ARBITRATION PROCEEDINGS

before

James M. Paulson, Arbitrator

In the matter of: **LOCAL UNION NO. 959, INTERNATIONAL BROTHERHOOD OF TEAMSTERS** and **HORIZON LINES OF ALASKA, LLC**	Suspension of Mr. Employee

DECISION

PRELIMINARY STATEMENT

Nancy Shaw, General Counsel, appeared on behalf of Local Union No. 959, International Brotherhood of Teamsters.

William J. Evans, Sedor, Wendlandt, Evans & Filippi, LLC, appeared on behalf of Horizon Lines of Alaska.

Horizon Lines of Alaska, LLC, hereinafter "Horizon" or the "Company", and Local Union No. 959, International Brotherhood of Teamsters, hereinafter the "Union", are parties to a collective bargaining agreement[1], hereinafter the "Agreement", which provides for the arbitration of unresolved grievances. The parties agreed that the grievance[2] regarding the suspension of Mr. Employee was properly in arbitration. The parties further agreed that James M. Paulson was selected to arbitrate the matter and his decision would be final and binding as described in Article 9 of the Agreement.

[1]Joint Exhibit No. 1.
[2]Joint Exhibit No. 3.

On February 10 and 11, 2010 a hearing was held at the Hotel Captain Cook in Anchorage, Alaska. During that time the parties were each permitted to present testimony and documentary evidence as well as oral argument in support of their respective positions. The Company called as its witness Anthony Davenport, Marine Manager[3]. The Union called as its witnesses Mr. Employee, grievant and former Marine Truck Foreman[4], and David Hoey, Union Steward and Hostler[5].

By agreement of the parties, post hearing Briefs were to be postmarked on or before April 5, 2010. The Arbitrator received both of the parties post hearing Briefs on or before that date. 2005. Upon reviewing the parties' Briefs, the Arbitrator noted that the Union had raised a new argument regarding the application of certain language in the September 10, 2008 Letter of Agreement among the Company, the Union and the Anchorage Independent Longshore Union Local No. 1. With the consent of the parties, the hearing was reopened to permit the parties to present evidence on the meaning of and practice under that language. On May 20, 2010 a third day of hearing was held at the Hotel Captain Cook in Anchorage. The Company called as its witnesses: Robert Witt, Business Manager, Anchorage Independent Longshore Union; Marion Davis, Vice President, Horizon Lines; and Anthony Davenport, Marine Manager. As its witness, the Union recalled Union Steward David Hoey.

The parties agreed that they would submit further Briefs regarding the evidence presented at the May 20th hearing by June 4, 2010. The Arbitrator received the parties' Briefs on or before that date.

STATEMENT OF THE ISSUES

The parties stipulated to the following statement of the issues[6]:

> Was Mr. Employee suspended on August 12, 2009, in violation of the collective bargaining agreement? If so, what shall the remedy be?

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[3] Tr. 50-90.

[4] Tr. 91-289.

[5] Tr. 290-329.

[6] Tr. 6. The original stipulation of the parties was amended at the hearing on May 20, 2010 to reflect the wording shown above.

RELEVANT CONTRACT PROVISIONS[7]

2. **Article 14 Wages:**

A. **Marine Truck Foreman.** The classification of marine truck foreman and relief marine truck foreman shall be established by the Company.

The position of marine truck foreman is a working position and the responsibilities of the foreman shall be as follows:

(1) Receive the work call from the Company and call the hostlers to work, call replacements as needed to ensure a full gang is working.[8]

*** The Employer will not decline to recognize Teamsters Local 959, will bargain in good faith for successive bargaining agreements, and shall not attempt to bargain for closure of the bargaining unit. The Marine Truck Foreman will continue to take first call for all dispatches. As a result of this Agreement, the manning requirements will be shared responsibility between the Hostler unit and the Anchorage Independent Longshore Union Local No. 1 (AILU). Furthermore, no Hostler will be disciplined pursuant to Work Rules as it applies to manning.

All additional labor force required beyond the above-mentioned red-circled Hostlers shall be dispatched through the AILU. Longshore Hustler drivers dispatched by the AILU to Horizon Lines under the aforementioned method shall be under the terms, conditions, wages, and benefits as set forth in the Longshore Collective Bargaining Agreement effective July 1, 2007. All other conditions of employment not covered above shall be agreed upon prior to implementation between the parties.

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[7] The Agreement is combination of documents in evidence as Joint Exhibit No. 1. The documents include the main "Agreement" as well as various Addendum and Letters of Understanding. References to pages in the Agreement shall be to the consecutive Bates Stamp numbers in Joint Exhibit No. 1.

[8] Joint Exhibit No. 1, p. 33. **ADDENDUM to the HOSTLER AGREEMENT By and Between HORIZON LINES OF ALASKA, LLC and TEAMSTERS UNION LOCAL NO. 959 Covering ANCHORAGE MARINE SHIP HOSTLERS**

Through attrition, members of the AILU, while affiliated with Teamsters Local 959, shall fill any and all vacancies created through Hostler retirement, termination, or other occurring events.[9]

The following rules and regulations, and the penalties to be charged for violations of same, are placed into effect, with the approval of the Company and the Union so that all employees may know what duties are required of them in the general conduct of the Company's business.

Nothing in these Rules and Regulations shall abrogate the employee's right through the Union to challenge a penalty or warning letter through the regular grievance machinery. * * *

Discipline imposed under these Rules and Regulations, to be considered valid, must be issued within ten (10) days exclusive of Saturday, Sunday, and holidays, after the occurrence of the violation claimed by the Employer in such disciplinary action.

Protests of any such discipline must be submitted in writing to the Employer within thirty (30) days after such disciplinary action is issued. Protest made outside the time frame will not be honored.[10]

The following Articles, Rules and Regulations, shall be subject to the progressive disciplinary action of warning letter, suspension, and/or discharge:[11]

* * *

ARTICLE VII:

Miscellaneous:

* * *

C.

Failure to follow established Company — First offense – 1 day suspension

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[9] Joint Exhibit No. 1, p. 61. **LETTER OF AGREEMENT By and Between HORIZON LINES OF ALASKA, LLC and ANCHORAGE INDEPENDENT LONGSHORE UNION LOCAL NO. 1 and TEAMSTERS UNION LOCAL NO. 959**

[10] Joint Exhibit No. 1, p. 64. **HORIZON LINES OF ALASKA, LLC - WORK RULES – Covering the HOSTLER AGREEMENT**

[11] Joint Exhibit No. 1, p. 65. **WORK RULES**

procedures of job responsibilities or instructions. (Proof required).	Second offense – 3 day suspension Third offense – 5 day suspension Fourth offense – Subject to discharge[12]

Warning letters, logged lates, and no punches shall be based on a rolling twelve (12) month period and removed as such from an employee's file.

The foregoing Rules and Regulations have been formulated to serve as guidelines for employees. * * *[13]

STATEMENT OF FACTS[14]

Background Facts[15]

Horizon is engaged in shipping containerized and other cargo from the Puget Sound area in Washington State to its locations in Alaska. At its Anchorage facility it employs several groups of workers to unload containerized and other cargo and reload empty containers for return. Among the groups of employees is a group called "hostlers", which are represented by the Union. Hostlers essentially drive truck tractors usually pulling a trailer/chassis with a container or sometimes cars. Longshoremen operate cranes which take containers and other cargo off the ship and place them on the hostlers' trailers. The Hostlers place the trailers together with the container, cars or other cargo at designated places in the storage yard. Additionally, hostlers will move these trailers around the yard as needed including bringing empty containers to the ship for loading.

The hostlers work schedule is centered on so-called ship or vessel days. Cargo ships arrive on Sundays and Tuesdays. Virtually all regular members of the bargaining unit work these days, which can be very lengthy. On Mondays, Wednesdays, Thursdays and Fridays the Company has a skeleton crew of three employees. This crew is usually made up of the Marine Truck Foreman and two other bargaining unit members. The duties of the Marine Truck Foreman, in addition to being a hostler, are to contact bargaining unit members to fill the

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[12] Joint Exhibit No. 1, p. 68. **WORK RULES**

[13] Joint Exhibit No. 1, p. 70. **WORK RULES**

[14] This Statement of Facts sets forth the basic, largely undisputed, facts giving rise to the suspension of the grievant. Other facts and contested facts supporting the various arguments of the parties are discussed later in this Decision.

[15] See generally: Tr. 51-52 (Testimony of Marine Manager Davenport); Tr. 93-98 (Testimony of former Marine Truck Foreman Employee).

Company manpower needs on any given day and to pass directions from management to the hostlers. From time to time the Company will request that the Union provide more than the skeleton crew on non-vessel days. Each day a crew is working the Marine Truck Foreman plays a role in contacting the workers and determining which workers will be offered the opportunity to work. The Marine Truck Foreman is paid a premium for dispatching workers in addition to the normal premium for his foreman duties. Pursuant to the Agreement[16], the bargaining unit selects the Marine Truck Foreman by seniority based on those who bid for the job.

Facts Giving Rise to the Discipline

On Thursday, August 6, 2009 at 3:00 p.m. the Company requested two additional hostlers to work[17] on Friday, August 7th at 8:00 a.m. Marine Truck Foreman Employee obtained the necessary men thereby making the total crew starting the 8:00 a.m. four hour block number five.[18] On that day Mr. Employee and another hostler (Hennessey) had planned to only work the morning block and to take the afternoon off.

At approximately 10:15 a.m. on the morning of the 7th Mr. Employee was notified by the Company that they needed three more hostlers for the afternoon time block bringing the total number to eight.[19] Mr. Employee then contacted the Longshoremen Dispatcher[20] and requested two additional men for the afternoon block.[21] At this point in time Mr. Employee forgot that he and Hennessey were taking the afternoon block off. Accordingly, the actual total then scheduled to work the afternoon was six and not eight.

About 1:30 p.m., while Mr. Employee was still at home, he received a call from Marine Shift Manager Jeanne Dosch in which she told him that there were only six instead of eight hostlers present for the afternoon block.[22] He immediately realized his error and offered to do what he could to fix things including his coming back to work on his own time. He then called the backup foreman (Kurt Seitz) and went over the work to be done and helped him prioritize the tasks. While he was on the phone with Mr. Seitz, Ms. Dosch had called back. Mr. Employee returned her call and explained his conversation with Mr. Seitz as well as apologized again for the error. A little while later he called Ms. Dosch again and suggested that by working the crew an hour of overtime, the work could be done without calling in any other men. Ms. Dosch passed this on to higher management.[23] The next Sunday Mr. Employee spoke with Ms. Dosch and apologized again about the incident. She told him: everything got done, "we all make

[16] Joint Exhibit No. 1, pp. 34-35.

[17] On non-vessel days hostlers are generally dispatched to work in four hour blocks – 8:00 a.m. to noon and 1:00 p.m. to 5:00 p.m.

[18] Joint Exhibit No. 6. Union Exhibit No. 6. Tr.158, 166-168.

[19] Tr. 169-171.

[20] This was done pursuant to the attrition agreement. Joint Exhibit No. 1, p. 61.

[21] Tr. 175.

[22] Tr. 177.

[23] Tr. 178-181.

mistakes", "it's no big deal" and "don't worry about it."[24]

The Suspension

By phone and e-mail on August 7th Marine Manager Anthony Davenport was made aware of the dispatch error by Mr. Employee.[25] After reviewing documentation of the matter, on August 12th Mr. Davenport issued a letter to Mr. Employee notifying him of his discipline of a three day suspension. Mr. Employee was given a three day suspension under the Work Rules because this was his second offense. The specific Work Rule it was determined that Mr. Employee violated was the rule concerning failure to follow "job responsibilities." [26]

On August 25, 2009, the Union filed its grievance regarding Mr. Employee's suspension.[27] The matter was not resolved in the grievance procedure and was submitted to arbitration.

CONTENTIONS OF THE PARTIES

Company Contentions

Protection from Work Rule Discipline for Manning Conduct

In response to the Union argument that language in the Letter of Agreement prohibiting the "discipline" of hostlers under the Work Rules "as it applies to manning" protects Mr. Employee, the Company first refers to the bargaining history. The only two witnesses who participated in the negotiations both testified that the intention of the language was solely to prevent discipline for situations in which hostlers refused work.

The Company then suggests that the language is ambiguous as to whether it protects Mr. Employee under the circumstances of this case as it uses the word "hostler" while in a preceding sentence the title "Marine Truck Foreman" is used. Mr. Employee was disciplined for the dispatching portion of his foreman duties and not his actions as a hostler. After pointing out that the Union drafted the language, the Company refers to the principle of contract interpretation that ambiguities are construed against the drafter.

Finally, the Company argues that the Union's arguments in other situations, as well as in the instant one throughout the grievance procedure, do not raise the interpretation of the language it now urges. The Company points to the earlier discipline of Mr. Employee and Mr. Bushue and emphasizes that the Union did not claim that in these instances, which are

[24] Tr. 183-184
[25] Employer Exhibit No. 2. Tr. 54.
[26] Joint Exhibit Nos. 1, p. 68 and 3. Tr. 62-64.
[27] Joint Exhibit No. 3.

indistinguishable from the instant matter, the employees were protected from discipline for dispatching errors. Last the Company refers to the failure of the Union to raise the argument in its grievance concerning the recent discipline of employee Ray for a dispatching error.

Just Cause Analysis

The Company argues that it had just cause to issue the three day suspension through an examination of its decision using the well known seven step analysis for just cause.

First, Mr. Employee was on notice that dispatching errors would result in progressive discipline by virtue of the warning he received eight months earlier. This discipline was not grieved and, therefore, is valid and beyond challenge now. Moreover, the Company had disciplined employee Bushue for similar dispatching errors around the same time as Mr. Employee's warning so he was further made aware of the consequences of dispatching errors.

Second, the Company policy of disciplining for dispatch errors has a business purpose. The Company's operations are labor intensive and a shortage of workers effect the expense and safety concerns. Even though the Company did not suffer a large monetary loss because of Mr. Employee's error its workforce was diminished by twenty-five percent. The Company could not demote Mr. Employee so its only recourse was to invoke progressive discipline.

Third, a careful investigation was made of the facts before issuing the discipline to Mr. Employee. Indeed, the facts of Mr. Employee's error are admitted by him.

Fourth, the investigation of the facts was fair and objective. Mr. Employee further acknowledged that his actions should warrant a "letter".

Fifth, there was substantial evidence to conclude that Mr. Employee had committed the dispatch error. Again, he admitted it.

Sixth, the Company argues, contrary to the position of the Union, that it has been consistent and evenhanded in issuing discipline for dispatching errors. The Company points to the earlier discipline of Mr. Employee and Mr. Bushue as well as the later discipline of Mr. Ray. As to its failure to discipline Mr. Bushue for a November, 2009 dispatch error, the Company notes that Mr. Davenport was on vacation and could not determine the facts and issue discipline within the time limit in the Agreement. This makes the second Bushue incident distinguishable. Mr. Employee's testimony that the type of mistake he made had been overlooked by the Company in the past was not supported with specific examples and, therefore, should be discounted. The suggestion by Mr. Employee that a management employee made a significant manning error and was not disciplined was distinguishable.

Seventh, the three-day suspension was commensurate with the gravity of Mr. Employee's offense. It is precisely called for in the negotiated Work Rules for a second offense. Moreover, the Company showed compassion by not having Mr. Employee serve his suspension on a ship

day thereby not jeopardizing his forty hour guarantee for the week.

Company Motivation for Discipline Analysis

The Company next deals with the Union contention that the Company disciplined Mr. Employee out of a desire to get rid to him because it wanted to reduce the number of hostlers since they would not be replaced under the attrition agreement and/or because Mr. Employee was a trouble-maker.

The Company first agrees with the Union that there was tension between the two Teamster bargaining units on the property but argues the evidence failed to show that Mr. Employee was a part of this tension such as to make him a troublemaker or cause the Company to want to get rid of him. Secondly, the Company points out that it did not need to get rid of Mr. Employee in order to make changes, such as taking down speed limit signs, because it had the right to make these changes anyway. Thirdly, the Union claim that the Company wanted to get rid of Mr. Employee to replace his position with a longshoreman is not supported by the e-mail exchange between Vice President Davis and the Teamster's business agent because, *inter alia*, it occurred after Mr. Employee had been discharged. Finally, the comment by Company official Galloway regarding the termination of Mr. Employee to the effect that the Company was going to pursue that course (to terminate Mr. Employee) and "see if things come to a head" is merely an innocuous and ambiguous statement and not evidence of any evil intent.

Union Contentions

Protection from Work Rule Discipline for Manning Conduct[28]

After dealing with the possible Company assertion that the Union argument regarding the attrition agreement should be ignored as being late,[29] it turns to the meaning of the wording in the attrition agreement protecting hostlers from discipline under the Work Rules as it regards manning. A description of the duties of a Marine Truck Foreman demonstrates that what he does in inextricably tied to manning thereby placing him under the protection of the language.

The Union then examines the testimony of Vice President Davis and explains that his understanding of the intent of the language does not fit with the reality of hostlers being disciplined with respect to manning because the penalty for a hostler declining work on a ship day is non-disciplinary. Moreover, there is no provision in the Work Rules relating to such a situation. Since the only person who could be disciplined for a manning error is the Marine Truck Foreman (or his stand-in), the protection must apply to Mr. Employee to have any

[28] This portion of the summary of the contentions of the Union is drawn from its Supplemental Brief filed after further evidence was presented on May 20, 2010.

[29] By reopening the hearing on this argument, the Arbitrator has effectively eliminated the Company contention that the Union should be precluded from putting forth its argument on the language in the attrition agreement.

meaning.

The Union next turns to the intent of the drafters and points out that Union Official Coleman and Steward Hoey worked on the wording and Vice President Davis and Longshore Official Witt did not. Accordingly, Steward Hoey's testimony about the intent is the only reliable source. Steward Hoey testified that he thought the intent of the language was to cover a situation like the present discipline to Mr. Employee.

Finally, the Union examines the merits of the Company claim that the Union has not made this argument in earlier and even in later situations where discipline has been meted out for dispatching errors. First, the previous cases are distinguished because they did not involve mixed Teamster and Longshore crews. Second, there are financial limitations on the Union's ability to take every case to arbitration. Moreover, in Mr. Ray's case, a favorable outcome for Mr. Employee would protect him.

Just Cause Analysis

The first Union contention is that Mr. Employee engaged in no misconduct. He made a simple mathematical error which caused no inconvenience to the Company resulting in a very modest cost. Moreover, the shift supervisor told Mr. Employee not to worry about it and everyone makes simple errors. When good employees make an occasional error there is no just cause for any discipline.

The Union then notes that the Work Rule under which Mr. Employee was disciplined contains the additional requirement that *proof is required*. Accordingly, the Company has a heightened level of proof in order to invoked discipline under this rule. The Company's position fails because no specific rule or job responsibility was identified in advance with an indication that any violation would result in disciplinary action. The Company did not meet the first step of the seven step analysis of just cause.

The next Union argument is that the penalty is far too severe for the offense. The Union calculates the cost to the Company to be $12.63 and the Company has agreed that it is minimal. By comparison the Agreement provides that a vehicle accident of less than $2,500 cannot cause the discipline of the responsible employee. In this instance the cost of the three day suspension to Mr. Employee was roughly $1,800 in wages and benefits—far in excess of the harm to the Company. The Arbitrator is also urged to take into consideration the mitigating factors of the attitude of Mr. Employee in admitting the error, expressing remorse and offering to help minimize the effects of the error. Further, clearly Mr. Employee's error was unintentional. Finally, his error was a rare occurrence based on the many times he has to perform the task of securing manning for crews.

The Union further points to the Company's lack of even handed enforcement of the rules. A management person made a much more serious error in manning in July, 2009 and in November, 2009 Mr. Bushue made a dispatching error. Discipline was not meted out in either

situation. Mr. Davenport's testimony that he did not have time to examine the facts of Mr. Bushue's error was false. Others were not treated the same as Mr. Employee.

While the Union concedes that Mr. Employee received a warning in December, 2008 and it was not grieved, the Arbitrator should discount the significance of the discipline because Mr. Employee intended that it be grieved and it was not his fault that it was not. Moreover, that discipline was distant in time from the situation under review and does not show a pattern requiring progressive discipline.

Finally, the Union recites in detail the tension between the hostlers and management and between the hostlers and the shop. The Union concludes that the Company was annoyed with the hostlers and disciplined Mr. Employee to intimidate the remaining hostlers. Obviously, such a motive by the Company cannot be just cause to discipline Mr. Employee.

DECISION

Protection from Work Rule Discipline for Manning Misconduct

If the protection language cited by the Union in the so-called "attrition" agreement[30] in fact insulates Mr. Employee from discipline, there is no need to answer the question of whether there was "just cause" for his three day suspension. Accordingly, a careful analysis of that language first needs to be made. In as much as the Union has raised this provision of the Agreement as precluding any discipline, it assumes the burden of proof as to its meaning and application to the facts as the nature of its argument is one of contract interpretation.

The Language Itself and in Context

The language in question reads: "[N]o Hostler will be disciplined pursuant to Work Rules as it applies to manning." Literally, Mr. Employee, at least being a hostler most of the time, would appear to come under the protection of the language. On the other hand, Mr. Employee was also the Marine Truck Foreman. In that capacity, his primary duty was to handle the Company's manning needs on a daily basis by either getting Teamster hostlers to fill those needs or by asking the Longshoremen dispatcher to provide men. He received additional compensation for those dispatching responsibilities. The error Mr. Employee made causing his discipline came as part of his performing his foreman duties and not while performing his hostler duties. Accordingly, how or whether the language may apply to the present situation is not clear.

It is also noteworthy that in the attrition agreement in a sentence preceding the "protection" language, the parties specifically reference the duties of the Marine Truck Foreman

[30] Joint Exhibit No. 1, p. 61. Letter of Agreement among the Company, the Union and the Longshoremen dated September 10, 2008.

in light of the new joint manning arrangement. If, as the Union has argued,[31] the protection language could only apply to the Marine Truck Foreman or his stand in, why didn't the parties specifically say so? The protection language references "Hostler" and *not* the foreman or his stand-in. This analysis would suggest that the parties had in mind the protection of hostlers rather than the foreman or his stand-in from manning errors/misconduct.

The protection language comes at the end of a paragraph describing how the hostlers and the longshoremen will jointly participate in the manning requirements of the Company. It also references discipline "pursuant to the Work Rules." An examination of the Work Rules[32] shows that no rule[33] specifically mentions "manning". Apparently, this means that the hostlers are protected in *new* situations (meaning those created by the joint manning arrangement) which will arise once the hostler/hustler[34] manning deal is in effect. It would appear that a nexus between the misconduct and the joint manning arrangement must be present in order for the hostler to be protected to make sense of the need for new language. On the other hand, the protection language may have simply been a concession extracted by the Union from the Company in order for the Company to secure the attrition agreement at all. This results in an ambiguity.

The Arbitrator concludes that the meaning of the protection language is sufficiently unclear by its own terms as applied to Mr. Employee as well as in the context of the other language in the attrition agreement to turn to extrinsic evidence to determine the intent of the parties.[35]

Bargaining History and Application

Three witnesses were presented to explain the bargaining history of the protection language. The two Company witnesses (Vice President Davis and Longshore Business Manager Witt) testified as to specific conversations regarding the meaning of the language. First, Mr. Witt testified that Teamster official Coleman drafted the protection language.[36] He further testified that he asked Mr. Coleman what was intended by the language and was told that no action could be taken against hostlers if they "refused work."[37] Mr. Davis testified that he also talked directly to Mr. Coleman who told him that the reason for the language was to protect

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[31] Union Supplemental Brief, p.8.

[32] Joint Exhibit No. 1, pp. 64-70.

[33] Arguably, the rules governing attendance (Article II) and reports (Article V) indirectly cover conduct which effects fulfilling "manning" requirements.

[34] Longshoremen performing "hostler" duties are referred to as "hustlers". Tr. 356.

[35] "Extrinsic evidence is used by most arbitrators to explain the meaning of contractual language if it is relevant to proving a meaning of which the language of the agreement is susceptible." St. Antoine, *The Common Law of the Workplace* (BNA 2nd Ed. 2005), §2.4, p. 75.

[36] "[A]mbiguous language is construed against the party that proposes it." Elkouri & Elkouri, *How Arbitration Works* (NBA 6th Ed. 2003), p. 744 quoting *San Jose/Evergreen Community College Dist.*, 111 LA 892, 896 (Staudohar, 1998).

[37] Tr. 353.

hostlers from discipline if they turned down work because with the addition of the longshoremen pool of workers there would never be a problem getting enough men to work.[38] Mr. Coleman was not called to testify. The Union did call Union Steward Hoey to testify. His role was to work with Mr. Coleman to convey the concern of the hostlers. He testified that with the new manning arrangement with the longshoremen supplementing the labor pool he wanted "protection" for his men. He testified that he had "no idea" what situations would arise were the hostlers would need protection.[39] He also testified that he thought that the language would protect Mr. Employee in the type of situation involving his manning error. [40]

The Arbitrator concludes from the evidence presented on the bargaining history that the Union (Mr. Coleman) expressed as the only concern in presenting the protection language that hostlers could not be disciplined for refusing work. If the Union disagreed with the testimony on this point, it could have called Mr. Coleman. While Mr. Hoey's testimony was interesting background, it did not establish what was exchanged between the parties in direct communications as to the intent of the language. The Company was entitled to rely on the representations of Mr. Coleman.[41]

While the Union spent a good deal of time at the hearing and in their Brief explaining that even without the protection language hostlers could not be disciplined for refusing work, the Company (Mr. Davis) believed that in certain circumstances they could be.[42] Accordingly, he reasonably thought that the language served the limited purpose Mr. Coleman represented that it did.

Additionally, in every instance of discipline handed out to the foreman or his stand-in for dispatching errors since the language was in effect, the Union has not argued that these men were insulated from discipline by the protection language. This is true even though Mr. Hoey was the Steward when each of these situations arose. These situations involved discipline to Mr. Bushue, Mr. Employee and Mr. Ray. The Arbitrator finds this fact persuasive in concluding that even the Union did not understand that the manning protection language covered foremen when performing strictly foreman dispatching duties and not hostler duties.

Conclusion

Based on the foregoing analysis and discussion, the Arbitrator concludes that the Company did not violate the manning protection language in the attrition agreement by issuing

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[38] Tr. 358-359.

[39] Tr. 394.

[40] Tr. 396

[41] "'[The] intent manifested by the parties to each other during negotiations by their communications and their responsive proposals—rather than undisclosed understandings and impressions—is considered by arbitrators in determining contract language,' . . .." (citation omitted). Elkouri & Elkouri, *supra,* p. 456.

[42] Tr. 361-362.

the suspension to Mr. Employee for dispatching errors.

Just Cause Analysis

Overview

It is well established that in a discipline case were the question is whether the employer had "just cause" for disciplining the employee, the burden of proof is on the employer.[43] Normally, as in the present case, that burden on the employer is to prove its case by a preponderance of the evidence.[44] There are two proof elements.[45] One is to prove that the employee engaged in the conduct for which he was disciplined. Here there is no material dispute as to the conduct for which Mr. Employee was disciplined. The second is to prove that the penalty was appropriate under the circumstances. This element is vigorously contested. If there is a gap in the evidence or a key element of proof is missing, the Company has not met its burden.

In the instant case, the Company has analyzed the facts and circumstances of the discipline meted out against the frequently applied and much analyzed seven step test for just cause originally developed by Arbitrator Carroll Daugherty in 1964.[46] In Daugherty's analysis if the answer to any one of the seven tests was "no", just cause was not established for the discipline.[47] As it turns out, only three of the seven tests are seriously contested in the present situation. Accordingly, this Decision will start an analysis of as many of those questions as may be necessary to determine whether there was just cause to discipline Mr. Employee. Again, the failure of the Company to satisfy any one of these tests will result in a finding that there was not just cause.

Proper Forewarning of the Rules and Penalties

This inquiry/test is whether the employer gave "the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct."[48]

The Union argues that the Work Rule referenced is general and vague ("failure to follow

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[43] "The employer has the burden of proving just cause in a disciplinary proceeding." *Seattle Housing Authority*, 117 LA 161, 166 (Monat, 2002).

[44] Elkouri & Elkouri, *supra*, pp. 950-951.

[45] S*upra*, p. 948.

[46] *Grief Bros. Cooperage Corp.*, 42 LA 555 (Daugherty, 1964).

[47] *Supra*, pp. 557-559. See generally, Brand & Biren, *Discipline and Discharge in Arbitration* (BNA 2nd Ed. 2008), pp. 33-35.

[48] Brand & Biren, *supra*, p. 33.

job responsibilities"). On the other hand, the Company points out that Mr. Employee had previously received a warning which both specifically described the improper conduct (dispatching errors), the rule violated and the consequences of a repeated violation. Making a dispatching error of the sort made by Mr. Employee in the situation for which he received his warning and that in which he received the suspension in the instant matter is, without doubt, a failure to perform his job responsibilities.

The Union's argument may have been much stronger if it had grieved Mr. Employee's initial warning.[49] However, it was not grieved. By the time Mr. Employee made his second dispatching error, he clearly knew that it subjected him to further discipline. Indeed, he even stated that he should "get a letter." The Arbitrator finds that Mr. Employee was aware of the consequences[50] of his dispatching error when he made it the second time. The Company satisfied this test of just cause.

Evenhanded Enforcement of Discipline

This test/analysis examines whether "the employer applied its rules, orders, and penalties evenhandedly . . . to all employees."[51]

The Company makes the general assertion that each time Marine Manager Davenport found that a foreman or his stand-in made dispatching errors, he invoked discipline under the Work Rules for failure to follow job responsibilities. The Union responded with the contention that before Mr. Davenport took over as Marine Manager no foreman had ever been disciplined for dispatching errors.[52] Moreover, in July, 2009 a management employee made a manning error[53] and in November, 2009 foreman stand-in Bushue made a dispatching error. In each case, Marine Manager Davenport issued no discipline. The Company has contended in its Brief that a manning error by a member of management is different than one made by a bargaining unit employee. There was no testimony or other evidence to support or explain this contention. The Company has asserted that the dispatching error by Mr. Bushue was overlooked because Mr. Davenport was on vacation when it occurred and he lacked sufficient time to investigate the facts. The Union responded that Mr. Davenport did return from his vacation in time to discipline Mr. Bushue.

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[49] Mr. Employee's testimony that before his and Mr. Bushue's warning he and other foremen had made the same type of dispatching mistakes without any discipline went unrebutted. Such an argument would have been very effective in challenging his and Mr. Bushue's *warnings* from the perspective that they were not aware of the consequences of dispatching errors.

[50] In as much as the Company had referenced the specific Work Rule that it determined that he had violated when it gave him the warning, Mr. Employee knew that a second violation within a year would subject him to a suspension.

[51] *Supra*, p. 34.

[52] Tr. 203.

[53] Tr. 218-223.

The Arbitrator finds great significance in Mr. Davenport's failure to take the stand the second day of the hearing to rebut or explain away the testimony of Mr. Employee and Mr. Hoey regarding: (1) the Company's failure before the tenure of Mr. Davenport to discipline foremen for dispatching errors, (2) the apparent failure to discipline management personnel for a manning error in July, 2009 and (3) the failure to discipline Mr. Bushue for his dispatching error in November, 2009. The Company has the burden of proof.

First, the Company's failure to enforce the performance rule as to dispatching errors before Mr. Davenport took over the position of Marine Manager does matter. Mr. Employee's testimony, even though he did not have specific examples, did need to be rebutted or somehow explained away. Lax enforcement is normally cured by a broad announcement to the bargaining unit that the rule in question will be enforced on a go forward basis. While the Arbitrator has found that Mr. Employee was put on notice of the Company intent to enforce the job performance rule as it applies to dispatching errors, the unexplained failure of evenhanded enforcement prior to Mr. Davenport's tenure still exists. The mere fact of Mr. Davenport becoming Marine Manager does not absolve the Company from responsibility for the conduct of previous Marine Managers.

Second, while Mr. Employee did not know whether or not the management person making the manning error in July, 2009 was disciplined, his description of this situation was enough to shift the burden to the Company to explain it away. It did not. Basic fairness requires that the Company is not at liberty to hold bargaining unit personnel to a higher standard than it does for its managers without a good or logical explanation.

Third, Mr. Hoey testified with specific detail[54] regarding the time limits under the Agreement for issuing discipline and the time Mr. Davenport had after his return from vacation to discipline Mr. Bushue. Again, Mr. Davenport did not rebut Mr. Hoey's testimony. An adverse inference is drawn by the Arbitrator for the failure of Mr. Davenport to testify a second time.[55]

Based on the foregoing, the Arbitrator concludes that the Company failed to establish that it has evenhandedly enforced its rule regarding job performance in disciplining

[54] The Union Brief (pp. 12-13) laid out the circumstances of Mr. Davenport's failure to discipline Mr. Bushue in great detail. The Arbitrator finds that Mr. Davenport, contrary to his testimony, did have time to investigate and discipline Mr. Bushue. He did not. Moreover, Mr. Davenport had subordinate management personnel who could have investigated the situation and laid out all the facts before Mr. Davenport on his return from vacation. If meting out discipline for dispatching errors was important to the Company, why was no provision made to have this matter covered in Mr. Davenport's absence? The "Company" is not just Mr. Davenport.

[55] "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 adduced would have been adverse to the position of that party." Elkouri & Elkouri, *supra*, pp. 331-332 (citations omitted).

manning/dispatching errors.[56] Accordingly, the discipline of a three day suspension to Mr. Employee was not for just cause and was, therefore, in violation of the Agreement.

REMEDY

If the Arbitrator he finds a violation of the Agreement, he is to fashion a remedy.[57] Significantly, there are no specific limitations in the Agreement as to the remedy the Arbitrator may order other than the general admonition that he may not "add to, subtract from, or to change any of the terms of this Agreement. . .."[58] Normally, the arbitrator is to "make the grievant whole" or put him in the place he would have been in "but for" the violation.[59] In this regard, arbitrators look at the situation of the employee at the time the award is made to determine what remedy is necessary to put the employee where he would be but for the violation. Accordingly, arbitrators consider post violation conduct of the parties to be sure that the grievant is made whole but no more than made whole. For example, if a grievant fails to make reasonable efforts to mitigate his damages after a discharge, his back pay may be reduced or eliminated[60]. Likewise, if the Company altered a person's employment status premised on discipline that is set aside and such action would impact a "make whole" remedy, that action may be considered in fashioning a remedy.[61]

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[56]Had the Company not failed this test, the Arbitrator would have examined the difficult question of whether the penalty of suspension outweighed the gravity of the infraction. Had the Company passed that test, the Arbitrator would have examined the argument of the Union that Mr. Employee's discipline was pretextual. The Arbitrator expresses no opinion on these two questions.

[57] "An arbitrator's broad authority extends to remedies as well as interpretation." Nolan, *Labor and Employment Arbitration*, (West, 1998), p. 274. "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution to the problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

[58]Article 9 GRIEVANCE PROCEDURE. Joint Exhibit No. 1, p. 8. "Some contracts simply prohibit certain types of remedies; others specify the remedy to be applied in the event of a certain breach; and still others limit the arbitrator's role to a determination of whether there has in fact been a breach, leaving the selection of a remedy to the parties themselves." Nolan, *supra*, p. 276.

[59] "The make whole remedy attempts to place the employee in the same position she would have been in if the improper discipline had not occurred." Brand & Biren, *supra*, pp. 462-463.

[60] See generally, Elkouri & Elkouri, *supra*, pp. 1224-1228.

[61] Elkouri & Elkouri references an arbitration case where "the employer was ordered to review the grievant's performance appraisals to determine whether a suspension, [which the arbitrator had set aside] . . ., had negatively affected the appraisals and, if so, to correct them." *Supra*, p. 1205.

The parties have already informed the Arbitrator that subsequent to his suspension, Mr. Employee was suspended again and then terminated. These two disciplinary actions were premised on the validity of the three day suspension before the Arbitrator. Since the three day suspension was in violation of the Agreement, the subsequent discipline must be correspondingly adjusted. Additionally, Mr. Employee must be made whole financially as well as in all other respects for the improper suspension. Simply, he must be put in the place he would have been in but for the suspension. In making any back pay calculation, interim earnings must be subtracted.

CONCLUSION

As set forth above, the Arbitrator finds that the Company violated the Agreement when it suspended Mr. Employee on August 12, 2009. Mr. Employee is to be made whole for this violation by putting him in the place he would have been in but for his suspension. His back pay shall be reduced by interim earnings. The Arbitrator retains jurisdiction for sixty days from the date of this Decision to resolve disputes the parties may have over implementing this remedy.

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James M. Paulson, Arbitrator

June 13, 2010