

IN THE MATTER OF THE ARBITRATION BETWEEN

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| TEAMSTERS, LOCAL 792, |) | FEDERAL MEDIATION AND |
| |) | CONCILIATION SERVICE |
| |) | CASE NO. 11-51365 |
| |) | |
| Union, |) | |
| |) | |
| and |) | |
| |) | |
| CAPITOL BEVERAGE SALES, L.L.P., |) | DECISION AND AWARD |
| |) | OF |
| Employer. |) | ARBITRATOR |

APPEARANCES

For the Union:

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On May 6, 2011, in Minneapolis, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties when it discharged the grievant, Michael J. Sowers. Post-hearing written argument was received by the arbitrator on June 11, 2011.

FACTS

The Employer distributes beer and other beverages to liquor stores, sports arenas, bars and restaurants located in St. Paul and Minneapolis, Minnesota, and in the surrounding metropolitan area. Its business office, which is adjacent to its warehouse and distribution center, is in Fridley, Minnesota, a northern suburb of Minneapolis. The Union is the collective bargaining representative of the non-supervisory employees of the Employer who work as Sales Delivery Drivers ("Drivers"), Warehouse Employees and Helpers.

The grievant was hired by the Employer in August of 2006, and he was discharged on October 28, 2010. He started as a part-time Helper. In September of 2007, he began full-time work as a Driver, on an experimental route delivering "Monster" branded beverages. After about fourteen months driving the Monster Route, the grievant decided to give it up because it required him to do extra paperwork, and in October of 2008, he began to work as a full-time Helper. As I describe more fully below, Helpers sometimes are required to fill in for absent Drivers on what the parties refer to as a "relief route."

On October 28, 2010, Penny Crowley, the Employer's Human Resources Manager, sent the grievant the following letter discharging him:

The Company is terminating your employment effective immediately. You are being terminated because you loudly, insubordinately and repeatedly refused to complete your relief route when directed to do so by your supervisor, Jesse Steenberg, on Friday, October 22, 2010. Your insubordinate behavior was aggravated by the fact that it

was premeditated -- you told others earlier that morning that you were not going to complete your relief route that day. Your insubordination was also aggravated by the fact that you engaged in this behavior in the presence of other employees, which was obviously demeaning to Mr. Steenberg.

When we interviewed you yesterday to get your side of the story, you expressed no contrition and lied to us about the incident and other relevant matters related to it. This also entered into our decision to terminate your employment. The Company will not tolerate this behavior.

. . .

The Employer makes deliveries to its customers by truck on four regular "keg routes," for the delivery of kegs of beer, and on fourteen regular "case routes," for the delivery of beer and other beverages by the case. The customers on each route are usually the same, though each customer may order deliveries of varying quantities and on varying days of the week to fit the business needs of the customer. Thus, on a particular case route, the number of cases ordered for delivery may vary substantially from day to day.

Usually, each of the fourteen case routes is assigned to the same Driver, so that he can learn the delivery requirements of the customers on his route. The usual work of a Helper is to accompany a Driver and help with deliveries -- though, on days when a Driver has a small number of cases to deliver, no Helper is assigned to that Driver. Often, the Helper assigned to a particular route is the same.

On days when the Driver assigned to a route is absent for illness, vacation or other cause, the Employer usually assigns a Helper to fill in for the Driver. The parties refer to a Helper so assigned as a "Relief Driver." The Relief Driver performs all of the functions of a Driver on that day and receives the

compensation of a Driver rather than the compensation of a Helper, as established by Article 26 of the parties' labor agreement.

On Friday, October 22, 2010, when the events occurred that led to the grievant's discharge, the compensation payable to a Helper was \$23.20 per hour. The compensation payable to a Driver on a case route was determined by two components -- base pay of \$43.40 per day and a commission equal to \$0.2925 per delivered case. The tenth paragraph (unnumbered) of Article 26 provides:

Any employee (whether part-time or regular) who drives a route in relief of a regular route driver shall during those hours that he performs such relief services, be paid the base pay and commissions applicable to regular route drivers.

During the week that included Friday, October 22, 2010, the grievant was scheduled to work four shifts of ten hours, Tuesday through Friday, as a Helper -- though, as all Helpers are, he was subject to being assigned to work as a Relief Driver. When the grievant left work on Thursday, October 21, he was aware that his scheduled assignment for the following day was to work as a Helper, assisting a Driver on a case route. When the grievant arrived at the Distribution Center the next morning, however, he found that his assignment had been changed -- that he was now assigned to work as a Relief Driver on Case Route 6, which serves customers in downtown Minneapolis. The grievant was aware from the orders on Case Route 6 that only 150 cases were scheduled for delivery that day and that, if he were required to work as a Relief Driver on Case Route 6, he would be paid as a Driver, with total compensation of \$87.28 for the day -- \$43.40

in base pay plus \$43.88 in commission for the delivery of 150 cases. If his assignment for the day had not been changed, however, he would have worked as a Helper, earning \$23.20 per hour or \$232.00 if he worked the entire ten hours of his scheduled shift or \$185.60 if he worked only eight hours.

It is the Employer's policy to require Drivers to collect for merchandise on the day it is delivered -- if not at the time of actual delivery, then at some time later on the same day. This policy is based on a Minnesota statute that requires such same-day payment for alcoholic beverages. The evidence shows that, if a case route Driver cannot collect at the time of actual delivery, other means are often used to obtain payment on the same day. Thus, it is possible to meet the policy's requirement of same-day payment by having the case route Driver return later in the day to collect, by having the keg route Driver collect for the cases delivered earlier by the case route Driver, or by having the Employer's sales representative on the route collect if he will be near the customer's place of business that day.

The grievant had learned about the customers on Case Route 6 from previous assignments 1) to work as a Relief Driver on Case Route 6 and 2) to work as a Helper, assisting the regular Case Route 6 Driver. Because of this previous experience on Case Route 6, the grievant was aware that some customers on the route might not have employees available in the morning who were authorized to issue checks in payment for merchandise delivered.

Kurt A. Olson, a lead Warehouse Employee, is the person who usually makes the morning assignments when Drivers and Helpers start their shifts at about 6:00 a.m. Olson testified that the grievant was unhappy when he arrived at the Distribution Center at about 6:00 a.m. on October 22 and learned that he had been assigned as the Relief Driver on Case Route 6. The grievant told Olson that he was concerned that he was going to lose money because of the change in his assignment, and Olson told him that he had to make the assignment because he was short-handed that morning. The grievant told Olson that there were some stops on the route where he could not get paid until after 2:00 p.m.

The grievant left the Distribution Center and began to drive the delivery truck toward downtown Minneapolis. As he was en route, he called another Driver, Roger Rambo, on his cell phone, and during their conversation, the grievant told Rambo that there were "a couple" of stops on his route where he could not get paid until after 2:00 p.m. and that, because the size of the route was small that day, he expected to finish it in the morning. Rambo also testified that the grievant "was talking about" not making four stops where payment would not be available until the afternoon.

The grievant testified that the first delivery he made was to the Chicago-Lake liquor store, which is several miles from downtown Minneapolis. Though that customer sometimes has a large order for delivery, its order was small on October 22, and the grievant finished the delivery in about twenty minutes.

Because no one was available to pay him, he decided to come back later to collect for the delivery he had made.

The grievant gave the following testimony about the four stops he did not deliver to that morning -- Murray's Restaurant, Hubert's Bar, Campus Pizza and Haute Dish Restaurant. From the Chicago-Lake Liquor Store, he drove to downtown Minneapolis to Murray's Restaurant. Without delivering Murray's order, he asked a Murray's employee who came out of the building if someone was there who could issue a check. The employee told him the person who could pay had just gone to the bank and would be back sometime soon. When the grievant asked how soon she would be back, the employee said, "I don't know, noon," and went back into the restaurant. The grievant left without making the delivery.

The grievant testified that he drove toward Hubert's Bar, making stops on the way, and that, at Hubert's, he found out that "there was no one going to be there [to pay him] until real late, or later than what I was going to be." He left Hubert's without making its delivery.

The grievant testified that he drove to Campus Pizza and that "there was actually no one there, but I caught a guy that was like right next door, and he said, well, there's no one here usually until noon. And I had known before that from being with Dale [the regular Case Route 6 Driver] on a couple occasions that that guy was known not to show up sometimes." The grievant left without making the delivery.

The grievant testified that Haute Dish was "a newer account and I knew it was a late open -- they don't open until

later at night for a night scene." He did not make the Haute Dish delivery. He went back to the Chicago-Lake Liquor Store and collected a check covering his earlier delivery.

The grievant then returned to the Distribution Center with the merchandise ordered by Murray's, Hubert's, Campus Pizza and Haute Dish still on the truck. He arrived at the Distribution Center at about 10:40 a.m. As he drove his truck into what the parties refer to as the "drive-through," Jesse M. Steenberg, Delivery Warehouse Supervisor, went out to meet him at the truck, as he does when all route delivery trucks come in. According to Steenberg, the grievant and he had the following conversation as the grievant was getting out of the truck. The grievant said, "I have four stops on the truck that I'm not doing." When Steenberg asked him why not, the grievant replied, "I can't get paid until noon, and I'm not making any money on this route today." Steenberg told the grievant, "it's part of your route; you need to finish the stops," and the grievant said, "I'm not doing them." Steenberg testified that the grievant then turned away and walked into the Drivers' Room, where employees gather and where a computer is kept for Drivers to enter data concerning their deliveries.

Steenberg decided to telephone the Employer's Operations Manager, Michael Rustad, to get his advice on how to proceed. Rustad told Steenberg that the grievant "has to go do those stops; give him a direct order or fire him." Steenberg went to the Drivers' Room and saw that the grievant was entering his end-of-day report into the computer. Because there were other

employees in the room, Steenberg, as he was in the doorway, asked the grievant to step out into the drive-through area so that he could speak to the grievant in private. According to Steenberg, the grievant threw his arms in the air and in a very loud voice said, "I'm not doing the stops; I'm not doing them" and "I'm not making any money." Steenberg, said, "Mike, either you do the stops or don't come back next week." The grievant told Steenberg, "you can't fire me for that," and Steenberg said that he could. The grievant said he had already started his end-of-day report, and Steenberg told him that he could get new invoices printed by the office for the four non-delivered stops, but the grievant told Steenberg, "I'm not doing the stops." This conversation took about three minutes -- from 10:47 a.m. to 10:50 a.m.

Steenberg left the Drivers' Room, and, as he did so, the grievant said that he was going to call the Union's Steward, John M. Kintop. Kintop testified that the grievant called him that morning, told him what had happened and asked if he could get paid an hourly rate because of the small size of the relief route he had been assigned to. Kintop told him he would check into the question, but he told the grievant to make the four deliveries he had not made. Cell phone records show two calls between Kintop and the grievant that morning -- one from the grievant to Kintop at 10:55 and one from Kintop to the grievant at 10:58.

Steenberg testified that, at about 11:25 a.m., he met the grievant as the grievant was walking toward his truck and that they had the following further conversation. The grievant

asked, "well, can you at least pay me hourly?" Steenberg replied that "it doesn't work that way" and that "Drivers are paid commission." The grievant said he would take the matter up with the Employer's Human Resources Director, Penny Crowley, on Monday when she returned from vacation.

The grievant returned to the truck, drove it back to the four downtown stops he had missed on his first trip, delivered their orders and collected for them. The evidence shows that he left the Distribution Center at about 11:25 a.m. and returned to the Distribution Center about forty-six minutes later.

The Employer presented evidence that, based upon its internal costing of delivery-truck mileage, the grievant's second trip downtown cost about \$105.

The grievant was disciplined once previously, when on June 29, 2009, Steenberg issued a written warning to him. Steenberg gave the following testimony about that warning. On June 26, 2009, Steenberg did the morning scheduling because Olson was on vacation. The grievant had been scheduled to work as a Helper, assisting a Driver on what Steenberg described as a small route. When another Helper who had been scheduled to assist a Driver on a larger route called in sick, Steenberg changed the grievant's schedule, requiring him to work as the Helper on the larger route. At about 6:15 a.m., the grievant looked at the day's schedule posted in the Drivers' Room, saw that his route had been changed and said to Steenberg, "you need to switch me back." Steenberg told the grievant that he could not do that because he needed coverage on the larger route. The

grievant told Steenberg that he should change him back to his originally scheduled route or he would leave. The grievant walked out of the Drivers' Room. About ten minutes later, the grievant returned with Kintop, the Steward. Kintop asked Steenberg if he could change the grievant to a different route so that he could keep a dental appointment he had later that day. Steenberg told Kintop that "all [the grievant] had to do was come up to me and ask me to switch him to a route that I thought might get in earlier so he could make it to his dentist appointment, and I probably would have been able to do that if I had researched it a little bit more."

The Employer presented evidence that on thirty-seven days during 2010 before October 22, the grievant worked as a Relief Driver and earned base pay and commissions equal to about \$28 per hour rather than the \$23.20 hourly rate of a Helper.

DECISION

The parties have stipulated that the issue presented in this case is whether the grievant was discharged for just cause. In deciding that issue, I consider the parties' agreement about discipline and discharge, which is established primarily by the following excerpt from Article 8 of their labor agreement:

The Employer shall have the right to discipline or discharge employees for just cause. The Employer shall have the right to make and enforce reasonable work and safety rules. No employee shall be discharged without first having been given some progressive discipline (where appropriate under principles of just cause), except that no such progressive discipline need be given if the cause of discharge relates to dishonesty, drunkenness, falsification of Company records, misappropriation of either Company or customer property, unauthorized use of, or

tampering with or willful damage or destruction of Company equipment or product, improper use of drugs or alcohol, or any more serious violation of a Company work rule. . . .

Just cause and progressive discipline. The following discussion gives a fair summary of what is "just cause" as defined in American labor law. The essence of the employment bargain between an employer and an employee (or a union representing an employee) is that the employer agrees to provide the employee with pay and other benefits in exchange for the agreement of the employee to provide labor in furtherance of the employer's enterprise. When the employer and the employee (or a representing union) have also agreed that the employer may not terminate the employment bargain except for "just cause," they intend that discharge will not occur unless the employee fails to abide by his or her bargain to provide labor in a manner that furthers the employer's enterprise.

The following two-part test of "just cause" derives from that intention:

An employer has just cause to discharge an employee whose conduct -- either misconduct or a failure of work performance -- has a significant adverse effect upon the enterprise of the employer, if the employer cannot change the conduct complained of by a reasonable effort to train or correct with lesser discipline.

Under this two-part test, an employer must establish

1) that the conduct complained of has a serious adverse effect on the employer's operations and 2) that the employer has attempted to prevent repetition of the conduct by training and corrective discipline, thus seeking to eliminate any future adverse effect from the conduct before taking the final step of discharge.

The application of the first part of this test requires a determination whether particular conduct is significantly adverse to the enterprise. Some conduct may create such a threat to the enterprise that discharge should be immediate and need not be preceded by an attempt to change the conduct by training or progressive discipline, as required under the second part of the test. Such serious misconduct may be so adverse to an employer that the employer should not be required to risk its repetition. Thus, an employer should not be required to use training and corrective lesser discipline in an effort to eliminate the chance of repetition for most thefts, for drug use in circumstances that threaten the safety of others or for insubordination so extreme that it undermines the ability to manage operations.

Some misconduct or poor performance is only a slight hindrance to good operations. For example, a single instance of tardiness will not have a significant adverse effect on the operations of most employers. Conduct, however, that is only slightly adverse when it is infrequent, may have a significant adverse effect on operations if it occurs often. Thus, tardiness and absence that become chronic will usually cause a serious disruption to operations, and, if progressive discipline does not eliminate such poor attendance, it will accumulate in its adverse effect and constitute just cause for discharge.

In the present case, resolution of the stipulated issue requires, primarily, a determination whether the grievant's conduct on October 22, 2010, was insubordination so serious that the Employer should not be put at risk of its future repetition.

For the following reasons, I rule that, though the grievant's conduct toward Steenberg on that date was insubordination, it was not conduct so egregious that further progressive discipline 1) would be unlikely to correct it, or 2) would cause great risk to operations.

In Article 8 of the labor agreement, insubordination is not one of the expressly listed exceptions to the requirement of "some progressive discipline." I recognize, however, that some insubordination (often referred to as "gross insubordination") may be so flagrant that, even a first occurrence should be classified as seriously adverse to operations and should not require progressive discipline.

If, for example, the grievant had not returned to downtown Minneapolis at 11:25 a.m., to make the four deliveries he did not make earlier, the nature of his insubordination would clearly have been significantly adverse to the Employer's operations, justifying discharge without further discipline. It would have been so for two reasons, first, because his reinstatement would put the Employer at substantial risk that he might repeat such a successful refusal to work, and second, because other employees might understand his reinstatement as an indication that they might also refuse work assignments.

The grievant, however, did obey Steenberg's directive to complete his route, when he returned to downtown Minneapolis and made the deliveries at about noon. The return trip was made with Steenberg's knowledge and consent, after Kintop advised the grievant that he should make the deliveries. Nothing in the

evidence shows that delaying the four deliveries from the time of the grievant's first trip until the time of his second trip caused any inconvenience to the customers. It appears that the time they received the deliveries, at about noon, was not much different from the time they usually received deliveries from the Employer.

Though the grievant's initial behavior toward Steenberg on October 22, 2010, was insubordinate, its adverse effect on operations was limited. Because the grievant soon changed his mind and made the deliveries, as Steenberg had ordered him to do, the four customers were not affected. The Employer incurred extra expense of \$105 for the second trip downtown. The Employer argues that, despite the grievant's eventual compliance with Steenberg's order, other employees saw his loud refusal of the order in the Drivers' Room, thereby diminishing their respect for Steenberg's authority as a supervisor. The grievant's eventual compliance with Steenberg's order, however, implies an enhancement of respect for his ability as a supervisor. Indeed, Olson, who is a member of the bargaining unit, commented to Steenberg that he thought Steenberg had handled the confrontation well.

It is concerning that the circumstances of the present case have some similarity to the circumstances that gave rise to the written warning Steenberg gave the grievant when he resisted a change in his assignment on June 26, 2009. On that occasion, the grievant, instead of explaining to Steenberg that the change would conflict with his dental appointment, reacted impulsively,

without explaining his problem to Steenberg. In the present case, the grievant again failed to control his initial impulse, caused by his sense that it was unfair to have his compensation for the day reduced to that of a Relief Driver on a small case route -- even though, as the Employer points out, he benefited substantially on other days when he acted as a Relief Driver. The two examples of similar initial resistance to supervisory authority may indicate that, in the future, the grievant will again be unable to control his first reaction to what he thinks is an unfair order. Nevertheless, the circumstances here show little risk to the Employer from the use a disciplinary suspension, the next step in progressive discipline.

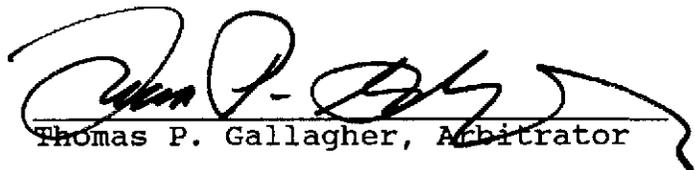
Accordingly, the award directs the Employer to reinstate the grievant to his employment. I do not award him back pay because it would be unfair to allow such a recovery when his insubordination was the primary cause of his loss. The award of reinstatement is conditioned upon the grievant's reimbursement to the Employer of \$105 -- the extra cost the Employer incurred because the grievant made a second trip to downtown Minneapolis on October 22, 2010, instead of completing his deliveries on his first trip. The time between the grievant's discharge on October 28, 2010, and his return to work shall be considered a long-term disciplinary suspension -- a further step in progressive discipline. Employees who become aware of the disposition of this case should be deterred from similar conduct, despite the grievant's reinstatement, by his loss of employment since October 28, 2010.

AWARD

The grievance is sustained in part. The Employer shall reinstate the grievant to his employment without loss of seniority and without back pay. The time between his discharge, on October 28, 2010, and his return to work shall be considered a long-term disciplinary suspension.

This award is conditioned upon the grievant's reimbursement of \$105 to the Employer -- the extra cost incurred by the Employer because the grievant's failure to delivery to four customers during his first trip to downtown Minneapolis on October 22, 2010, required him to make a second trip to make those deliveries.

August 28, 2011


Thomas P. Gallagher, Arbitrator