither party objected to the conduct of the hearing. A court reporter recorded the proceedings. At the close of the hearing the parties asked to file post-hearing briefs. The Arbitrator declared the hearing closed when he received the last brief on December 14, 2016.

Issue

At the hearing the parties stipulated the following issue:

Was there just cause for the one-day suspension, the three-day suspension, or the termination of Alvin Matthews?
If not, what shall be the remedy?

Stipulations

The parties entered the following stipulations:

1. The lower steps of the grievance procedure have been met or waived and the matter is properly before the Arbitrator for determination.
2. If, and only if, there is a remedy, the Arbitrator will retain jurisdiction over the remedy.

Facts

Grievant began working at the Company's milk plant in May 2007. He worked almost every job in the plant. Around "June or July" 2014 he began training to become a state licensed pasteurizer.¹ The pasteurizer is responsible for assuring the equipment used to pasteurize the milk is properly sanitized.² The sanitizing process is called "Clean in Place" or "CIP." The Standard Operating Procedure ("SOP") outlines the steps for CIP. (Employer Ex. 3) The pasteurizer isolates the equipment to be sanitized by installing "jumpers." They direct the flow of cleaning solutions and keep them from mixing with any milk product. The SOP has a chart showing the cleaning product used for each step, its concentration, the temperature to which it must be brought, and the time it must be held at that temperature.

The process of sanitizing begins with making the correct jumper attachments, then going to the control room and pressing the button to start the process. In the control room there is a digital gauge that indicates the temperature of the solution in real time. There is also a round recording chart that the Company is required to keep for the State and the FDA. This chart records the pasteurization and CIP processes, showing the flow of product or cleaning solution, cut-in and cut-out temperatures, and the time held at various temperatures. (Tr. 49-50) The pasteurizer checks the seals on the recorder, checks the agreement between the temperature shown on the recorder and digital thermometer, and signs that both are correct. (Employer Ex. 6) While there was some disagreement about when the pasteurizer signs the CIP chart, that is irrelevant.

¹ Licensing requires passing an oral and written test. (Tr. 19)

² He is also responsible for proper pasteurization and "identity," which is, for instance, butterfat percent. (Tr. 16-17)

The pasteurizer is required to monitor the CIP chart during the cleaning cycle. (Tr. 71)

Furthermore, the SOP reads:

At the end of the wash review the CIP chart ... Corrective action must be taken for all substandard findings. Initial and submit the CIP chart for supervisor review and sign off.

The pasteurizer must monitor and review the CIP chart to ensure that all the temperature and time requirements were met. A supervisor reviews the CIP chart the following day to ensure the CIP was done in compliance with the SOPs. (Tr. 48)

The Company disciplined Grievant for three incidents in which he failed to properly follow the SOP, causing losses and delays in production.

September 22, 2014

What occurred on this date is not in dispute. Grievant was washing equipment (PT7), a task he had done before. He put the wrong jumper in place, causing an incorrect connection. (Tr. 64) By incorrectly connecting lines, he caused "over 2100 gallons of water to go into BT1, which had 5490 gallons of milk in it." (J-2) The Company lost approximately \$12,000 because of his error. The Corrective Action Required of Grievant was to "Always double check your connections." (J-2) Although he was still training as a pasteurizer at the time of this error, the Company gave him a one-day suspension, rather than any lesser discipline. The plant manager testified that he chose this penalty because Grievant was experienced in making connections, having been a filler operator on two different machines. (Tr. 65-66) The Company did not discipline the person responsible for training Grievant as a pasteurizer. (Tr. 69)

September 2, 2015

Grievant did a CIP during which “the unit failed to reach temperature during the entire wash” This failure “was never caught or checked on the wash chart.” (J-3) Grievant did not properly check the temperature shown on the digital thermometer during the CIP and did not check the CIP chart afterwards.³ If he had, he would have caught the error. The Corrective Action Report lists the following “Corrective Action Required”:

Alvin needs to be checking the washes as they progress to ensure proper settings, concentrations, temperatures and destinations along with the charts themselves to ensure everything is correct. Alvin needs to double check all of his work. (J-3)

The Company gave Grievant a three-day suspension for this error.

September 25, 2015⁴

Sergio Mendoza began working at the plant in June 2015. Richard Finkes, an experienced pasteurizer was training him to become a licensed pasteurizer. Mendoza estimated that because he had been pulled off training to do many other jobs, he had only a month of training as a pasteurizer by this date. (Tr. 148) Finkes stayed beyond his shift this day because he was having difficulty standardizing a batch of product. He told Mendoza to stay so he could see how it was done. When Grievant came on shift, Finkes told him he would finish standardizing the batch because that would be more

³ The SOP for the caustic wash reads: “Mid cycle time, Verify temperature meets targeted set point.” (Er-3)

⁴ The Corrective Action Report reads: “On 9/25/15 with an unlicensed pasteurizer trainee under your watch setting up HTST#2 to wash, you failed to walk the line and check the employees[sic] hook ups to ensure they were correct ... As the licensed pasteurizer and having a trainee working with you, the licensed pasteurizer must check all of the trainees work and walk the lines with them.” (J-4)

efficient. (Tr. 130) At some point there was nothing else for Finkes to show Mendoza. Mendoza volunteered to help Grievant and left. He said nothing to Grievant, but started setting up the unit for washing. When he finished, he went inside the control room and said "start up the unit." (Tr.145-6) Grievant asked "Are you sure?" and Mendoza replied "I'm positive. I hooked everything up." Then Grievant pressed the CIP start button. (Tr. 146-7) Mendoza had not properly set up the jumpers. Caustic chemicals contaminated 5800 gallons of cream, causing \$60,000 worth of damages. (Tr. 68) After investigating how the contamination occurred, the Company terminated Grievant.

Discussion

The Company makes three arguments to show it had just cause to terminate Grievant. First, it asserts the CBA does not require progressive discipline. The Company does not have to prove the merits of the 2014 discipline or the propriety of the one-day suspension. The Company must prove only that there was just cause for the termination. Second, the Company must show three things to prove it had just cause to terminate Grievant: a) it warned Grievant of the consequences of failing to improve his performance; b) it gave him an opportunity to improve; and, c) he failed to improve his performance. Third, the Company argues that it terminated another employee who made a wrong connection and caused 10,000 gallons of half and half to go down a drain. Thus, it did not subject Grievant to disparate treatment.

The Union makes four arguments to show the Company did not have just cause to terminate Grievant. First, it asserts the Company did not have just cause to suspend Grievant for his error on September 22, 2014 when he was a trainee pasteurizer.

Because it gave Mendoza a written warning for his error as a trainee pasteurizer, which caused far more damage, it was disparate treatment to give Grievant a one day suspension for his error. Second, the Company did not have just cause to give Grievant a three-day suspension for the incident on September 2, 2015. The Company never told Grievant he had to monitor the “cold” temperature, never trained him to do so, and provided no written instructions to monitor that temperature. Third, the Company improperly terminated Grievant for negligence in overseeing the work of a trainee pasteurizer. The Company never assigned Grievant to oversee any trainee, nor did it communicate the responsibilities that go with overseeing a trainee. Fourth, even if Grievant were responsible for the actions of an unassigned trainee pasteurizer, the Company did not have just cause to terminate him. The Company applied progressive discipline, terminating Grievant because it had previously given him one and three-day suspensions. Because it did not have just cause to give Grievant a one-day suspension for the first incident, if any discipline is appropriate for the September 25, 2015 incident, it is only a three-day suspension. Similarly, if the Company did not have just cause to discipline Grievant for the September 2, 2015 incident, it only has just cause to discipline Grievant with a three-day suspension for the September 25, 2015 incident.

The Company had just cause to terminate Grievant. There are four reasons for this finding. First, there is no basis for considering the one-day suspension the Company imposed for the incident of September 22, 2014. The CBA requires the Company to provide the Local Union written notice of a suspension. The Local Union must protest a suspension within seven days of the Company providing it written notice of the suspension. (J-1, Article 5, Section 3, p. 5) The Union does not claim the

Company failed to make it aware of the one-day suspension. Consequently, the Union does not have a right to protest that one-day suspension. Second, assuming *arguendo* the Union can protest the one-day suspension, it was not improper. The Union makes a *post hoc* disparate treatment argument. It asserts that because Mendoza was only suspended for his costly error as a trainee, Grievant should not have been given a one-day suspension for his costly error when he was a trainee. The circumstances, however, are not in any way comparable. Mendoza was new to the milk plant and had about a month of interrupted training as a pasteurizer. Grievant was a 12 year employee at the time of his pasteurizer training. He had previously worked two jobs that required correct jumper placement. The Company gave him a one-day suspension because he failed to make correct jumper placements while setting up a CIP. The difference in experience between the two employees could logically lead the Company to apply different disciplinary penalties for similar mistakes.

Third, the Company did not discipline Grievant for failing to monitor the cold temperature on September 2, 2015. Grievant is required to monitor the temperature gauge and the recording chart to ensure the solution temperatures reach the levels required by the SOP. These temperatures are shown on the digital thermometer and the red line on the recording chart. They are independent of the "cold" temperatures. There is a relationship between the hot and cold temperatures. There was testimony that an automatic cold shutoff valve failed, preventing the solution from achieving the proper temperature. But that is irrelevant to Grievant's job. He testified that the "main thing" is to be sure the temperature is up on the hot side. (Tr.155) That temperature is indicated by the digital thermometer and recorded on the CIP chart. Although the SOP

requires him to monitor the solution temperature at the mid-point of the wash, he did not. Nor did he check the CIP chart, which showed that the temperature had never gotten high enough for a successful wash. The Company had just cause to suspend Grievant for three days because of his failure to correctly perform the CIP. Less than a year earlier he made another significant mistake performing a CIP, for which he received a one-day suspension.

Fourth, the Company had just cause to terminate Grievant for failing to check that all connections were correct before he began the CIP on September 25, 2015. The Union points to the language of the Corrective Action Report to argue that Grievant was terminated for doing a poor job while training Mendoza, despite never having been taught to train, nor assigned to train, Mendoza. That is an inaccurate characterization. The Company terminated Grievant for failing to properly perform the work of a licensed pasteurizer. Grievant conceded that as the licensed pasteurizer he is supposed to "make sure all of the connections are correct." (Tr. 160) On September 15th he was warned that he must "double check all his work." (J-3) As a licensed pasteurizer he knows that he must check the connections himself. (Tr. 176) He had never allowed someone else to set up a unit for CIP. (Tr. 160) The licensed pasteurizer who pushes the button to start the CIP is responsible for making sure everything is right. (Tr. 142) Nevertheless, despite knowing that Mendoza was a trainee pasteurizer, Grievant did not check the connections himself. He pushed the button to start the CIP. His only explanation is that Finkes is a good trainer and so he assumed Mendoza knew what he was doing. His assumption is inconsistent with his responsibilities.

Grievant failed to carry out his responsibilities as a licensed pasteurizer. Ten days earlier the Company warned him he must double check his work and he would be terminated if he did not. He failed to check that the jumpers were properly placed, costing the Company about \$60,000. Considering his prior errors and warnings, the Company had just cause to terminate Grievant.

Award

1. The Company had just cause to suspend Grievant for one day.
2. The Company had just cause to suspend Grievant for three days.
3. The Company had just cause to terminate Grievant.
4. The grievance is denied.

San Francisco, California
January 13, 2017


Norman Brand