

FMCS Case No. 200908-09750

In the Matter of Arbitration between:

[Union]

Arbitrator: Richard Bales

Grievant: [Grievant]

Grievance: August 17, 2020

and

[Company]

Hearing: December 18, 2020

Brief Exchange: January 15, 2021

Award Date: January 18, 2021

Award

I. Facts

Nearly all the facts of this Grievance are undisputed. For the sake of efficiency, I will omit pinpoint cites to the record and will specifically note the few disputed facts.

[The Company] Industries, headquartered in [City], Ohio, is a vertically integrated manufacturer of engineered class chains, sprockets, vibrating conveyors, and malleable cast iron. [The Company] takes pride in using American materials and American labor, and consistent with that philosophy it has a longstanding collective bargaining relationship with [the Union]. The relationship between [the Company] and [the Union] is governed by a collective bargaining agreement dated January 1, 2018 (CBA).

Grievant [], a 21-year Machinist at [the Company], is a member of the bargaining unit covered by the CBA. He is 100% ASL, meaning his main way to communicate is through American Sign Language. Throughout his employment, he mostly used handwritten notes for daily communication with supervisors and fellow workers. [[The Company] also used closed captioning on its employee message boards.] When [the Company] provided scheduled training to its workforce, it would schedule an ASL interpreter. However, interpreters nearby are scarce and in high demand, so the [Company] Human Resources Department would have to schedule them about a week to ten days ahead of time.

Mr. [Grievant] had a history of anger issues throughout his employment at [the Company], and [the Company] presented testimony describing many such incidents. The most recent documented incidents included:

- In 2017, Mr. [Grievant] was written up for smoking and taking a break at an inappropriate time. [the Company] Ex. 1. When his supervisor confronted him, Mr. [Grievant] threw a newspaper and ignored the supervisor's instructions to follow him.

- In 2018, Mr. [Grievant] threatened another employee, told him he would blacken his eye, yelled at him, used his hand to make an obscene gesture, and waved his fists in a threatening manner. [The Company] Exs. 2, 3. The day before, multiple employees reported that Mr. [Grievant] had thrown a clipboard when he became angry. Tr. 24, 68; Co. Exs. 2 and 3.

After the 2018 incident, [the Company] suspended Mr. [Grievant] for five days and provided him anger management training. [the Company] Ex. 4. [the Company] also gave Mr. [Grievant] a written warning that this was his last chance and that further violations of Company policy would result in his termination. This “last-chance” letter did not have a termination date. Mr. [Grievant] signed the letter to acknowledge receipt, but next to his signature wrote “don’t agree”.

On August 14, 2020, Machinist [G] returned to his workstation to discover someone had turned off his machine. [The Company] Ex. 5. Suspecting it was Mr. [Grievant], Mr. [G] handed Mr. [Grievant] a note telling him to mind his own business. [The Company] Ex. 6. An altercation broke out in which both employees shoved and spat on each other. [the Company] Exs. 5, 8. Mr. [Grievant] also threw Mr. [G]’s clipboard. [The Company] Ex. 8. At the arbitration hearing, Mr. [Grievant] admitted that he turned off Mr. [G]’s machine, that he spit on Mr. [G], and that he pushed Mr. [G]. He also admitted he knew spitting and pushing were against Company policy and he could be terminated for that conduct. He claimed, however, that Mr. [G] had provoked the incident.

After the altercation, Mr. R (Machine Shop Supervisor) and Mr. P (Operations Engineering Manager) met with Mr. [Grievant] and recorded his account of events. [the Company] Ex. 7. Mr. [P] communicated with Mr. [Grievant] in writing. *Id.* Messrs. [R] and [P] instructed both employees to stay away from each other and instructed Mr. [K] (group leader) to monitor both employees at their workstations while they waited for [Ms. D], the Company’s Director of Human Resources, to get out of previously scheduled meetings. [the Company] Ex. 7.

When Ms. [D] met with Messrs. [R] and [P], all three agreed to discharge both employees. [The Company] Ex. 9. The dispute over who started the altercation was not relevant to their decision; both parties claimed the other had started it, but admitted to violating the Handbook rule against fighting. The spitting was a significant factor in the decision to discharge, given the risk at that time posed by the COVID-19 pandemic. An additional factor relevant to the decision to discharge Mr. [Grievant] was that this incident involved much of the same conduct that resulted in his 2018 suspension – conduct which his anger management course was designed to correct. Ms. [D] prepared a discharge letter.

At some point in this process Ms. [D] considered the possibility of bringing in an interpreter. However, because an interpreter would take at least a week to schedule, it was not feasible to arrange for one to be there that same day. Ms. [D] did not want to postpone the discharge decision, however, because she worried that bringing Mr. [Grievant] back to the workplace might precipitate another altercation.

About four hours after the incident, Mr. [P] asked Mr. [H], Union Steward and Recording Secretary, to accompany him to Mr. [Grievant]’s workstation. Mr. [P] then asked Mr. [Grievant] to accompany the two of them to the front office. Mr. [Grievant] asked for an interpreter. When Mr. [P] told him there would not be one, Mr. [Grievant] became upset and initially refused to go to the office. Mr. [H] convinced him to go.

The three of them were met at the front office by Ms. [D]. Mr. [Grievant] again asked for an interpreter. Ms. [D] said there had not been enough time to arrange for one. Mr. [P] handed Mr. [Grievant] his discharge letter. [the Company] Ex. 9. Mr. [H] ensured Mr. [Grievant] had adequate time to read the letter, and that he understood what he had read. Mr. [Grievant] read the letter and became angry. Ms. [D], Mr. [P], and Mr. [R] all testified they became worried that another altercation would ensue. Mr. [H] then escorted Mr. [Grievant] out of the building.

That same day, [the Company] also discharged Mr. [G] for his role in the altercation.

After the discharges, [the Union] representatives met informally with Ms. [D] to advocate on behalf of both Mr. [Grievant] and Mr. [G]. For Mr. [Grievant], [the Union] argued [the Company] should have provided an interpreter before making the discharge decision so Mr. [Grievant] would have a meaningful opportunity to tell his side of story. For Mr. [G], [the Union] argued discipline should be mitigated because he had an unblemished disciplinary record and no prior history of aggression. [the Union] further pointed out that Mr. [G] had shown remorse and contrition throughout the disciplinary process, and thus likely had learned from the incident and would not repeat it.

After some negotiation, [the Company] ultimately agreed to reinstate Mr. [G]. However, [the Company] disagreed with [the Union] on Mr. [Grievant] and declined to reinstate him. [The Union] then grieved Mr. [Grievant]’s discipline.

II. Issue

Did [the Company] Industries have just cause to discharge [Grievant] for the incident that occurred on August 14, 2020? If not, what should the remedy be?

III. Relevant CBA Provisions

ARTICLE III – Grievance Procedure

* * *

SECTION 1.

* * *

STEP D. If not resolved at Step C, the unsettled grievance shall be referred to arbitration for final and binding determination provided such grievance involves a question concerning the meaning or application of the terms and provisions of this Agreement * * *.

In making an award, however, the arbitrator shall have no power to alter, add to, or subtract from the expressed written provisions of this Agreement. The costs of the arbitrator's fees and expenses shall be borne by the losing party, as well as the hearing room expense.

ARTICLE IX – Management's Rights

SECTION 1. Subject to the provisions of this Agreement, including Article III, Grievance Procedure, the management of the plant and the direction of the working forces, including the right to hire, promote, demote, suspend or discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reasons and introduce new and improved methods, and to adopt reasonable shop rules, are vested exclusively in the Employer, provided, however, that the exercise of any of these enumerated rights shall not be used for the purpose of discriminating against any employee.

IV. Relevant Handbook Provisions

SECTION III. STANDARDS OF EMPLOYEE CONDUCT

3.1 Standards of Employee Conduct and Corrective Action

There are times when disciplinary action has to be taken to insure that our business is operated in an orderly and efficient manner. The authority to discipline rests with the Shop Supervisors., the Manufacturing Operations Manager, and the Human Resources Department. There are four (4) forms of disciplinary actions:

1. Documented (Written) Verbal Warning
2. Written Warning
3. Supervision
4. Discharge

In general, the first warning will be a Documented (Written) Verbal Warning and repeat offenses will progress to the next step of the warning procedure. However, due to the severity of the offense, some or all steps in the warning procedure may be eliminated.

... [T]he following list sets forth examples of violations which will result in disciplinary action up to and including termination of employment. In each case, the appropriate disciplinary actions will be determined by any one or more of the following: seriousness of the offense, employee's overall employment record and/or previous disciplinary actions.

* * *

- Fighting or other disorderly conduct; * * *.

V. Arguments and Analysis

Following the arbitration hearing, both [the Company] and [the Union] agreed to submit “letter briefs” of no more than five pages each. Each party submitted a brief concisely and effectively presenting its arguments.

[The Company] argues that fighting on company time and company property is a zero-tolerance offense providing just cause for discharge. [the Company] further argues the fighting in this incident was made worse by spitting, which because of an ongoing pandemic exposed both employees to significant physical danger. Finally, [the Company] argues that its later decision to reinstate Mr. [G] but not Mr. [Grievant] was justified because Mr. [G], but not Mr. [Grievant], had an unblemished disciplinary record and no prior history of aggression and had shown remorse and contrition throughout the disciplinary process.

I agree.

[The Union] makes two arguments. First, [the Union] argues it was discriminatory for [the Company] to reinstate Mr. [G] but not Mr. [Grievant], where both were disciplined for the same incident and both were equally culpable. I disagree. Mr. [Grievant]’s long history of discipline for aggression, and the similarity between the 2018 incident and the incident giving rise to discharge, entitled [the Company] to conclude reinstatement likely would lead to a repetition of the misconduct. Mr. [G]’s unblemished disciplinary record, no prior history of aggression, and remorse for the incident giving rise to discharge, all entitled [the Company] to conclude that his reinstatement likely would not lead to a repetition of the misconduct. I find [the Company] had ample reasons to impose different discipline on the two men.

Second, [the Union] argues [the Company] violated Mr. [Grievant]’s industrial due process right to tell his side of the story, by failing to provide an interpreter before making the decision to discharge him. I agree. [the Company] knew Mr. [Grievant] needed an interpreter to effectively communicate on complex issues, because it hired translators when he received training. [The Company] counter-argues there was no time to arrange for an interpreter on the date of the incident, and that it did not want to wait until another day for fear of an additional altercation if Mr. [Grievant] returned to the workplace. I agree there was no time to arrange for an interpreter on the date of the incident. However, I find [the Company] could have accommodated Mr. [Grievant]’s industrial due process rights with its responsibility to avoid an additional altercation by putting Mr. [Grievant] on leave until an interpreter could be scheduled, then providing appropriate security at a pre-disciplinary meeting. I also find, that [the Company] would have made the same discharge decision, and that it had just cause to do so pursuant to the CBA Article IX Section 1 and Handbook Section 3.1, even if it had provided an interpreter before making the discharge decision.

VI. Disposition

For the reasons described above, the Grievance is sustained in part and denied in part. I find [the Company] denied Mr. [Grievant] his industrial due process rights by terminating his employment without first giving him an opportunity to defend himself with an interpreter present. However, I also find that [the Company] had just cause for discharge, and that [the Company] would have appropriately made that decision even absent the due process violation. I therefore find the appropriate remedy is to uphold the discharge, but order that [the Company] pay Mr. [Grievant] two weeks' wages to reflect the outer limit of the time the parties and witnesses testified it likely would have taken to arrange for the presence of an interpreter at a pre-disciplinary meeting. I retain jurisdiction for the limited purpose of resolving any disputes the parties may have about applying or interpreting this Award.



Richard A. Bales, Arbitrator
January 18, 2021