FEDERAL MEDIATION AND CONCILIATION SERVICE

Proceedings before

James M. Paulson, Arbitrator

In the matter of: **TEAMSTERS, LOCAL UNION NO. 117,** and **E. J. BARTELLS.**	FMCS Case No. 100322-2319-8 Employee Termination

DECISION

PRELIMINARY STATEMENT

Daniel A. Swedlow, Esq., Staff Attorney, represented Teamsters Local Union No. 117.

William T. Grimm, Esq., Davis, Grimm, Payne & Marra appeared on behalf of E. J. Bartells.

E. J. Bartells, hereinafter the "Company", and the Teamsters Local Union No. 117, hereinafter the "Union", are parties to a collective bargaining agreement[1], hereinafter the "Agreement", which provides for the arbitration of unresolved grievances. The grievance[2] in this matter involves the termination of Mr. Employee. The parties agreed that James M. Paulson was selected to arbitrate the matter and his decision would be final and binding as described in the Agreement.

On August 3, 2010, a hearing was held at the Company headquarters and fabrication plant in Renton, Washington. At the hearing the parties were each permitted to present

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

testimony and documentary evidence. The Company called as its witnesses: Jerome Fisher, Working Foreman, Fabrication Shop; Tony Spring, Fabrication Shop Manager; Tanya Pilichowski, Human Resources Manager. The Union called as its witness: Mr. Employee, grievant and former Assistant Working Foreman, Fabrication Shop.

The Arbitrator received the parties' Briefs on September 7, 2010 and the hearing was closed. The Arbitrator's Decision and Award will be issued on or before October 7, 2010.

STATEMENT OF THE ISSUES

The parties stipulated to the following statement of the issues:

> Was the Employer's discharge of Mr. Employee on December 31, 2009, for just cause? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 27 – MANAGEMENT RIGHTS

The Employer, except as provided or limited by this Agreement, has and retains all rights to manage its business whether heretofore exercised and regardless of the frequency or infrequency of its exercise including, but not limited to, the exclusive right in accordance with its judgment to:

(a) Suspend, discharge or discipline for just cause; * * *

STATEMENT OF FACTS

Background Facts

The Company is in the industrial and mechanical insulation industry with its headquarters and a fabrication plant in Renton, Washington. The non-managerial employees in its fabrication plant are represented by the Union. The represented employees include,[3] among other titles, Fabricator, Assistant Working Foreman and Fabrication Working Foreman.

Mr. Employee, the grievant, started working for the Company approximately 5 years ago. He began as a Fabricator and about two years ago was promoted to Assistant Working Foreman

[3] Joint Exhibit No. 1, p. 16.

on the night shift. During the last year of his employment he was one of two employees on the second shift.

In late 2008 Tony Spring was promoted from the bargaining unit position of Working Foreman to the management position of Fabrication Manager. In his previous eight years with the Company, he had held various bargaining unit positions in the fabrication shop. In order to improve the operations, Mr. Spring issued a letter on September 11, 2008, to all fabrication shop employees stating that there were too many errors on recording the status of and directing various pieces through the shop. On part of his plan was to have items double-checked to make sure that they were accurately labeled before shipping. He also said that he would be using progressive discipline in response to employees making errors.[4]

Facts Giving Rise to the Termination

On February 17, 2009, Mr. Spring created the first version of the Quality Control Procedure Guidelines.[5] These guidelines contained a very detailed explanation of the paper work requirements expected of all fabrication shop employees when building and storing for shipping customer orders. In conjunction with issuing these Guidelines, a training session was held with all fabrication shop employees to explain their responsibilities. Employees were required to sign a form acknowledging their receipt of the Guidelines. Subsequent revisions to the Guidelines were distributed to and discussed with the employees April 13th and May 5th. Mr. Employee signed accepting the Guidelines and attended the training sessions. Employees were told that there would be a break-in period for employees to learn and utilize the Guidelines before discipline would be issued for failure to comply with them.

On October 26th another employee meeting was held on the Guidelines when it was announced that the break-in period (lasting approximately eight months) was over and progressive discipline would be meted out for employees who did not follow them. Mr. Employee attended this meeting. He did not indicate that he did not understand the procedures or in any way indicate that he could not perform as required.

Verbal Warning

On October 29th Mr. Employee was given a verbal warning[6] by Working Foreman Fisher for not filling out his work order cover sheets and daily logs correctly. Mr. Fisher went over the correct procedure with Mr. Employee. On November 5th Mr. Fisher gave Mr. Employee a second verbal warning. This time he had skipped over and not completed two customer orders as well as not using the material that had been prepped for him. He double cut material. Mr. Employee refused to sign acknowledging the verbal warning. He admitted his mistakes but provided excuses. These excuses were not accepted by Mr. Fisher.

[4] Employer Exhibit No. 14.
[5] Employer Exhibit No. 3.
[6] Employer Exhibit No. 6.

Written Warning

On November 6th Mr. Spring issued a written warning to Mr. Employee for a separate infraction in that his paperwork "did not include the time or materials that you used for the job you were working on during your shift."[7] The warning notice also informed Mr. Employee that continued failure to comply with the correct procedures would subject him "to further discipline, up to and including discharge." Again, Mr. Employee was defensive and refused to sign the warning. No grievance was filed regarding either the previous verbal or this written warning.

Suspension

On December 18th Mr. Employee was issued a Notice of Suspension. Specifically, Mr. Employee initialed paperwork indicating that he had double checked[8] the labels for a customer and the labels were correct when they were not. This notice mentioned his previous discipline for failure to follow the correct procedure. Mr. Employee was suspended for two days (December 21st and 22nd) and informed that further infractions within six months would result in more severe disciplinary action, including possible discharge. This discipline was grieved.

Meeting with Mr. Spring

Upon his return from his suspension on December 23rd, Mr. Employee met with Fabrication Manager Spring. Mr. Spring retrained Ms. Employee for an hour on the correct procedures—showing him exactly what he needed to do. Mr. Employee was given the opportunity to ask questions. He assured Mr. Spring that he knew what was required. At the end of the meeting, Mr. Employee told Mr. Spring that he was having very serious family troubles. Mr. Spring was sympathetic and offered to have Mr. Employee call him if he needed to for any reason. Mr. Spring also told Mr. Employee, however, that he was still expected to do his job correctly regardless of family difficulties.

Discharge

On December 29th Mr. Employee committed two more errors regarding customer work orders. He failed to put in his hours on the Deer Creek order. He failed to put in which staging area he left the finished product on the Clackamas project. [9] Mr. Fisher testified that on December 30th Mr. Employee[10] failed to turn in a daily work log. On December 31st, Human Resources Manager Pilichowski sent a letter to Mr. Employee notifying him of his termination

[7] Employer Exhibit No. 9.

[8] Mr. Employee's job responsibilities as Assistant Working Foreman required him to "double check" the paperwork of both himself and his co-worker on the second shift.

[9] Employer Exhibit No. 17.

[10] Mr. Employee disputes the Company claim that he did not turn in his work hours.

"[d]ue to your repeated performance issues."[11]

Following the Union grievance[12] on January 8, 2010 protesting Mr. Employee's discharge, the Union referred[13] the matter to arbitration on March 12, 2010.

CONTENTIONS OF THE PARTIES

Employer Contentions

Paperwork Errors Are Sufficient for Discharge

The Company first recites the evidence adduced at the hearing, including numerous admissions by Mr. Employee, that he made the errors as noted by his foreman and his manager. The Company further notes that it followed its policy of progressive discipline and Mr. Employee was made aware of the consequences of his mistakes. Further, the Company points out that Mr. Employee was well trained by the Company in the proper way of doing his paperwork. The Union presented no evidence of disparate treatment.

The Company then references the testimony from Mr. Fisher and Mr. Spring that the errors were not trivial. The Company next references a decision[14] of Arbitrator Willard in a similar situation. Arbitrator Willard upheld the discharge of an employee for continued paperwork errors where the employee had been through progressive discipline. Specifically, he rejected the defense of the employee that there was no harm because his errors had been caught. Arbitrator Willard noted that the employee did not take responsibility for his own actions and did not have the right to set his own standards of work. The Company urges this Arbitrator to make the same analysis and uphold Mr. Employee's termination.

Just Cause under the Seven Tests

The Company then goes through the seven tests for just cause originally set out by Arbitrator Carroll Daugherty.[15] The evidence adduced at the hearing is next discussed as to each test with the following conclusions: (1) Mr. Employee was forewarned of the disciplinary consequences of his errors. (2) The Guidelines were reasonable related to the efficient and orderly operation of the business. (3) The Company investigated each error by Mr. Employee. (4) The Company investigation was fairly and objectively conducted. (5) The errors committed by Mr. Employee were clearly established by documentation and admissions from Mr. Employee. (6) The Guidelines and progressive discipline for infractions was evenhandedly applied. (7) The penalty of discharge was warranted considering the seriousness of the errors

[11] Joint Exhibit No. 2.
[12] Joint Exhibit No. 3.
[13] Joint Exhibit No. 4.
[14] *American Ingredients Co.*, 122 LA 1312 (Willard, 2006).
[15] *Grief Bros. Cooperage Corp.*, 42 LA 555, 557-59 (1964).

notwithstanding Mr. Employee's service.

Serious Family Problems Do Not Mitigate Termination

In response to the Union argument that Mr. Employee's family problems should mitigate the penalty of termination to a lesser penalty, the Company references several arbitration decisions in which the arbitrators rejected such an argument. One arbitrator concludes that management's judgment as to the appropriate penalty should not be set aside absent it being determined to be an abuse of discretion. The Company notes that Mr. Employee was given extra one-on-one training but specifically warned that his family problems would not be accepted as an excuse for future paperwork errors. The Arbitrator is urged to reject Mr. Employee's personal problems as a reason to mitigate the penalty of termination.

Union Contentions

Burden of Proof

The Union begins its argument by citing a leading text and various arbitration decisions standing for the proposition that an employer not only has the burden of proof with respect to the facts constituting the misconduct of a discharged employee but also with respect to the ultimate action of termination. While the Union concedes that some disciplinary action may have been appropriate, "industrial capital punishment" was unreasonable.

Discharge Was Unreasonable

The Union next emphasizes that Mr. Employee's work as a fabricator was flawless and that doing it constituted the vast majority of his day. Paperwork took just a small fraction of his work day. Mr. Employee agreed that paperwork was important, however, none of his mistakes cost the Company any money or lost a customer. The Union then references an arbitration decision where the arbitrator overturned a discharge where the misconduct of the employee did not harm the company and the mistakes were all found and corrected—as here.

The Union further notes that the Company could have put Mr. Employee on a "last chance" agreement rather than terminate him because to do so would more appropriately fit the concept of progressive discipline. Here the Company used a mechanical approach. Moreover, Mr. Employee had demonstrated that he was capable of doing the job.

Finally, the Union suggests that Mr. Employee should have been demoted to the Fabricator position rather than terminated. While it is conceded that even a Fabricator was required to do some paperwork, Mr. Employee was successful in that position.

The Grievant Deserves a Second Chance

The Union first cites several arbitration decisions to the effect that an arbitrator has the authority to reduce the discipline meted out to an employee so long as the language in the agreement does not preclude him from doing so—as here. Finally, the Union suggests that Mr. Employee could be reinstated without back pay to the Fabricator position. A focus of the Union's argument is that the stress of his family problems in late 2009 on Mr. Employee is now alleviated and he should be given a chance to raise his level of performance on paperwork to an acceptable one.

DECISION

Burden of Proof

As both parties correctly point out, the burden of proof in this case is on the Company both as to the facts of the alleged misconduct as well as to the appropriateness of discharge as a penalty.[16] Under the nature of the alleged work rule violation by Mr. Employee, the standard of proof is by a preponderance of the evidence.[17] Simply stated, the employer must put forward evidence that the facts supporting its determination of the alleged misconduct and the propriety of discharge are more probably true than not.

Just Cause

The first stipulated issue requires an inquiry as to whether there was just cause to discharge Mr. Employee. While there have been many attempts to describe just cause, one of the most commonly used methods is to apply the seven tests established by Arbitrator Daugherty.[18] Under the circumstances of this case and as the parties both agree the type of alleged misconduct

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[16] "Arbitrators uniformly hold that employers bear the burden of proving just cause for discipline." St. Antoine, *The Common Law of the Workplace*, (BNA 2nd Ed. 2005), §6.9, p. 190. "[M]any labor arbitrators require management to establish, with adequate proof, cause for the discharge determination." Schoonhoven, *Fairweather's Practice and Procedure in Labor Arbitration*, (BNA 4th Ed. 1999), §10. II, p. 273. See generally, Elkouri & Elkouri, *How Arbitration Works*, (BNA 6th Ed. 2003), Ch. 15, §3.D, pp. 948-952.

[17] "Generally, in more straightforward cases involving normal work rules * * * arbitrators will use the preponderance of the evidence standard." Brand & Biren, *Discipline and Discharge in Arbitration*, (BNA 2nd Ed. 2008), Ch. 11, §II. A, pp. 431-432. Preponderance of the evidence has been defined as: "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." Garner, ed., *Black's Law Dictionary*, (Thompson/West 8th Ed. 2005), pp. 991-992.

[18] Daugherty, *supra*. See generally, Koven & Smith, *Just Cause The Seven Tests*, (BNA 3rd Ed. 2006) and Brand & Biren, *supra*, pp.33-35.

is such that the proper application of progressive discipline[19] is necessary to establish just cause.

Facts

As referenced at the end of the hearing, there appears to be only one dispute of a *material* fact. Fabrication Manager Spring testified that Mr. Employee failed to turn in his Daily Work Log on November 6th, 29th and December 30th. Mr. Employee testified that he always turned in his daily work log and that on December 30th, Mr. Fisher must have lost it. As to whether Mr. Employee turned in his daily work logs, the Arbitrator credits the version of Mr. Spring. The preponderance of the evidence, particularly considering the numerous admitted careless errors of Mr. Employee as well as the detailed and precise recollections of Mr. Spring and Mr. Fisher, supports the Company's version.

As to the other material facts, the Arbitrator has set those forth in the earlier Statement of Facts[20] portion of this Decision.

Application of the Facts to the Just Cause Standard

As the analysis of the Company under the seven tests for just cause in its post hearing Brief[21] shows, a strong case is made that each test had been satisfied. Accordingly, the Arbitrator will focus the remainder of this Decision on an analysis of whether the Union arguments are persuasive enough to offset the Company case for discharge.

Whether the Paperwork Errors Warrant Discharge

The Union emphasizes that, effectively, very little harm, cost or disruption was caused by Mr. Employee's "minor" paperwork errors. Indeed, the Union cites to the decision[22] of Arbitrator Daly in which, *inter alia*, the failure of the employer to experience "substantial loses" caused him to overturn the employee's discharge. Each error was found and corrected with only the loss of time to make the correction realized by the employer.[23]

On the other hand, a careful reading of the *Baker* case shows that it is distinguishable. First, the grievant was inputting data into a computer in the employer's parts department where he did not have a chance to correct a mistake if he made one. Here, Mr. Employee was not so limited. Second, in the *Baker* case, the grievant was "*learning the job* during a stressful and high

[19] "All progressive discipline systems use a series of steps, or disciplinary actions, which increase in severity. The generally accepted forms of discipline prior to discharge are oral warnings, written warnings, and suspensions." Brand & Biren, *supra*, p. 70.

[20] Pp. 2-5.

[21] Pp. 9-11.

[22] *Baker Support Service*, 113 LA 348 (Daly, 1999),

[23] *Supra*, p. 352.

volume time."[24] Mr. Employee was well past learning the job. He had at least three group training sessions, a copy of the Guidelines, eight months to learn how to handle the paperwork and a one-on-one training session immediately before the errors he made causing his discharge. Third, in the *Baker* case it was emphasized that the mistakes that the grievant made were the "same types of mistakes that other employees had made." Here, the evidence was undisputed that other employees were able to stop making the mistakes that Mr. Employee continued to make. Fourth, in the *Baker* case after his suspension the grievant went several months without notice of his continuing mistakes. Then the Company pulled a "random" sample of the mistakes and discharged him[25]. Each of Mr. Employee's mistakes were pointed out to him as they occurred. He was not lulled into feeling that things were okay.

In this case, the Arbitrator finds that the mistakes Mr. Employee made were serious in light of his job responsibilities and that he was very aware that it was important to get the paperwork right. The Company went to extraordinary efforts to impress upon the bargaining unit employees, including Mr. Employee, that an important part of their responsibilities included getting the paperwork right. While the Company cites an arbitration decision[26] where an employee was discharged for, *inter alia*, paperwork errors, that case is distinguishable in that the employee was also guilty of several other infractions and it cannot be determined what role the paperwork errors played in the arbitrator's decision to uphold the discharge. It is correct, however, that Arbitrator Willard did not accept the grievant's position that he should not be disciplined because other employees caught his paperwork errors thereby minimizing the harm to the employer. Additionally, a leading treatise notes that "punishment should be based on the employee's actions, not on the consequences of those actions."[27] While this statement is made in the context of a mistake causing very serious harm to an employer, it should also hold true where the conduct is the same but the harm is small. Moreover, there is appeal to the testimony of Fabrication Manager Spring that the paperwork errors were relatively expensive for an operation as small as that of the Company where being cost efficient is especially critical in hard economic times. To require that employees adhere to the standards of performance set by the Guidelines established by Mr. Spring appears quite reasonable. The Arbitrator finds that the fact that Mr. Employee's errors were caught by others thereby minimizing the harm to the Company does not absolve him of responsibility for making them.

Whether Serious Family Problems Justify Mitigation

The Union urges that but for Mr. Employee's very serious personal family problems, he probably would not have made the paperwork errors causing his termination[28]. Mr. Employee testified in response to a question on direct examination that he "believed" that the stress from

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[24] *Supra* (Emphasis added).

[25] *Supra*, p. 351.

[26] *American Ingredients Co., supra.*

[27] Koven & Smith, *supra*, p. 455.

[28] Some arbitrators have recognized "stressful family problems" as a defense to discipline for job performance problems. Brand & Biren, *supra*, p. 185.

his family problems had "contributed to" his paperwork errors. Unfortunately, it is impossible for the Arbitrator to determine if this statement is true and, if true, how much the stress did contribute to his errors[29]. What is clear is that Mr. Spring did listen to Mr. Employee's recitation of his problems and offered to discuss them with him in an effort to help. Importantly, Mr. Spring also warned Mr. Employee that he had to do his paperwork and that the family problems would not be accepted as an excuse for further errors. It is also clear that on many days from October until his discharge in December, Mr. Employee was able to perform his paperwork responsibilities without errors notwithstanding the stress from his family problems. It appears to the Arbitrator that when Mr. Employee put forth the proper effort he was able to overcome the stress of his personal problems and do his paperwork correctly. The errors that he made were out of carelessness[30] and not errors of judgment. Having gone through a suspension and a counseling session with Mr. Spring just a few days before the final errors causing his discharge, he, as a reasonable person, should have had a heightened concern to do his job properly. The Arbitrator does not find that the stress Mr. Employee was suffering from due to serious family problems alleviates him from his duty to do the paperwork aspects of his job correctly.

Conclusion

The Arbitrator finds that the Company did satisfy the standards for just cause to discharge Mr. Employee. Of concern to the Arbitrator was Mr. Employee's reluctance to take responsibility for his errors. His refusal to sign the warnings and defensiveness when confronted with his errors did not show appropriate concern for being part of an organization working to keep going in hard economic times.

Whether the Grievant Should Be Given a Second Chance

Finally, the Union urges the Arbitrator to exercise his authority to show leniency and give Mr. Employee a second chance. Most arbitrators, including this one, conclude that they do not have the power to grant leniency once just cause has been found for discharge.[31] "[P]owers of leniency or clemency reside in management."[32] This Arbitrator would point out to the Company that, as urged by the Union, Mr. Employee was an experienced and, apparently, skilled fabricator. It may be that rehiring Mr. Employee would be a good investment. However that decision is up to the Company.

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[29] Mr. Employee did make paperwork errors in 2008 and early 2009 when he was, apparently, not under stress.

[30] "'Carelessness' is the absence of ordinary care and is often used to describe poor or substandard work performance that did not result from errors in judgment." *Ibid*, p. 181.

[31] Elkouri & Elkouri, *supra*, p. 963.

[32] *Ibid*.

CONCLUSION

For the reasons set forth above, the Arbitrator finds:

> Mr. Employee was discharged for just cause on December 31, 2009. The grievance is denied.

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James M. Paulson, Arbitrator

September 27, 2010