

AMERICAN ARBITRATION ASSOCIATION

In the Matter of:

United Food and Commercial Workers Union,

Case No. 01-20-0005-0405

Local 1445

([REDACTED])

And

[REDACTED]

Before: Marilyn H. Zuckerman, Esq., Arbitrator

Appearances:

For the Employer: [REDACTED]

For the Union: Alfred Gordon O'Connell, Esq.

Dates of Hearing: September 15, 2020; October 21, 2020

Briefs Received: December 14, 2020

BACKGROUND

When the Grievant, [REDACTED], was terminated on February 17, 2020, he had worked for the Company for 45 years. He had held a variety of positions in the Grocery Department including Working Foreman. He bid into the Fresh Checker position about 1 1/4 years before he was terminated.

The Company alleges that on February 12, 2020, ████████ violated the Company's Standards of Behavior Policy (Jt. Ex.2) by performing incentive-eligible produce checking duties on an off-standard (non-incentive-eligible) replenishment tag. The video footage from February 12 (Jt. Ex. 8) showed ████████ checking produce pallets and performing other checking duties while on an off-standard replenishment tag. The time that ████████ spent performing these produce checking duties should have been counted towards his produce checking efficiency on which his produce checking incentive payment was based. Since ████████ performed these produce checking duties while on an off-standard tag, his reported produce checking time understated his actual produce checking time.

The Company alleges that ████████ intentionally misreported the amount of time that he spent checking produce by failing to report all of that time on the produce checking tags. The result was that he gave the mistaken impression that he was checking produce much faster than he actually was. His reporting of only a fraction of the time that he spent checking produce on produce checking tags led to the payment to him of incentive pay which he was not entitled to.

Fresh Checker position

By way of further explanation, a Fresh Checker in the produce area receives his checking assignments on clipboards located in the produce receiving office next to the produce receiving area. Each clipboard contains a Purchase Order. Once the Fresh Checker has picked up clipboards in the receiving office, he enters the receiving area where the pallets of produce are staged for inspection before they are put away for storage in the distribution center. A single PO may include dozens of pallets. The checker inspects each of the pallets to ensure that each contains the proper produce and the correct quantity of produce and is not damaged or out of

date. After the Fresh Checker has inspected each of the pallets covered by a particular Purchase Order, he puts a sticker on each of the pallets so that the forklift drivers know that the pallets are ready to be put away in the warehouse. The checker completes and signs off on the PO paperwork and may make notes of any issues that have arisen during the checking process. The Fresh Checker goes through this same process throughout the workday until all of the POs have been checked.

Fresh Checkers are paid a base hourly wage and certain premiums and incentives. While the premium rates are for working certain shifts or in certain conditions, the incentives are for exceeding expected productivity levels. A Fresh Checker is eligible to earn a produce checking incentive and a separate meat checking incentive. The produce checking incentive is calculated based on the Fresh Checker's weekly produce checking efficiency. Fresh Checkers are expected to check an average of at least 67 pallets per hour over the course of a workweek. If the Fresh Checker's produce checking efficiency for the week exceeds 67 produce pallets per hour, the Fresh Checker earns a produce checking incentive payment for that week.

The produce checking incentive is calculated by subtracting the amount of time that the checker spent checking produce during the week from the amount of time that the checker would have spent checking the same volume of produce had he worked at the 67 pallets-per-hour standard. For every hour or part of an hour that the checker saves by working faster than the 67 pallets per hour standard, the checker receives an incentive of \$16.

Fresh Checkers in the produce receiving area sometimes also check meat POs if a mixed shipment of produce and meat is delivered to the produce receiving area. If the Fresh Checker checks meat, he is also eligible to earn a meat checking incentive, which is separate from the

produce checking incentive. The meat checking incentive is based on a different formula than the produce checking incentive.

If a Fresh Checker is waiting for a new checking assignment and/or has completed his checking assignments for the day, he is expected to contact the Working Foreman to obtain a different assignment to work on until his shift is over or until more checking work becomes available. The Fresh Checker is eligible to earn an incentive related to the type of work he is then performing. If the Fresh Checker is assigned to do put-aways, the checker is eligible to earn a put-away incentive for that work, but this is based on a different formula from the produce or meat checking incentives.

In order for all of the different incentives to be calculated accurately, the checker must actually be clocked in on the correct checking tag. If the checker does some of his checking duties before or after being on the correct checking tag, then his pallets-per hour efficiency rate would be over-stated and he would be paid an unfairly high incentive payment.

The Company maintains that [REDACTED] knew how the incentive program worked before he became a Fresh Checker. While working in the grocery department, he was a grocery loader and used the tagging process to earn a loading incentive. As the Working Foreman in the grocery department for 6 years, he directed the work of associates who used the tagging system for incentive pay purposes. He also worked as a forklift operator when he recorded his time spent on the forklift to earn a put-away incentive.

[REDACTED] received a week's training for the Fresh Checker job. [REDACTED] trained [REDACTED] during his first five days in the position. [REDACTED] asked [REDACTED] questions. [REDACTED] did not complain to Management about the training, but he was not satisfied with it. He maintains that

his predecessor in the position should have trained him. [REDACTED] was a Boston Checker which is a different position.

[REDACTED] Counselings

Management claims that as a Fresh Checker, [REDACTED] repeatedly misused the tagging system to his financial advantage. He routinely performed produce checking duties while working on a non-produce checking tag, thereby reducing the amount of time recorded for his produce checking duties and increasing his produce checking efficiency. In this way, he inflated his produce incentive pay. Management gave [REDACTED] a series of counselings and meetings to try to help him correct his behavior. The Company maintains that each time, Management told [REDACTED] that he should be on the tag that corresponded to the activity that he was performing.

1. September 23, 2019 Counseling: Mr. [REDACTED] instructed to use a checking tag while performing checking duties.

On that date, Supervisor [REDACTED] counseled [REDACTED] on his tag usage. [REDACTED] had determined that [REDACTED] was spending less than 20 hours per week on a produce checking tag and spending the remainder of the week on off-standard tags. This was inconsistent with the volume of produce that [REDACTED] was actually checking. It was clear to [REDACTED] that [REDACTED] was not on a produce checking tag for all of the time that he was actually checking produce. [REDACTED] counseled [REDACTED] and “asked him to be on standard more. I gave him the clear expectation that he is not to use any tags while checking.” (Jt. Ex. 3, p. 7) [REDACTED] also instructed [REDACTED] that if there were no POs available for checking, then [REDACTED] should perform forklift (i.e., put-away) duties or check with a foreman to get another assignment and then use the tag for that assignment.

During this conversation, [REDACTED] gave [REDACTED] permission to use an off-standard replenishment tag for the first 10-15 minutes of the day to give him time to walk from the entrance of the building to the produce receiving area and to get settled before starting his checking assignments.

2. January 3, 2020 Discipline: [REDACTED] is issued Step 1 Discipline for Poor Performance Related to the Tagging/Incentive Process.

[REDACTED] received a Step 1 verbal counseling on this date from the Fresh Department Supervisor, [REDACTED] (Jt. Ex. 4) The issue was that [REDACTED] put-away rate per hour on his forklift assignments was only 7 pallets per hour during the previous week, when the expected rate of put-aways was 22.5 pallets per hour. The put-away incentive is a group incentive for all of the associates who worked on put-aways in a given week. [REDACTED] put-away rate was low and he caused the entire put-away group to lose their incentive for the week.

One reason that [REDACTED] put-away rate was low was that he was reporting produce-checking duties on put-away tags. Another reason that [REDACTED] put-away rate was low was because he was switching from a produce checking tag to a put-away tag prior to taking his breaks. He was supposed to take his break while on the produce checking tag. [REDACTED] counseled [REDACTED] that he needed to take his break on the tag of the activity that he was performing at the time of his break and that he should only be on the put-away tag if he was actually performing put-away duties.

3. January 8, 2020 Fresh Crew Meeting: [REDACTED] Instructed to Use the Tag that Corresponds to the Assignment He Is on.

Union Representative ██████ participated in the January 3, 2020 counseling meeting and requested that Management hold a meeting for the entire Fresh Crew to review expectations. On January 8, 2020, ██████ held a meeting with the Fresh Crew including ██████. ██████ gave the instruction that employees needed to ensure that they were performing duties for the tag that they were punched into. (Jt. Ex. 3, p. 6)

4. January 9, 2020 Fresh Crew Meeting: ██████ Again Instructed To Use The Tag That Corresponds to the Assignment He is On.

On January 9, 2020, ██████ held another crew meeting and again told the Fresh Crew including ██████ that they needed to be on the tag of the assignment that they were working on. He reminded the Fresh Crew employees that they needed to go on break while punched onto the tag that they were working on at the time of their break.

5. January 22, 2020 Counseling: ██████ Reprimanded for Performing Produce Checking Duties While On A Meat Checking Tag.

On this date, ██████ again met with ██████ to counsel him on the misuse of the tagging process. (Jt. Ex. 3, p. 4) This time, ██████ was performing produce checking duties while on a meat checking tag. ██████ showed ██████ a report from the prior 7 days of tag usage with several examples of ██████ meat checking tags having disproportionately long times with few meat pallets checked. ██████ explained to ██████ that his meat-checking efficiency was so low because he was checking produce pallets while on a meat checking tag and thereby improperly gaining efficiency on his produce time. ██████ explained that he punched all of the tags for a delivery at once regardless of whether they contained meat or produce, and therefore whichever tag he punched last recorded all of his checking time for that delivery. ██████ told

██████ that he should be checking meat and produce on separate tags and while punched onto the appropriate meat or produce checking tag.

6. February 3, 2020 Step 2 Warning: ██████ Warned That His Continued Misuse Of the Tagging System Would Result in Termination.

██████ apparently continued to check produce while on a meat checking tag thereby inflating his produce checking incentive. Therefore, on February 3, 2020, ██████ issued ██████ a Step 2 warning. ██████ told ██████ that any further instance of tag misuse would lead to discipline up to and including termination. Union Rep ██████ was present during this meeting.

7. February 5, 2020 Fresh Crew Meeting: ██████ Again Reminded to Be On the Tag That Corresponded to the Activity That He Was Performing.

On this date, Union Rep ██████ addressed the Fresh Crew employees including ██████ that all Checkers had to be checking the product that corresponded to the tag that they were on.

██████ again explained the system to the Fresh Crew.

According to the Company, ██████ continued to fail to follow instructions and then was caught on video performing produce checking duties while on an off-standard tag on February 12, 2020. On that date, ██████ Operations Manager, was conducting one of his routine reviews and noticed that the tagging entries for ██████ reflected that he checked three produce orders consisting of dozens of pallets in only ten minutes. (Jt. Ex. 9, p. 1) ██████ obtained and reviewed video footage from February 12. ██████ actually spent approximately thirty minutes checking the three POs at issue, but ██████ reported checking time was low because he punched in on an off-standard replenishment tag for approximately 20 of the 30 minutes that he

spent checking POs. This meant to the Company that [REDACTED] was again purposely manipulating his tag entries to obtain improperly high incentive payment. The Union's and [REDACTED] response will be detailed further in this fact section.

Because of [REDACTED] actions in allegedly intentionally misrepresenting the amount of time that he spent checking produce in order to obtain improper produce checking incentives, [REDACTED] recommended to [REDACTED] Director of Distribution Operations, that [REDACTED] be terminated. [REDACTED] suspended [REDACTED] on the same day, February 12. The Company then called [REDACTED] at home on February 17 and terminated him. He was terminated for alleged insubordination, dishonesty and a falsification of time records. These were all violations of the Company's Standard of Behavior Policy. [REDACTED] based his decision on the video evidence that showed [REDACTED] performing produce checking duties while on an off-standard tag. [REDACTED] was well aware of the prior warnings that [REDACTED] had received.

The Union filed a grievance challenging [REDACTED] termination. (Jt. Ex. 10) The Step 3 grievance meeting was held on March 20, 2020. During this meeting, [REDACTED] explained why he thought that his behavior was acceptable. He complained about the way that he was trained by [REDACTED]. He also said that if there had been a time clock in the receiving office, he would have punched onto a produce checking tag before beginning to perform his produce checking duties. The Union's grievance request to reinstate [REDACTED] was denied and the present arbitration followed.

Union's Case at Arbitration

The Union maintains that the training that the Grievant received for the Fresh Checker position was inadequate. He received five days of training with a co-worker, [REDACTED]. The

Company did not provide a job description or standard operating procedure for the position or even a checklist as to what the training was supposed to cover. ██████ asked ██████ questions, but the training was not organized. According to ██████ ██████ did not provide any training as to when to use the different tags. Then as different supervisors rotated through, they seemed to have different perspectives as to how and when to use indirect tags. At arbitration, ██████ testified that he was told by different supervisors to use different tags for the same thing. He was told to use all four tags at once. He received different instructions from the different supervisors as to which tags to use for problem pallets.

When ██████ arrived at the receiving office first thing in the morning, the clipboards with Purchase Orders were often not ready because the tags had not yet been stamped by Quality Assurance. ██████ would then try to straighten out the POs and get them sorted and attached to the clipboards. He would bring them out to the various produce receiving areas so that the QA bargaining unit employees could stamp them as ready to be checked.

Assuming that the clipboards were ready to go on his arrival, ██████ would go to the dock area where the pallets were waiting to be checked. There is a time clock on the dock to scan a produce tag, but there is no scanner in the produce receiving office. Therefore, an employee cannot scan onto a checking tag until he gets out onto the dock. After scanning on and finishing with all of the clipboards from the initial round of checking, ██████ would return to the produce receiving office to get another round of clipboards to check. If there was no checking work to be done, he would hop onto a forklift to do put-aways or seek out a supervisor for another assignment.

At arbitration, ██████ testified that he would often find a gap in the deliveries in the late morning and would then do put-aways. It was during the slow period that he would also take his break. He might have been on put-aways for 10 or 15 minutes and then on a 20 minute break. Then, if he went back down to the receiving office after break because another truck had come in, he may have only put away a handful of pallets although he might have been on a put-away tag for up to 40 minutes and had a very low pallet count.

The Union maintains that the required method of tagging on and off for a mixed delivery of meat and produce was unclear even after the testimony of four different supervisors. Supervisor ██████ testified that an employee was allowed to work on multiple POs at once. It was his expectation that in a mixed delivery, the checker would do the meat first and then the produce on separate tags. But ██████ testified that he never explained this to ██████

The Conflicting and Confusing Messages Received by the Grievant

On April 9, 2019, ██████ spoke with ██████ about his tag usage saying that ██████ was “to use off standard put tags when fixing problem pallets” and indicating that ██████ “would let him know how to manage his off time.” (Jt. Ex. 3, p.8) ██████ never got back to ██████ about this.

On September 23, 2019, Supervisor ██████ spoke to ██████ about spending more time “on standard.” ██████ gave ██████ permission to use an off-standard rep tag for the first 10-15 minutes of the day. (Jt. Ex. 3, p. 7)

On January 3, 2020, ██████ received a verbal counseling for poor work performance. (Jt. Ex. 4) ██████ had been on a put-away tag and fell significantly below the time expectations for forklift drivers using those tags. The Union grieved the verbal counseling and explained that

██████ was checking errors at the time and that there was no tag to punch onto during the times that he needed to address these errors. (Jt. Ex. 5) The Union requested that ██████ be given a clear understanding of the checking job along with an SOP. The Company did not provide this understanding or an SOP, but rather upheld the discipline for “low productivity.” This was the first time that ██████ had ever been disciplined on this basis.

On January 22, 2020, Supervisor ██████ met with ██████ and Union Steward ██████ to discuss the concern that ██████ may have been checking produce on a meat checking tag. (Jt. Ex. 3, p. 4) During the meeting, ██████ spoke at length about his checking process, but ██████ did not understand what ██████ meant. At arbitration, ██████ testified that ██████ spoke for about 45 minutes, but ██████ could only remember one thing that ██████ said: that is, if he had multiple tags in his pocket, he scanned them all at once. ██████ ended the meeting saying that he would get back to ██████ and ██████ which ██████ never did. While ██████ testified at arbitration that he gave ██████ specific instructions as to how to proceed, this testimony does not square with the contemporaneous note that he made. Supervisor ██████ testified that he had never before instructed ██████ to check produce and meat POs separately when they came in together on the same order, so this January 22 meeting was the first time that this issue was raised with ██████.

On February 3, 2020, Supervisor ██████ gave ██████ a first written warning for checking produce while punched in on a meat tag. This was the same issue that ██████ was going to get back to ██████ about and never did. At arbitration, both ██████ and Supervisor ██████ testified that the written warning was a result of the January 22 incident. The Union maintains that it was inappropriate for Management to use the January 22 incident both as notice of expected behaviors and as justification for the discipline.

The Facts Giving Rise to the Grievance

The video evidence demonstrates that Ha [REDACTED] arrived in the produce receiving office by 5:31 a.m.. (Jt. Ex. 8) For the next 10 minutes, [REDACTED] helped the clerk to get organized in putting the clipboards together. Manager [REDACTED] testified that [REDACTED] should have been scanned onto a produce checking tag, but the Union replies that there is no time clock in the produce office to scan onto a tag and also that Quality Assurance had yet to stamp the tags, so [REDACTED] could not yet scan on and start checking.

[REDACTED] left the receiving office at 5:44 and headed out to the dock. QA had yet to sign off on the produce tags, so [REDACTED] could not begin checking the produce in. [REDACTED] placed the clipboards on the table by the timeclock at 5:46 and headed to the 55-degree dock to leave the clipboards for those products to be inspected by QA. He returned to the main produce dock at 5:48. The QA person still had not stamped the POs. [REDACTED] then walked around the produce pallets to see which produce was there, but he still could not scan the tags to check the produce.

QA employee [REDACTED] appeared at 5:49 and began working on the clipboards at the time clock. After [REDACTED] finished his work at 5:50 a.m., [REDACTED] scanned in his produce tags. Then [REDACTED] checked the produce pallets and applied the stickers to the pallets once he completed his check.

Though the Company's video ended at 6:01 while [REDACTED] was standing at the time clock, [REDACTED] associate assignment report shows him punching on and off produce tags for the next 18 minutes through 6:19 a.m.. (Jt. Ex. 9) Therefore, the Union maintains that the only alleged aberration on February 12 is what occurred at the very beginning of [REDACTED] day. This time was complicated by the specific instruction from Supervisor [REDACTED] to [REDACTED] on September 23,

2019 to use an off-standard tag at the beginning of the day; the fact that there was no time clock in the produce office; and the fact that [REDACTED] was not able to officially check the pallets until QA had signed off on the POs.

The Company's Investigation and Decision to Discharge

After reviewing the video and [REDACTED] times on the produce tags on the morning of February 12, the Company suspended him on that day and terminated him on February 17, 2020. The Company made its decision to discharge without having given [REDACTED] notice of the charges against him or an opportunity to address the specific allegations. The Company simply fired [REDACTED] by telephone on February 17 without ever interviewing him about the facts.

The Union grieved the discharge and it was only during the grievance procedure that the Company talked to [REDACTED]. On March 20, [REDACTED] explained his view of the facts. But the Company had made up its mind and refused to reinstate him. Arbitration followed.

Stipulation of Fact

Mr. [REDACTED] served a 10-month unpaid suspension from the Company in 2012 to 2013.

The parties also stipulate that the Company did not rely on this prior unpaid suspension in terminating [REDACTED] employment in 2020.

Stipulated Issue

Did the Company have just cause to discharge [REDACTED]? If not, what is the appropriate remedy?

Positions of the Parties

The Company

Management argues that ██████ improperly performed produce checking duties while on an off-standard tag on February 12, 2020 which justified his termination. The video footage and tag usage data on that date speak for themselves ██████ improperly performed approximately 20 minutes of produce checking duties while punched into an off-standard replenishment tag. He thereby increased his reported checking efficiency and his produce checking incentive. ██████ was representing to the Company that it took him 10.73 minutes to check the three POs, when it actually took him approximately 30 minutes. He took approximately 20 minutes off of his efficiency rate for these three POs and was only on the produce checking tag for 33% of the time that he was actually checking the POs. The Company maintains that ██████ final act of improperly padding his incentive pay justified his termination.

At arbitration, ██████ acknowledged that he performed produce checking duties while on an off-standard tag. He testified that he punched onto an off-standard tag at 5:21 a.m. and that he remained on that tag for 29 minutes until about 5:50 a.m.. During this time, he was organizing clipboards with produce POs and organizing checking stickers with the corresponding clipboards. According to Management, these are clear checking functions. While ██████ denied at arbitration that he was filling in any paperwork on the clipboards, the video shows him writing on different clipboards with POs.

Management maintains that ██████ admitted that during the twenty minutes that he was clocked onto an off-standard tag, he was inspecting produce pallets in the receiving area. This

activity is quintessential checking activity and is confirmed on the video. During this time, [REDACTED] walked by the time clock several times.

He maintains that he did not take notes or start any checking activity during those twenty minutes because he was waiting for a QA associate to stamp his clipboards. The Company disagrees with [REDACTED] characterization that he was waiting for QA to do their job before he could do his. Management argues that the role of QA is immaterial in this arbitration [REDACTED] was terminated for performing the checking duties seen on video on February 12 while punched onto an off-standard replenishment tag. He was not terminated for waiting for QA to come to stamp his clipboards. Management argues that the video clearly shows [REDACTED] walking around and inspecting the pallets and writing on the PO clipboards, not waiting for a QA stamp as he claimed. __

The Company maintains that [REDACTED] knew that he should have been on a checking tag during that time. At the Step 3 grievance meeting, Ha [REDACTED] told the Company that if there had been a time clock in the receiving office, he would have punched on to a produce checking tag on his arrival in the office. There is a time clock on the receiving dock. The video shows that [REDACTED] stopped next to the time clock twice; that he drove by the time clock several times; and that he spent six minutes working within a few feet of the time clock. According to the Company, he had numerous opportunities to punch in on a produce checking tag and did not do so.

The Company next argues that it trained, counseled and warned [REDACTED] that his repeated misuse of the tagging system would result in termination. According to Management, the evidence reveals that the Company repeatedly told [REDACTED] that he had to be on the tag of the activity that he was performing and that if he went on break, he had to remain on the tag that he

was on prior to the break. The Company maintains that [REDACTED] was informed seven times in the five-month period leading up to his termination that he needed to be on the tag that corresponded to the work he was performing. He was told this individually by [REDACTED] and [REDACTED]. He was told in fresh crew meetings. And he was told by Union Rep [REDACTED]. [REDACTED] also received progressive discipline including a Step 1 verbal notice and a Step 2 written warning regarding his improper tag usage. The Step 2 warning stated that any further instances of [REDACTED] performing checking duties on the wrong tag could lead to termination.

The Union would argue that [REDACTED] was not on notice because each instance of counseling and discipline addressed a slightly different method that [REDACTED] was using with different tags. But Management states that the key thread in all of the Company's discussions, counseling, and disciplinary actions during the five-month period leading up to the termination was that [REDACTED] was not on the tag that corresponded to the work that he was performing. [REDACTED] knew that he was supposed to be on a produce checking tag while performing produce checking duties.

The Company argues that the Union's focus on [REDACTED] use of an off-standard replenishment tag at the beginning of the shift on February 12 is a red herring. [REDACTED] was not terminated for using an off-standard replenishment tag at the beginning of the shift. He was terminated for performing checking duties on an off-standard replenishment tag. On February 12, [REDACTED] arrived at the receiving clerk's office almost exactly ten minutes after clocking in on the off-standard replenishment tag. He then began performing produce checking duties and he should have been on a produce checking tag before starting those duties.

Management next argues that [REDACTED] knew how to use the tagging system, but chose to misuse it for his financial advantage. The Company points to [REDACTED] lengthy tenure and

experience. Before becoming a Fresh Checker, ██████ worked in other positions that earned incentive compensation. He knew how the tagging process worked and the impact of that process on incentive payments. If there was any confusion on his part, it should have been corrected by the Company's counselings.

At arbitration, ██████ testified that he was performing the job as trained and should not have been disciplined as a result. But the Union did not bring forward any other employees to corroborate ██████ erroneous understanding of the tagging system. And the evidence revealed that the Union understood and agreed with the Company's expectations with respect to tag usage because ██████ told ██████ that he needed to be on the tag of the activity that he was performing.

The Company maintains that ██████ misuse of the tagging system actually demonstrates his understanding of it. Each time that the Company counseled or disciplined ██████, it was because his misuse of the tagging system led to an inflated produce checking incentive for the week. It is no coincidence that ██████ "mistakes" with tagging were always financially beneficial to him. ██████ never made the mistake of performing off-standard, forklift, or meat checking duties while on a produce checking tag. He always inflated his produce checking incentive by performing produce checking duties on those other tags. Every time that the Company caught ██████ inflating his produce checking incentive through one method, he would change his tactics and find another way to do his produce checking work while on a different tag.

The Company argues that ██████ termination was a product of his intentional actions, not any ill-will by Management. The Company did all that it could to avoid this outcome, including partnering with the Union to provide clear instructions to ██████ and other Fresh Crew

members. But ██████ persisted in gaming the incentive program through his misuse of the tagging system.

The Company concludes that ██████ conduct was insubordinate; it was dishonest; and it was a falsification of his time records. All of this was in violation of the Company's Standards of Behavior Policy.

The Union

The Union argues that the Company failed to meet its burden of proof on the discharge. Management failed to accord the Grievant his due process rights which are part of the just cause analysis. The Company discharged him without giving him a chance to explain his side of the story with regard to the events of February 12. The Company also failed to prove the central element of its case that ██████ intentionally misrepresented his time in a way that violated clearly established rules. This is because he was given confusing and conflicting information about the tagging system. Even if the Company had proven intentional misconduct, Management did not establish that discharge was the only appropriate penalty under the Company's progressive discipline system.

The Union argues that for these reasons, the Arbitrator must sustain the grievance, reinstate ██████ and order that he be made whole.

With regard to the Grievant's due process rights, the Union maintains that the Company failed to give him the opportunity to address the charges against him prior to his discharge. When an employee is accused of misconduct, he has the right to be informed of the charges; the right to confront accusers; the right to answer charges; and the right to union representation. See Chevron-Phillips Chemical Co., 120 LA 1065 (Neas, Arb. 2005). Arbitrators routinely decide

that if an Employer makes a disciplinary decision without giving the employee the chance to explain his side of the story, the Employer has denied the employee due process. See United Parcel Service, 121 LA 207 (Wolff, Arb. 2005). See also CR/PL Limited Partnership, 107 LA 1084 (Fullmer, Arb. 1996) reversing discipline even for pulling a knife on a co-worker when the employee was not given a chance to address the charges prior to discharge.

The Union in the present case states that there is no question that the Company failed to give ██████ an opportunity to defend himself prior to discharge. While the Company argues that ██████ had this opportunity during the grievance process, the meeting after the fact was not satisfactory because the Company had already made up its mind. Since the record established that the Company failed to accord ██████ due process prior to his discharge, the Arbitrator must sustain the grievance and order the Grievant reinstated.

The Union next argues that the Company failed to prove that the Grievant did anything other than attempt to follow the conflicting directions of various supervisors. The Company alleges that the Grievant intentionally manipulated the time-tracking system in order to improperly increase his incentives. Therefore, the Arbitrator must decide whether the Company has proven that the Grievant engaged in acts of deliberate and willful misconduct; that is, whether he intentionally violated clear rules in order to inappropriately increase his pay. Arbitrators have routinely held that the penalty of discharge in these types of cases is too severe unless “the time-card discrepancy was the product of an intentional act as opposed to carelessness.” See Crothall Facilities Mgmt., 127 LA 48 (Ross, Arb. 2009) and Schafer Bakeries, 95 LA 759 (Brown, Arb. 1990).

The Union maintains that the Company failed to adduce evidence that the Grievant did anything other than what he understood to be expected of him. He was acting specifically under supervisor's orders when he started his day on an off-standard replenishment tag. On February 12 when he arrived at the receiving office, he was unable to take his clipboards and go to the dock because the clipboards were not ready for him. The QA function had not been completed at that point and there was nothing that ██████ could do until that process was completed. For these reasons, the Company failed to meet its burden of proof that ██████ engaged in the alleged misconduct. The Arbitrator must sustain the grievance and reverse the discharge.

The Union next argues that the Company failed to apply progressive discipline before deciding to discharge the Grievant. Even if the Arbitrator were to conclude that ██████ had engaged in some intentional misconduct, discharge was not required. The Company could have issued a final warning which was the next step in progressive discipline. Considering all of the confusion surrounding the complex incentive system and the conflicting messages as to what ██████ could have been doing on February 12, there was no reason for the Company to skip over a final warning. This is especially true for an employee with 45 years of service to the Company who had only recently taken the Fresh Checker position. ██████ had repeatedly asked the Company to go on record about its expectations. The Company did not offer any further training or anything in writing such as a Standard Operating Procedure.

Even if the Arbitrator were to conclude that ██████ engaged in the intentional conduct as alleged, the Arbitrator must still sustain the Union's grievance and reduce the penalty to a final warning in keeping with the Company's progressive discipline system.

The Union concludes that the Arbitrator must find that the Company has violated the contract by discharging the Grievant. The Arbitrator must sustain the grievance, reverse the discharge, and order that the Grievant be made whole.

DISCUSSION AND DECISION

The parties did excellent jobs in presenting their respective cases both at arbitration and in the briefs.

The Arbitrator has studied all the ins and outs of the facts and the arguments. The only facts not represented in this decision have to do with the bananas that ██████ submitted as checked on February 12. That seemed like a red herring because he was not disciplined for this. He was disciplined for intentionally underreporting his time checking produce on his produce tags, thereby improperly inflating his produce checking incentive pay.

The Arbitrator is not deciding this case on the merits. The case must be decided on procedural grounds. Discharges by management have been reversed where the action was held to violate basic notions of due process. Arbitrators have fashioned an “industrial due process doctrine” from the constitutional imperative of due process in the governmental employment context. To satisfy industrial due process, an employee must be given an adequate opportunity to present his or her side of the story before being discharged. If the employee has not been given this opportunity, arbitrators will often refuse to sustain the discharge of the employee. See Elkouri and Elkouri, How Arbitration Works, Sixth Edition, pp. 967-968.

In a case where management failed to give an employee an opportunity to be heard, an arbitrator refused to sustain the employee’s discharge, stating that:

A just cause proviso, standing alone, demands that certain minimal

essentials of due process be observed. One at least of those minimum essentials is that the accused have an opportunity, before sentence is carried out, to be heard in his own defense. ...

It is the *process*, not the *result*, which is at issue. McCartney's Inc., 84 LA 799, 804 (Nelson 1985).

The Grievant in the present case did not have an opportunity to tell his side of the story with respect to the events of February 12 or prior events when he was discharged over the phone while he was at home on February 17. His first reaction was to go back into work and explain. But he got a call from the Union telling him that he could not return to work after Management's call.

It was particularly inappropriate for Management to call ██████ at home and fire him over the phone because he was an employee with 45 years of service. He was owed deference and the protections of procedural due process. Although the parties did meet during the Third Step of the grievance procedure, this was after the fact of the termination. The parties sat twenty feet away from each other across a room and Management had already made up its mind. They were not going to go back on their decision at that point. Due process requires that an Employer meet with an employee before the final decision to discharge is made. Management is more likely to consider the position of the Union and the employee at that stage before the decision is final.

The Company in this case also failed to follow progressive discipline. The Company's practice was to provide an oral warning and then a written warning and then a final written warning to an employee prior to discharge. ██████ did not receive a final written warning. The Company skipped immediately to discharge. A final written warning with an opportunity for discussion would have served as another opportunity to try to resolve this case.

The Arbitrator is aware that Management felt that it met with, counseled and disciplined [REDACTED] repeatedly and that he was not listening or changing his behavior with respect to underreporting his produce checking time on the produce checking tags. But just cause requires fundamental procedural due process prior to a final decision on termination. The parties' practice also requires a final written warning prior to termination.

Since the Employer did not meet with the Grievant prior to the final decision to terminate, the termination was not for just cause and is rescinded. [REDACTED] is to be reinstated with back pay and benefits.

A handwritten signature in cursive script that reads "Marilyn Zuckerman". The signature is written in black ink on a white background.

January 12, 2021

Marilyn Zuckerman