In the Matter of the Arbitration Between)
)
SOLVAY USA, INC.)
)
and)
)
UNITED STEELWORKERS)
LOCAL UNION 7-765)
)
FMCS Case No. 16-53695-1 ( ))

OPINION AND AWARD

The hearing in the above matter was held on September 15, 2016, at the Hilton Garden Inn Chicago/Tinley Park, Tinley Park, Illinois, before Gail R. Moran, serving as the impartial arbitrator by selection of the parties. The Union was represented by Frank Shubert, its Staff Representative. The Employer was represented by Joshua L. Ditelberg, its attorney. The hearing was held pursuant to a collective bargaining agreement between the parties. (Jt. Ex. 1)

At the hearing, both parties were afforded the full opportunity to call, examine and cross-examine witnesses, introduce documentary evidence and present arguments. The parties stipulated that the matter was properly before me for resolution. Both parties submitted post-hearing briefs received by me on October 14, 2016.

The Issue

The parties stipulated that the issue before me is:

Was the Grievant, _____, discharged for just cause and if not, what is the remedy?

Relevant Contract Language

Article IV - Management Rights

The Company shall have the right to manage the plant and direct the working force, including the right to plan, direct, control plant production, to hire, layoff, suspend, transfer, or discharge employees for just cause, subject to the terms and provisions of the Agreement...

Article XV - Miscellaneous

Section 1. When the Company calls employees into meetings to discuss an occurrence which could lead to a reprimand, the Company will so notify the employees in order to give them an opportunity to have a Union representative present if they so desire. If disciplinary action is taken a copy of such action shall be given to the Union. After twelve (12) months, such disciplinary action shall not be used for the purpose of progressive discipline.

Background/Facts

The grievance contests the Employer's right to terminate the Grievant At the time of his discharge, was employed by the Employer at its Chicago Heights facility as a C1 Packager. He had been employed for eight and a half years. His history of discipline is detailed below. The Chicago Heights facility manufactures silica products used in tires and other industrial applications. The Packaging Department employees load and unload railcars and over-the-road tractors, operate the bagging machine filling bags with product, and perform other miscellaneous duties.

In July and October 2014, the Grievant was alleged to have had disagreements with a fellow employee where he uttered threats of bodily harm. (Er. Ex. 7)[1] Plant Manager Phil McCray testified that the Union conducted an internal investigation into the matters alleged and participated in joint investigatory interviews with the Employer. As a result, on November 10, 2014, the Grievant signed a Last Chance Agreement. The Agreement contained certain specific conditions[2] of continued employment, as well as other more general conditions of continued employment. The relevant portions of the Agreement are as follows:

[1] The Exhibit, a police report, describes the alleged conduct by the Grievant as "Aggravated Assault".

[2] Not detailed above but also included in the Agreement were conditions that Grievant serve a brief suspension and attend Anger Management classes.

"Effective November 10, 2014, this Agreement is entered into as a condition of continuing employment for In lieu of terminating his/her employment, Employee agrees to refrain from inappropriate conduct or performance standards as follows:

Refrain from intimidation or threatening conduct towards other employees, contractors, truck drivers or visitors to the plant site.

Employee understands that his/her continued employment is dependent upon his/her meeting certain conditions and demonstrating effective performance of his/her duties. Failure to do so will result in immediate termination of employment....

2. Employee will follow all oral and written policies, procedures, directives, and instructions communicated from management or the supervisor...

4. Employee understands that if s/he fails to meet the conditions of this Agreement, s/he will be terminated from employment. Meeting the conditions means that Employee will demonstrate continued and sustained improvement in the areas of concern and that s/he will comply with all the performance and conduct standards expected of the organization's employees..

8. This Agreement shall be valid and binding from the date of its signing for two years. Employee's disciplinary record will remain in effect during and subsequent to the term of this Agreement in accordance with the terms of the Employer's personnel policies/collective bargaining agreement (if applicable)."

The Union did not sign the Last Chance Agreement.[3]

Lori Hodges, Logistics Manager, Packaging and Shipping, and Grievant's immediate supervisor, testified that in March and April of 2015, four to five months into the term of the Last Chance Agreement, she approached the Union about the Grievant's frequent unscheduled call-offs. She did so again in July 2015. This resulted in the Union issuing the Grievant a letter regarding his attendance. (Er. Ex. 1).[4] The letter, signed by Kent Ferree, Unit Secretary, informed that management had brought to its attention issues regarding his attendance, that the Union Board had interceded on his behalf, and an adjustment in his attendance was required to assure his continued employment. Ms. Hodges testified that after issuance of the letter, the Grievant continued his pattern of unexcused absences.

[3] Unit Chairman McGowan testified that an unfair labor practice charge was filed concerning the two year term of the Last Chance Agreement, but was dismissed.

[4] Another employee was issued a similar letter at the same time.

On October 7, 2015, one month shy of the first year of the Last Chance Agreement, the Grievant was issued a written warning regarding his attendance. (Jt. Ex. 3). It stated, "For the duration of the Last Chance Performance/Behavior Agreement, any unexcused absence will result in immediate termination from the company." The Grievant signed the warning letter, along with Manager Hodges and Union Representative McGowan. This written warning was not grieved.

Lori Hodges testified that in advance of her December 2015 holiday vacation, she prepared and disseminated to employees by email the schedule for Packaging and other plant operations for the period December 21 - 27, 2015. (Er. Ex. 2 & 3). The schedule reflected that was one of two Packagers scheduled to work first shift, 7 a.m. to 3 p.m., December 21, 22 and 23. The Packaging Department was closed and its employees on paid holiday December 24 and 25.

There is no dispute that the Grievant did not report to work at 7:00 a.m. as scheduled on December 23, 2015. Rachel Strickler, Lab Supervisor, testified that she was covering supervisory duties for Ms. Hodges and at about 9:30 a.m. she noticed that the Grievant was absent. She checked to see if she had received a phone call from him, but had not. She called his cell phone at 10:05 a.m. (Er. Ex. 5) and left a message when she did not get an answer.

The Grievant testified that on the evening of December 22, when he arrived at home after working a twelve hour shift, his wife informed him that her mother was ill. They immediately departed to care for her in Kankakee, IL, about an hour from home, where they spent most of the night. At about 5:30 a.m., he left Kankakee to drive he and his wife back home but had a flat tire on Interstate 57. His key and jack were missing from the truck - he had loaned them to his son - so he could not lower the spare tire from it storage place under the truck to mount it. He began to flag down passing cars and finally at around 10:00 a.m. a similar vehicle stopped, the driver had compatible equipment, and he was able to mount the spare and drive back to his home. He dropped his wife off in the driveway and said, "Babe, I'll see what happens". He drove directly to work. The Grievant produced a copy of an invoice for the purchase of a new tire dated December 30, 2015. (Un. Ex. 2). The Grievant recounted that he was unable to call the Employer to report his absence because his cell phone was dead. He testified that he had left the charger at home during his haste to depart, and that his wife had forgotten her cell phone at her mother's house that evening. He testified that he did not try to call in when he finally reached home but, rather, departed directly for work. His wife did not testify at the hearing.

The facts are not in dispute that after he arrived at the plant, somewhere in the vicinity of noon or shortly before, he called Rachel Strickler from the Packaging Department phone. He said he was there and ready to work, that he'd had a family emergency, and asked to make up the hours. Rachel Strickler testified that the Grievant did not elaborate other than saying he had a family emergency. Because there was work to be done and they needed to get a shipment out that day, she permitted him to work to make up the hours. There was no discussion about discipline at this time, but

according to her testimony Ms. Strickler did press the Grievant for an explanation for his absence.

Grievant's testimony disclosed that after he called Ms. Strickler, he called Union representative McGowan to tell him he showed up late for work, had spoken to Ms. Strickler, and that she was going to let him make up the hours.

With regard to the allegations concerning falsification of time, Ms. Strickler testified that the Grievant approached her on December 21 and 22 asking permission to work on the Christmas holidays of December 24 and 25. She declined his request because the Packaging Department was closed. The evidence is clear that in entering and subsequently approving his time in the Company's e-time reporting system, he reported eight hours work, from 7 a.m. to 3 p.m. on December 23, 24 and 25. (Er. Ex. 4). Manager Hodges testified that employees enter their time into the electronic e-time system over a two week period, then self-certify their hours the last day of the pay period. Managers then approve the time and send it on to payroll for processing. Hodges testified that she corrected the discrepancies in his time record to reflect no hours worked on December 24 and 25 before forwarding them to payroll.[5]

The Union presented evidence that there had been other instances of over-reporting of time worked with no discipline. (Un. Ex. 3, 4, 5 & 6). In fact, the parties concurred in their testimony that the e-time system had been the source of many disputes among them including a number of grievances.

Hodges testified that on January 8, 2016 the Grievant was called into an investigatory interview regarding his absence on December 23 and the time reporting errors. He was accompanied by Union Representative Al Coleman. According to Hodges testimony, the Grievant recounted the flat tire incident and explained that he could not call in because there was no cell phone available to him. While the Grievant does not recall whether the time reporting errors were raised during this meeting, in his testimony he explained that he enters his time in advance and any discrepancy between his entries and his actual hours of work were a mistake and not done with any intent to defraud the company.

Grievant was terminated on January 18, 2016 for alleged multiple violations of the company's rules and policies (Jt. Ex. 3(b)) including excessive unauthorized absences from work after prior warnings, falsification of time records, and breach of the Last Chance Agreement (Er. Ex. 6).[6]

Employer's Position

[5] According to , he was only paid for three hours work on December 23 although he worked eight hours.

[6] The Grievant testified that he was not paid for accrued vacation.

The Employer contends that it has proven just cause for Grievant's discharge on several independent grounds: 1) excessive unauthorized absences from work; 2) falsification of time records for December 24 and 25; and, 3) breach of the conditions of his Last Chance Agreement. It argues that each ground, standing on its own, provides sufficient and just cause for the Grievant's discharge.

The Employer asserts that it engaged in progressive discipline concerning the Grievant's poor attendance, and that despite it being clear about the potential dire consequences of repeat conduct, the Grievant failed to report to work on time on December 23 and failed to call in his absence. It contends that even assuming his uncorroborated account of the flat tire is true, it does not excuse missing more than half his shift and failing to call in his absence or the emergency for almost five hours.

Independent of the unexcused absences, the Employer argues that the Grievant's falsification of time records on December 24 and 25 is such a serious act of misconduct that it justifies immediate termination.

Finally, the Employer contends that breaching the conditions of his Last Chance Agreement by this attendance and time record falsifications supplies yet another independent basis for his discharge.

Union's Position

The Union argues that the Employer has failed to meet its burden on each of the separate grounds for the the Grievant's discharge and generally asserts that the Grievant has been treated unfairly.

With regard to the unexcused absences, the Union contends that the December 23 late reporting was occasioned by events beyond the control of the Grievant and was remedied by working a modified shift. Furthermore, it argues that the Employer failed to apply progressive discipline concerning the Grievant's absences and that "late starts" or "tardiness" was not contemplated by nor in the October warning letter that the Grievant received. It flags the Grievant's period of perfect attendance after receiving the October 2015 warning letter - almost three months - as evidence that the Grievant had sustained improvement in his attendance record.

The Union strenuously argues that defining the Grievant's e-time errors as falsification is merely a ruse to validate an unjust termination. It points out that there have been extensive and pervasive errors in e-time reporting by employees, including instances of over-reporting of hours resulting in overpayments, that have been never been the subject of discipline let alone discharge. It highlights the fact that the Grievant was not enriched by any overpayment.

Finally, the Union asserts that the Employer's reliance on the Last Chance Agreement as a basis for discharge is misguided. First, it argues that the conduct at issue in the Last Chance Agreement - intimidation or threatening conducts to co-workers - has not been repeated. Second, it argues that the two-year term of the Last Chance Agreement is inconsistent with Article XV of the collective bargaining agreement that specifies discipline may only be maintained for a period of twelve months.

Discussion

Having heard, read and carefully reviewed the evidence and arguments, including the parties' briefs, in light of the above discussion, I deny the grievance.

There is no dispute that the Grievant was warned about his pattern of unexcused absences beginning in July 2015. The Grievant signed off on the October 2015 warning letter that clearly put him on notice that further instances of unexcused absences may result in his discharge. He was obviously concerned about this absence from work when he told his wife, "[W]e'll see what happens" and when he called the Union upon arrival at the plant to report that he had been late.

The Union's argument that the Grievant's failure to report on time on December 23 was an act of "tardiness" or a "late start" not contemplated by the October 2015 written warning is not persuasive. It is a generally accepted tenant of the employment relationship that one must arrive on time and perform his or her job and, if unable to do so, notify their employer and provide the reasons therefor. Grievant was not merely tardy or starting late. He appeared for his scheduled shift a full five hours after it was to commence - with no notice to the Employer. The Grievant's absence on December 23 left the Employer with impending shipping deadline and only one of its Packaging employees available on the day preceding a two-day Christmas holiday. That the Grievant successfully sought to make up his lost time by working extra hours does not excuse the underlying conduct.

The conditions of continued employment set out in the Last Chance Agreement are also compelling. The Agreement required that during its term the Grievant would "demonstrat[e] effective performance of his/her duties" and "follow all oral and written policies, procedures, directives, and instructions communicated from management or the supervisor". This he failed to do by his pattern of unexcused absences and despite the intervention of his Union on his behalf and by his Employer to bring to his attention the dire consequences of his failure to improve his attendance.

As to the Union's argument that the two-year term of the Last Chance Agreement conflicts with Article XV of the collective bargaining agreement and precludes the retention of any discipline beyond a twelve-month period, the language of Article XV makes it clear that the twelve month prohibition on retention of discipline applies only for purposes of *progressive discipline*. A Last Chance Agreement is not progressive discipline - it is an agreement to forego discharge and allow an employee to preserve his job while meeting certain strict conditions. Given the serious nature of the conduct

underlying the Last Chance Agreement, a two year term for strict adherence to all the conditions of the Agreement is not unreasonable.

The Union has generally alleged that the Grievant has been treated disparately compared to other employees. However, I find that there is no compelling evidence that any employee standing squarely in the shoes of the Grievant was treated any differently.

An employer's right to discharge or discipline an employee is limited by the requirement that any such action be for cause, and the employer has the burden of proving that the discipline or discharge of an employee was for just cause. The Employer has satisfied this burden.

"Just cause" or "cause", as the term is used in collective bargaining agreements, consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he or she was discharged. Other elements include a requirement that an employee knew or reasonably was expected to know ahead of time that engaging in a particular type of behavior would likely result in discipline or discharge, the existence of a reasonable relationship between an employee's misconduct and the punishment imposed, and a requirement that discipline be administered even-handedly.

For the reasons set forth above, I find that the Employer has proven just cause for the Grievant's discharge. Having reached this conclusion, I find it unnecessary to pass upon whether the Employer has met its burden with respect to the alleged falsification of time records.

AWARD

1. The grievance is denied.
2. The Employer had just cause to terminate the Grievant on January 18, 2016.

Dated at Chicago, Illinois this 14th day of November, 2016.

Gail R Moran, Arbitrator