

**In the Matter of Arbitration Between
International Brotherhood of Teamsters,
Local 4 [Rayburn] and St. Paul Pioneer
Press**

OPINION AND AWARD

FMCS Case No. 060817-58901-7

GRIEVANCE ARBITRATION

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of Teamsters, Local 4
Richard A. Williams, Jr., Esq.
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Roseville, MN

On behalf of St. Paul Pioneer Press
Marc T. Chrismer, Esq.
St. Paul, MN

JURISDICTION

In accordance with the Collective Bargaining Agreement between St. Paul Pioneer Press and Teamsters Local 4 (Mailers), November 1, 2004 through October 31, 2007; and under the jurisdiction of the United States Federal Mediation and Conciliation Service, Washington, D.C., the above Grievance Arbitration was submitted to Joseph L. Daly, Arbitrator, on December 1, 2006 in St. Paul, Minnesota. Post-Hearing Briefs were filed by the parties on January 15, 2007. The decision was rendered by the Arbitrator on February 1, 2007.

ISSUES AT IMPASSE

Was Roy Rayburn discharged for just and sufficient cause; if not, what is the appropriate remedy?

The pertinent Collective Bargaining Agreement provisions are:

IV. PERTINENT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

SECTION 16

Employment, Discharge, Priority

- A. Except as limited by the terms of this Agreement, the Company reserves and retains exclusively to itself the traditional rights in the exercise of the functions of Management, including but not limited to the rights to manage and operate all Company facilities of any kind; to direct, plan and control all company operations . . .
- E. The manager may discharge employees for (1) incompetence, (2) neglect of duty, (3) violation of office rules or Company policies, which shall be posted in the Mailroom (4) and any other just and sufficient cause . . .

[Joint Exhibit No. 2]

The pertinent rules and policies are:

ST. PAUL PIONEER PRESS-DISPATCH COMPANY OFFICE RULES

- 13. Harassment of other employees by direct or indirect means is prohibited.

[Employer Exhibit No. 1]

PIONEER PRESS OFFENSIVE BEHAVIOR POLICY

The Pioneer Press is committed to providing a work environment free from offensive or degrading remarks or conduct. This includes any conduct which has the intent or effect of unreasonably interfering with an individual's or group's work performance, or which creates an intimidating, hostile or offensive work environment.

Such behavior includes inappropriate remarks about or conduct related to a person's race, color, sex, religion, national origin, marital status, disability, age or sexual orientation, or any other protected class in state, federal or local law . . .

[Employer Exhibit No. 1]

FINDINGS OF FACT

- 1. Roy Rayburn, a 19-year employee of the Pioneer Press and a machine operator, received a memo dated May 17, 2006 entitled "Termination of Employment". The memo stated, in full:

On April 26, you yelled at and made derogatory comments to Bob Turner about his disability and work performance which created an "offensive work environment" and discriminated against him based on his disability. This is a clear violation of

the company's "offensive behavior" policy. You have an extensive record of creating a hostile work environment as outlined in your February 9, 2006 suspension letter. These include a March 19, 2005 written warning for yelling and screaming and insubordination to your supervisor, a March 25th, 2005 suspension for insubordinate behavior and on February 9, 2006 you were again suspended for derogatory comments toward another employee.

Based on your past record and unwillingness to comply with The Pioneer Press's offensive behavior policy, as well as the company's Office Rules #13 (harassment of other employees by direct or indirect means is prohibited), your employment is being terminated effective immediately.

[Joint Exhibit No. 3]

2. In just over one year's time, Mr. Rayburn compiled the following discipline record:

- A. March 19, 2005, a written warning for insubordination [Employer Exhibit No. 5];
- B. March 25, 2005, a suspension for insubordination [Employer Exhibit No. 4];
- C. February 9, 2006, a suspension for derogatory and inappropriate behavior towards

a co-worker (Employer Exhibit No. 5).

The March 19, 2005 written warning involved Mr. Rayburn yelling and screaming at two different supervisors. The suspension on March 25, 2005 involved Mr. Rayburn repeatedly refusing direct orders of his supervisor. The February 9, 2006 suspension constituted behavior toward a co-worker. [See generally Post-Hearing Brief of Pioneer Press at 7].

3. The Pioneer Press is a general circulation newspaper published daily in St. Paul, Minnesota. Teamsters Local No. 4 is the recognized bargaining representative for mailroom workers at the Pioneer Press. The Pioneer Press and the Union are parties to a Collective Bargaining Agreement that covers the time period November 1, 2004 to October 31, 2007. Mr. Roy Rayburn was employed by the Pioneer Press as a journeyman mailer.

Mailroom employees are responsible for putting the newspaper together. The duties include taking the newspaper off the press, inserting all of the advertisement supplements into the newspaper and then bundling the newspapers and shipping them out to distribution centers. On April 26, 2006, the SLS 2000 was being operated by the mailroom employees. The SLS 2000 is an inserting machine that

takes newspapers off the press and puts the inserts (advertisements) into the papers. The SLS 2000 has a number of “heads” on it which is the arena from which the pre-printed advertising material are inserted into the newspaper. In order for the machine to operate efficiently, the employees are required to staff the various “heads” on the inserting equipment. They are required to make sure that there are no problems with the way the machine is handling the advertisements and to make sure that there is a continuous flow of product on the “head” so that no advertisements are missed.

4. On April 26, 2006 Mr. Roy Rayburn was working as a Machine Operator on the SLS 2000. One of the jobs of the Machine Operator is to instruct the individuals feeding inserts onto the “heads”. Ultimately, the Machine Operator is the person responsible for making sure that the heads are appropriately manned at all times and that the machine operates as efficiently as possible. [Post-Hearing Brief of Pioneer Press at 2]. The Machine Operator is paid a higher wage for these additional duties. When operating as a Machine Operator, Mr. Rayburn had a right to direct the employees on his machine. He had no rights to direct employees who were not working on the machine; nor did Mr. Rayburn have authority to discipline any employees since Mr. Rayburn was not a supervisor. [Post-Hearing Brief of Pioneer Press at 3].

Mr. Robert Turner, a journeyman mailer, was also working on the SLS 2000 as a head feeder on April 26, 2006. Mr. Turner was not able to complete all of the job duties of a journeyman mailer since he has a permanent restriction due to a prior work injury. These restrictions include no lifting over 20 pounds and no continuous bending, lifting or twisting.

5. During the course of the shift on April 26, 2006, Mr. Turner alleges that he was repeatedly harassed about his restrictions by Mr. Rayburn and others. [Post-Hearing Brief of Pioneer Press at 3; TR 14, 35]. Towards the end of his shift, Mr. Turner got a relief person so that he could go to the bathroom. A relief is a quick break to the bathroom or to grab something to eat or to perform some other task. [Post-Hearing Brief of Pioneer Press at 3]. The person taking the break is expected to find another person to cover the machine and then quickly do what is needed. [Id.] While Mr. Turner was

on relief, he had an “extra” [someone who doesn’t work full-time] to cover his spot. Anyone can be a relief person and the employer does not hire persons specifically for relief duties. [Id.]

6. When Mr. Turner was on his way back from the bathroom, he stopped at his locker to get his restrictions so that he could talk to his supervisor, David Lockwood, about them. It took Mr. Turner approximately three minutes to go to the bathroom and to get his restrictions from his locker. When Mr. Turner got back to the machine, he saw Mr. Lockwood standing by his machine. Mr. Turner engaged Mr. Lockwood in a conversation about his restrictions. While Mr. Turner was discussing matters with Mr. Lockwood, Mr. Joseph Cherry, the shop steward, asked Mr. Turner what he was doing. One of the duties of a shop steward is to be sure union rules regarding how people work on the floor and the fact that they show up for work and do the work are followed. Mr. Cherry yelled at Mr. Turner to get back to his “head” and get to work. Mr. Rayburn, also walked over to Mr. Turner, Mr. Cherry and Mr. Lockwood and told Mr. Turner to return to his head. Mr. Rayburn yelled at Mr. Turner and told him to “do [his] job”. Mr. Turner replied that he was talking to his supervisor about his restrictions. Mr. Rayburn then stopped the machine he was operating and began “screaming at Turner”. [Post-Hearing Brief of Pioneer Press at 3; TR 16]. Among the comments that Mr. Rayburn “screamed” at Mr. Turner were “you can’t do anything”; “you shouldn’t even be here”; “you’re useless”. [Post-Hearing Brief of Pioneer Press at 3-4; TR 16, 132]. Both Mr. Rayburn and Mr. Cherry “became angry” contends the Union. “In light of the fact that the entire line was shut down because of Turner’s desire to take care of personal business on shift time and on the time of all the other employees on the line, about a medical restriction that had nothing to do with his job which he was assigned that evening”. [Post-Hearing Brief of Union at 5]. Witnesses testified that Mr. Cherry, Mr. Rayburn and Mr. Turner had all raised their voices and were shouting at one another. [Id. at 5] During the argument, Mr. Rayburn continued “screaming” at Mr. Turner, and said that Mr. Turner “shouldn’t even be there”. [Post-Hearing Brief of Pioneer Press at 4; TR 16]. Mr. Rayburn further yelled at Mr. Turner that Mr. Rayburn would “tell

[him] when he was done talking to [him] and [he] was not done now”. [Post-Hearing Brief of Pioneer Press at 4; TR 16].

At some point during this argument, Mr. Rayburn said “let’s take this upstairs” which meant that the parties would go up to the supervisor’s office to try to resolve the matter. Both Mr. Turner and Mr. Rayburn then went to Darrell Stone’s office. Mr. Stone is the night side manager. Once they were in the office, Mr. Rayburn proceeded to yell about what Mr. Turner should be doing. The entire incident lasted approximately 10-15 minutes. During this confrontation, Mr. Rayburn asked for, and received, confirmation from Mr. Stone that he was, in fact, the Machine Operator and that Mr. Turner had an obligation to follow his directions with respect to operations of the inserter. Ultimately, Mr. Rayburn and Mr. Turner went back to operating the machine and the head, respectively, and the shift was finished.

7. Approximately a week later, after Mr. Turner returned to work from a vacation, he filed a formal harassment complaint against Mr. Rayburn with the Pioneer Press Human Resources Department. [Post-Hearing Brief of Pioneer Press at 4; TR 20, 21]. Mr. Turner testified he filed a complaint because Mr. Rayburn had “harassed” him many times in the past and Mr. Turner felt that if he did not file a complaint that it would keep happening. [Id.] Mr. Turner testified he had refrained from making complaints against Mr. Rayburn in the past because he had hoped that the two of them could work it out, but instead the harassment continued. [Id.]

8. Ms. Mary McDiarmid, a Human Resource Generalist with the Pioneer Press, conducted the investigation into Mr. Turner’s Complaint. After concluding her investigation, Ms. McDiarmid came to the conclusion that Mr. Rayburn had violated The Pioneer Press Offensive Behavior Policy. [Employer Exhibit No. 2] These findings were forwarded to Raul Vazquez, the mailroom manager, who ultimately made a decision to terminate Mr. Rayburn. [See Joint Exhibit No. 3 above in Finding of Fact No. 1]

9. The basic contentions of The St. Paul Pioneer Press are:

a. Mr. Rayburn is guilty of dischargeable misconduct because he violated the Pioneer Press offensive behavior policy and he violated company office rules;

b. There was just cause to discharge Mr. Rayburn [see Generally Post-Hearing Brief of St. Paul Pioneer Press 6-17].

10. The basic contentions of the Union are:

a. Mr. Rayburn did not violate any company policy. “An examination of the policy demonstrates that what [Mr. Rayburn] did was in no way related to the harassment policy”. [Post-Hearing Brief of Union at 10]. The Union contends that the policy cited by the company defines “harassment” as being actions that are based upon one of the prohibited classifications under state and federal law. The Union argues the parties are simply dealing here with general civility and not legal “harassment”. This notion of harassment used by the company is that the adverse action is being taken against an individual solely on the basis of an irrational classification such as race, age, sex, national origin or disability. The Union contends that in this case the interactions that Mr. Turner and Mr. Rayburn had are do solely to the lack of civility between them and had nothing to do with “harassment”. [Post-Hearing Brief of Union at 12];

b. The investigation conducted by Human Resources did not support his conclusions that there was a violation of the policy by Mr. Rayburn;

c. The company’s actions with respect to people engaged in behavior identical to Mr. Rayburn’s has not been consistent. The Union contends that even if Mr. Rayburn’s behavior is offensive and demeaning, it was not a violation of the policy. The Union contends that “there is not one scintilla of evidence that the incident was in any way, shape or form related to a disability. It was clearly related to [Mr.] Turner’s failure to return to his assigned head and his insistence on talking about an unrelated medical issue when he should have been manning his assigned head”. [Post-Hearing Brief of Union at 17];

d. The company's contention that this is progressive discipline is without support in the record. The Union contends that Mr. Turner was given a "ticket" by the Union for his behavior that evening. The Union has a right to control its member's behavior and if they do something which a Union steward finds improper while working, the Union can give a "ticket to the member". Mr. Turner alleges that the Union gave him the ticket because of his complaint against Mr. Rayburn.

11. Essentially, the company contends that because of Mr. Rayburn's past disciplines and because of the April 26, 2006 incident, the termination is for just cause.

On the other hand, the Union contends Mr. Rayburn did not, in fact, violate any policy or company rules involving harassment. Rather, this incident was simply a lack of civility on the part of both Mr. Rayburn and Mr. Turner, which is not a violation of company policy or company rules. "More importantly, however, is the fact that even if the company had intended at one point and time to create a general civility policy, it not only failed to make that clear in the policy itself, but it did not do so in the application of the policy". [Post-Hearing Brief of Union at 11]. The Union asks that the grievance of Mr. Roy Rayburn be sustained and that he be reinstated with full back pay and benefits. [Id. at 22].

DECISION AND RATIONALE

"Harassment of other employees by direct or indirect means is prohibited" [Employer Exhibit No. 1]. This is clear and rational. An employee must not be harassed by other employees. Further, when a person is harassed by inappropriate remarks or conduct related to his race, color, sex, religion, national origin, marital status, disability, age, or sexual orientation or other protected class in state, federal or local law, it is legally wrong. Not only is it legally wrong, but it is "offensive behavior" according to the St. Paul Pioneer Press Offensive Behavior Policy. So if Mr. Rayburn, a person who has already been disciplined three separate occasions for his inappropriate behaviors was in fact harassing Mr. Turner because of his disability, then he should be terminated under the progressive discipline policy of the Pioneer Press.

But the question, of course, raised by the Union is valid. Did Mr. Rayburn actually violate the St. Paul Pioneer Press Offensive Behavior Policy and the St. Paul Pioneer Press company Office Rules? Was he harassing Mr. Turner because of his disability? The Union argues Mr. Rayburn was not harassing Mr. Turner because of his disability. The Union seems to accept that both Mr. Turner and Mr. Rayburn were acting toward each other in a highly uncivil manner. However, the Union argues that this was not a violation of the harassment language under the Office Rules nor under the Offensive Behavior Policy. The Union contends that the Human Resources investigation was simply wrong in the conclusions it reached. The Union concludes that the argument had nothing to do with Mr. Turner's "disability" since everyone agrees his restrictions did not apply to the work he was doing that evening. The Union contends that Mr. Turner was simply not doing his job properly.

The Company views the facts quite differently. "Due to the constant harassment [Mr. Turner] had been getting over the course of his shift from [Mr. Rayburn] and others about his restrictions, [Mr.] Turner on the way back from the bathroom stopped at his locker to get his restrictions so that he could talk to his supervisor, Dave Lockwood, about them". [Post-Hearing Brief of St. Paul Pioneer Press at 3]. Yet, there were no facts introduced at the arbitration hearing to show that Mr. Turner was in fact "being harassed" over the course of his shift about his work because of his disability. The only testimony at the hearing shows "yelling", "screaming", and "loud" words in anger when Mr. Turner returned from the bathroom and both Mr. Cherry and Mr. Rayburn told Mr. Turner to get back to work. Then a series of exchanges took place between Mr. Rayburn, Mr. Turner and Mr. Cherry which can be characterized as "uncivil" but cannot be characterized as "harassment" in violation of the St. Paul Pioneer Press Offensive Behavior Policy nor in violation of the St. Paul Pioneer Press dispatch company Office Rules. As the uncivil exchange continued, Mr. Rayburn suggested that they "take it upstairs". And the parties did so.

Nothing in the exchanges between Mr. Rayburn and Mr. Turner indicates that Mr. Turner was being harassed by inappropriate remarks related to his disability. He was, however, being addressed in a

“hostile manner” which Mr. Turner took to mean he was being intimidated in a manner which he found offensive because of his disability, i.e., his work restrictions due to a previous injury. Mr. Rayburn, on the other hand, viewed Mr. Turner as a person who had walked away from the machine for a break and now was having a discussion with a supervisor about something totally irrelevant from the work on the machine. Mr. Rayburn felt that Mr. Turner was not carrying his weight. All agree that Mr. Turner’s restrictions had no application to the work he was doing that evening on the specific machine.

So, there was a misunderstanding, a misperception. Mr. Rayburn was not harassing Mr. Turner because of his disability. The fact that Mr. Turner perceived Mr. Rayburn’s “hostile” words and delivery of those words to be focused on his disability does not prove by a preponderance of the evidence that Mr. Turner was being harassed.

On the other hand, Mr. Rayburn has three previous disciplines in a little over a year which relate to his lack of control over his temper. Mr. Rayburn is now on very thin ice. If Mr. Rayburn’s words and behavior were interpreted by this arbitrator to be focused on Mr. Turner’s restrictions, then this arbitrator, based on progressive discipline, would uphold the discipline of termination. However the facts do not show by a preponderance of the evidence that Mr. Rayburn was harassing Mr. Turner by inappropriate remarks or conduct related to Mr. Turner’s disability. But Mr. Rayburn was being very “hostile” to Mr. Turner. The St. Paul Pioneer Press Offensive Behavior Policy states clearly that “the Pioneer Press is committed to providing a work environment free from offensive or degrading remarks or conduct. This includes any conduct which has the intent or effect . . . or which creates an intimidating, *hostile* or *offensive* work environment”. [Employer Exhibit No. 1, emphasis added]

This is a close case. Close because Mr. Rayburn has a history of such disciplines. Close because Mr. Turner could have reasonably concluded that he was being harassed because of his disability. On the other hand, “the employer admits that an industrial plant is not a convent, and no managerial directive will motivate employees to stop swearing” [Post-Hearing Brief of St. Paul Pioneer Press at 13]; or, perhaps, even treating each other in an uncivil manner.

Based on the above rationale, it is held that the grievance is sustained. Mr. Roy Rayburn may return to his job with benefits and seniority. However, Mr. Rayburn will be disciplined with a suspension from the time of suspension until he returns to work. He will receive no back pay. Mr. Rayburn must understand that he has come as close as possible to being terminated. He has violated the St. Paul Pioneer Press Offensive Behavior Policy by creating a hostile and offensive work environment, but he is not being terminated because he was not harassing Mr. Turner based on his disability. But he was being hostile and creating an offensive work environment.

Essentially this arbitration is giving Mr. Rayburn one last chance. His hostile and offensive behavior must stop now. It is held that Mr. Rayburn may return to work immediately with seniority and benefits, but without back pay. “ ‘Equity’ may also be a factor in the formulation of a remedy [in Arbitration]”. *Elkouri and Elkouri, How Arbitration Works, 6th Edition* at 482 (BNA 2003). “In cases where the remedy can be divisible, such as back pay or seniority as compared to reinstatement or reprimand, and where merits are somewhat split, and all—or—nothing solution does not seem to be equitable or effective. Thus, in this case, the arbitrator concludes that the balance weighs partially...” *Chestnut Operating Company*, 82 LA 121, 123 (Arbitrator Zirkel, 1983).

Mr. Rayburn will get his job back; but, because of his hostile and offensive behavior, he will get no back pay. This is an equitable decision. The balance weighs in part on the fact that Mr. Rayburn did not harass Mr. Turner based on his disability. But Mr. Rayburn did act toward Mr. Turner in a hostile and offensive manner in violation of the Pioneer Press Offensive Behavior Policy. This is likely Mr. Rayburn’s last chance to keep his employment at the Pioneer Press. Mr. Rayburn may return to his job on February 5 or as soon as possible thereafter.

Dated: February 1, 2007.

Joseph L. Daly
Arbitrator