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Andrea L. Dooley, Arbitrator
5111 Telegraph Avenue #273
Oakland, CA 94609

IN THE ARBITRATION PROCEEDINGS

BETWEEN THE PARTIES

BROTHERHOOD OF TEAMSTERS, LOCAL UNION 2785, Union, vs. YRC FREIGHT, Employer. (Discharge of Grievant)	Case No.: JC7 10-15-0092 DECISION AND AWARD

INTRODUCTION

This dispute involves the application and interpretation of the collective bargaining agreement ("Agreement") between YRC Freight ("Employer") and Brotherhood of Teamsters, Local 2785 ("Local 2785" or "Union"). Pursuant to the Agreement, the parties selected the undersigned Arbitrator to serve as the neutral panel member in this case. Robert Bell, Teamsters Joint Council 7, was appointed by the Union to serve as a member of the panel and Rick Porter, ABF Freight, was appointed by the Employer to serve as a member of the panel. This matter came for hearing in San Leandro, California, on December 3, 2015. The parties submitted this matter to the Arbitrator after presentation of evidence and oral arguments.

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APPEARANCES

For the Union:

William Cromartie, Business Agent
Brotherhood of Teamsters Local 2785
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San Francisco, CA 94134

For the Employer:

Tom Walters, Vice President, Labor Relations
YRC Worldwide
6016 Kenneth Oak Way
Fair Oaks, CA 95628

ISSUE

Whether the Employer had just cause to discharge the Grievant, and if not, what shall be the remedy?

The parties stipulated that this matter is properly before the Arbitrator and that the Arbitrator retains jurisdiction over the remedy, if necessary.

STATEMENT OF THE FACTS

The relevant facts in this case are not in dispute. Grievant is a dockworker for the Employer and has been employed for approximately seventeen years. On July 14, 2015, Grievant left work with a job-related injury. On July 22, 2015. Grievant's workers' compensation claim was accepted by Sedgwick, the insurance carrier, and Grievant was offered Modified Work by the Employer. Employer's Exhibits B and C. Grievant was expected to begin Modified Work on August 20, 2015 and was expected to from 7:00 a.m. until 3:30 p.m., work five days a week, Monday through Friday. Employer Exh. C. Grievant accepted this Modified Work assignment on August 3, 2015. Id.

On September 14, 2015, Grievant arrived in the Employer's parking lot at 7:56 a.m. and punched in at 7:58 a.m. He returned to the parking lot at 8:01 a.m. and drove out of the parking lot at 8:10 a.m. These actions were recorded by the Employer's video surveillance system and electronic time clock system. Grievant did not punch out or notify management that he was leaving. Grievant did not return on that day.

On September 15, 2015, Grievant arrived in the Employer's parking lot at 7:30 a.m. and punched in at 7:31 a.m. He returned to the parking lot at 7:33 a.m. and drove out of the parking lot at 7:45 a.m. These actions were also recorded by the Employer's video surveillance system and electronic time clock system. Grievant did not punch out or notify management that he was leaving. Grievant did not return on that day.

On September 16, 2015, Grievant was interviewed the Terminal Manager [Witness] about the events of the two prior days. Grievant told [Witness] that he had left "around noon both days" and could not explain why he had not clocked out or told anyone he was leaving. Grievant later stated that he was ill on those days.

On September 18, 2015, Grievant was discharged for Just Cause/Breaking a Cardinal Rule – Theft. The Employer stated:

> Specifically on 9/14/15 and 9/15/15, you had clocked in on both days but did not clock out. In our meeting on 9/16 with another union member present, you claimed that you were on the premises until noon both days. After reviewing video recordings of both days, you are viewed leaving the premises in your truck 40 minutes after clocking in and never returning. This is considered dishonesty and theft of company time.

ER Exh. A.

The Grievant had notice that this conduct would be subject to discipline. In letters dated October 18, 2013, November 26, 2014 and December 2, 2014, Grievant was informed that clocking in and leaving the terminal "may result in . . . disciplinary action up to and including discharge." ER Exh. H.

DECISION AND AWARD

The Employer bears the burden to demonstrate that just cause exists for the discipline imposed on the Grievant. The just cause standard typically requires progressive discipline when appropriate. Typically, disciplinary action is also expected to be corrective in nature as well, if the circumstances warrant it. An employer need not impose progressive discipline where the conduct is more serious. However, when a serious charge is made against an employee it should be narrowly construed, because of the long-lasting effects of such an accusation on an employee's career.[1]

In the present care**,** the Employer has discharged the Grievant for Breaking a Cardinal Rule – Theft, "a cardinal sin" which, according to the collective bargaining agreement, can lead to discharge without progressive discipline.

The evidence presented by the Employer at the hearing establishes that the Grievant falsified his time cards by clocking in and leaving company premises, in hopes of being paid for his time under the Modified Return to Work Agreement despite his absence from the Employer's premises. It is the Employer's position that the Grievant's conduct constitutes theft of time and dishonest behavior and that discharge is appropriate.

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[1] Bornstein, Labor and Employment Arbitration (2011), §20.01.

The Union argues that discharge is too harsh under the circumstances, that Grievant was sick and that Grievant never benefited from his actions because he was not paid for that time. The Union also argues that the past practice in the Employer's modified work program is for employees on modified work to sleep in the break room or in their cars. The Union also argues that Grievant's many years of service with the Employer should mitigate the severity of the discipline.

Based on the evidence presented at the hearing, the Employer has established that just cause exists to discharge the Grievant for theft of time and dishonesty. While the Grievant's absence may have been discovered before he was paid, he had more than 14 hours of unaccounted-for time. Arbitrator Angelo has previously found that, "almost three hours of unaccounted for time is not de minimus. Rather, it is a gross abuse of time." *ABF and Teamsters Local 287* ([Redacted] Discharge). The Employer's decision to discharge the Grievant does not exceed the bounds of reasonableness.

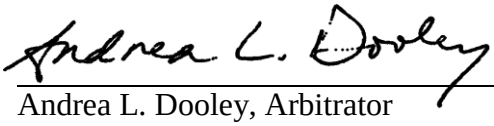
It is credible that the Grievant was ill at the time of the misconduct, but it is not a mitigating factor. Grievant clearly had the option to notify management or his physician that he was too ill to work, and decided to clock in instead. Grievant's Modified Return to Work Agreement clearly states, "***However, you must take primary responsibility for your own safety.*** **Please notify your Terminal Manager immediately if you encounter any problems with your work assignment.**" ER Exh. C (emphasis in the original). Grievant did not notify the Terminal Manager that he was too sick to work in even a modified capacity on September 14 and 15, 2015.

The Union argues that the Employer's Modified Work program is, in essence, a sham. In their experience, employees on modified work are not given any work to do, and are allowed to sit around the break room or sleep in their cars for the duration of their shift. In the Union's view, the Grievant did not act any differently than other similarly situated employees by choosing to sleep at home rather than in his car. While the Union may be properly characterizing the Employer's Modified Work Program, it is the employer's prerogative to assign, or fail to assign, its employees as it sees fit. In other words, the Employer can choose to pay its employees to sit around the breakroom, to sleep in their cars, to do busy work or wait for assignments. Employees are subject to the direction of the Employer during that time period and are not free to leave the premises. The actions of the Grievant distinguish him from other employees on modified duty.

Presumably the Employer weighed the grievant's seventeen years of employment in determining the severity of the discipline to be imposed and determined that it was not a strong enough mitigating factor to warrant a discipline less than discharge. In light of the totality of the circumstances, I am not willing to set aside the Employer's judgment for my own concerning the severity of the discipline.

THEREFORE, the grievance is denied.

Dated: December 8, 2015.



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