

IN THE MATTER OF THE  
VOLUNTARY ARBITRATION

Glazer #2

Employer,

And

Union.

\* \* \* \* \*

ARBITRATION OPINION AND AWARD

\* \* \* \* \*

ISSUE

WAS THE DISCHARGE OF THE GRIEVANT FOR JUST CAUSE, AND IF NOT,  
WHAT SHOULD BE THE REMEDY?

Grievant, a cashier in the food court at University, was terminated on December 6, 2004 for theft by allowing a customer to avoid paying for \$1.89 worth of bread sticks. Grievant wrote in response to the charge, "I am denying this happened and never let anyone go through the line without paying." A grievance requesting the Grievant's reinstatement was filed on December 10, 2004.

An arbitration hearing was held on September 7, 2005. Testifying for the Employer were: M, University Police Department; C, Food Court Director and J, Director of Operations. The Union rested without calling any witnesses. Comprehensive post-hearing briefs were submitted by the parties.

BACKGROUND

Grievant works as a cashier in the food court. Students pay for their meals with a debit card, which shows their name and the nature and amount of their purchase. Officer M, of the Police Department, testified that he took a police report from an A on December 2, 2004. A identified himself as a loss prevention officer at a store. A reported to the officer that a female in front in him at the checkout line in the food court was permitted to pass without having her card stamped. The cashier purportedly told her "I got it" and "I'll just say that I forgot to print up your receipt." Officer M made the following report at 5:48 pm:

On December 2nd at approx. 5:15 pm A was in line to check out the commons and observed the following:

A younger white female approx. 5'10" with long curly black hair, 20 yrs. old, was in line as I was walking up. The gentleman in the line in front of her left & she moved up to the cashier. The cashier's name was B, she was an older white woman. The girl showed B what looked like a meal card. B said "I got it". The girl walked away from the line. As she was walking away she looked back and B said "I'll just say I forgot to print you a receipt." The girl went through a door next to the Pizza Hut stand.

\* girl was also wearing a blue shirt like they wear in the Commons

\* B did not scan the card.

Officer M said that he went to the food court, but was told that B had left for the day. The officer said that he got the Grievant's last name from another employee, since A had only said that "B" was the cashier. Officer M did not verify that A actually worked as a loss prevention officer. A criminal case was not taken against the grievant, insofar as the employer declined to prosecute.

C, the food court director, spoke to Officer M the morning after the event.

He said that he terminated the Grievant for failing to ring up a sale. C did not contact, the witness, A. He also doesn't recall speaking with the Grievant before terminating her.

J, the director of business operations, also met with Officer M on December

2. She said that she spoke with A by telephone, and that he reiterated his complaint. J does not know what A looks like.

J did some research on the ring up of the bread sticks. She said that the computer tape did not show a ring up for bread sticks in the time frame of the witness' complaint. The tape was checked for the period between 3:58 and 5:45 p.m.

J said that the Union was not given the names of people she investigated to protect their privacy. She adds that the Company has a zero tolerance for theft.

## PERTINENT CONTRACT PROVISIONS

### ARTICLE 8 - DISCIPLINE, SUSPENSION AND DISCHARGE

A) The Employer agrees that an employee should not be peremptorily discharged or disciplined without just cause. If it becomes necessary to discipline, suspend or discharge an employee, the initial action and notification by the Employer will occur within a reasonable period of time after the Employer's knowledge of the event giving rise to the action. However, in instances where the Employer may conclude that an employee's conduct may justify suspension or discharge, such employee shall first be suspended. In cases of discipline, suspension or discharge, the chief steward, or in his/her absence, the appropriate union steward, shall be notified of the discipline and the reasons thereof as soon as reasonably possible. The chief steward or designee (President or Vice President), without loss of time or pay, will be allowed to discuss the discipline, suspension or discharge with the employee in a suitable area provided by the Employer, before the employee is required to leave the premises.

## ARTICLE 6 - GRIEVANCE & ARBITRATION PROCEDURE

Step 5. If a satisfactory settlement is not reached in the Step 4 meeting, the Union may appeal the grievance to arbitration within thirty (30) days. The parties shall attempt to mutually select an arbitrator. In the event they cannot mutually agree upon an arbitrator, the grievance shall be submitted to the American Arbitration Association for arbitration under their rules of voluntary labor arbitration. The cost of the arbitrator shall be shared equally by the Employer and the Union

The decision of the Arbitrator shall be submitted in writing and shall be final and binding upon the parties. In the case of a discharge, the Arbitrator shall have the power to sustain the discharge or to order reinstatement of the employee, without or with pay for days lost, subject to the provisions of Article 8 - Discipline, Suspension and Discharge, and providing the amount earned by the employee since date of discharge is deducted from any pay award.

Multiple issues shall not be arbitrated by the same Arbitrator unless by mutual consent and agreement. The jurisdiction and authority of the Arbitrator of the grievance and his opinion and award shall be confined exclusively to the interpretation of the explicit provision or provisions of this Agreement at issue between the Union and the Employer. He shall have no authority to add to, detract from, alter, amend or modify any provision of this Agreement or impose on any party thereto a limitation or obligation not explicitly provided for in this Agreement, or to alter any wage rate or wage structure.

### POSITION OF THE EMPLOYER

The evidence is argued to prove that the Grievant failed to ring up a sale of \$1.89 for bread sticks. It is emphasized that the Union rested without presenting a case. The Employer argues that its case stands totally un rebutted, and that it was shown to be true and factual. The preponderance of the evidence is argued to support the discharge of the Grievant.

### POSITION OF THE UNION

The Employer's investigation is argued to have been insufficient and improper. It is emphasized that A did not appear as a witness. Further, it is maintained that the Employer improperly failed to question the Grievant for her side of the story before terminating her. The Union contends that the Employer has failed to prove its case by the beyond a reasonable doubt standard. It is argued that the Employer neglected to question A during the investigation. The Union maintains that it was improper for the Employer to simply accept A's account at face value, without a more thorough investigation of its own. The Union argues that no one really knows if A actually works as a loss prevention person.

It is noted that the debit cards were not examined to determine witnesses who might have

seen the alleged event, and these witnesses were not interviewed. This failure is said to be contrary to the due process requirements of just cause.

## DISCUSSION

The Employer has a zero tolerance policy for theft. In the food industry, the theft of even a small amount is generally considered a dischargeable event because of the need to deter theft and because an employee who commits a theft, however small, destroys the trust relationship with the employer. Therefore, if the charge is sustained against the Grievant, discharge must follow.

## THE APPROPRIATE STANDARD OF PROOF

The Employer has the burden of proof in a discharge case. It contends that it must only prove its case by a preponderance of the evidence; the Union argues that a reasonable doubt standard is necessary. Where the offense charge could lead to a criminal prosecution, as the one in this case could have, arbitrators often use the middle standard of clear and convincing evidence. Further, the leading treatise on evidence maintains that most arbitrators are generally using a clear and convincing evidence standard in all discharge cases. Hill and Sinicropi in *Evidence in Arbitration*

(BNA 2nd Ed., pp. 37-38) state:

Regardless of the nature of the conduct at issue, the body of arbitral case law appears to be leaning toward a clear and convincing standard rather than proof beyond a reasonable doubt or a mere preponderance of the evidence.

Therefore a clear and convincing standard should be utilized.

## THE EVIDENTIARY EFFECT OF THE GRIEVANT'S AND A'S FAILURE TO TESTIFY

This is not a criminal case where no adverse inference can be drawn from the accused's failure to testify. The Grievant's failure to testify creates an adverse inference against her. However, as noted by Arbitrator Brisco in *Phillips Painting Contractors*, 72 LA 16, 20 (1978), the employer still has to prove its case by probative evidence.

An adverse inference is also created by the Employer's failure to call the sole accuser against the Grievant as a witness. No explanation was given for why A did not testify. It would be expected that if he indeed was a loss prevention officer, he would extend the professional courtesy to present himself for testimony and cross examination. Elkouri and Elkouri, in *How Arbitration Works* (BNA 6th Ed, pp. 381, 382) note that an adverse inference is created by the failure of a key witness to appear in an arbitration hearing, and may even require the case against the Grievant to be thrown out. The authors state:

The failure of a party to call as a witness a person who is available to it and who should be in a position to contribute informed testimony may permit the arbitrator to infer that had the witness been called, the testimony would have been adverse to the position of that party.

Where an employer failed to have a single accusing witness appear, however, the arbitrator expressed concern because of the accuser's absence and found insufficient evidence to support the employee's discharge.

The adverse inferences created by the Grievant's and A's failure to testify create a condition of equipoise; therefore, the Employer must prove its case by clear and convincing evidence

with something more than A's statement to the officer.

#### THE SUFFICIENCY OF THE INVESTIGATION

A's report to the officer is hearsay and deprives the Union of an opportunity to cross examine his accusation. This puts the Union at a serious disability.

Further, A was not personally investigated by the Employer. It is not known if he is truly a loss prevention officer or if instead, he suffers from some condition or disability that would make his accusation suspect.

Of importance, statements were not taken from the students whose debit card records show that they made purchases at the time of the alleged theft. These statements could have been incriminating to the Grievant, exculpatory, or could have shed no light on the case. However, these students should have been questioned, particularly since A did not testify in the proceeding and his accusation represents the only evidence against the Grievant. The Grievant was not interviewed for her explanation of the situation before she was terminated. Many arbitrators find a failure to interview the employee prior to termination to be a fatal defect in the Employer's case. Elkouri and Elkouri state at pp. 967-968:

Discharge and disciplinary action by management has been reversed where the action was found to violate basic notions of fairness or due process. Borrowing from the constitutional imperative of due process operative in the governmental employment context, arbitrators have fashioned an "industrial due process doctrine." To satisfy industrial due process, an employee must be given an adequate opportunity to present his or her side of the case before being discharged by the employer. If the employee has not been given such an opportunity, arbitrators will often refuse to sustain the discharge or discipline assessed against the employee. The primary reason arbitrators have included certain basic due process rights within the concept of just cause is to help the parties prevent the imposition of discipline where there is little or no evidence on which to base a just cause discharge. Thus, consideration of industrial due process as a component of just cause is an integral part of the just cause analysis for many arbitrators.

In one case, an employee's discharge for pulling a knife on a coworker was set aside where the subject employee had never been interviewed. Fairness dictated that the employee be given the opportunity to tell his side of the story.

In a case where management failed to give an employee an opportunity to be heard, an arbitrator refused to sustain the employee's discharge.

A just cause proviso, standing alone, demands that certain minimal essentials of due process be observed. One at least of those minimum essentials is that the accused have an opportunity, before sentence is carried out, to be heard in his own defense....

It is the process, not the result, which is at issue.

I decline to sustain the grievance merely because the Employer failed to interview the Grievant before it discharged her. However, the failure to interview the Grievant in a case of this type, where A did not even appear as a witness, is a serious due process issue that reduces the efficacy of the Employer's case against the grievant.

#### WAS THERE CLEAR AND CONVINCING EVIDENCE OF THE GRIEVANT'S GUILT?

I would have liked to have heard from the grievant, and have her crossed examined. However, I would have also liked to have heard from A, and to have him cross examined. Further, I would have liked to have seen an attempt made to find other witnesses and for there to be an opportunity for the Grievant to be heard prior to her termination. What is left in this case is a hearsay accusation against the grievant. Nothing was personally known about the accuser except that he made an accusation. More is required to substantiate a clear and convincing evidence case against the Grievant. In the absence of clear and convincing evidence, and because of the investigative and due process issues, I have no choice but to grant the grievance.

#### AWARD

The grievance is granted. The Grievant shall be reinstated and made whole. The issue of the computation of a monetary remedy is remanded to the parties. If they are unable to reach agreement, then the issue of the remedy shall be returned to me. I will retain jurisdiction for this purpose.

Mark J. Glazer  
Arbitrator

November 1, 2005