

THE LABOR RELATIONS CONNECTION
Voluntary Labor Arbitration
Case No. #706-22
James S. Cooper, Arbitrator

In the Matter of Arbitration between:

UNITE HERE!, LOCAL 26

-and-

ENCORE BOSTON HARBOR RESORT

Grievance of [REDACTED]

Introduction

UNITE HERE!, Local 26 (“Union” or “Local 26”) and Wynn, LLC d/b/a Encore Boston Harbor (“Employer” or Encore”) are parties to a collective bargaining agreement effective April 19, 2021 which provides for arbitration of disputes over the interpretation or application of the Agreement.¹ On October 19, 2022 and January 24, 2023 the Union, represented by attorney James Hykel, and the Employer, represented by attorney Robert A. Fisher, presented this matter in arbitration and submitted post-hearing written argument on or before April 14, 2023.

Issues

The parties agreed to submit the following issues for resolution:

1. Was there just cause to discharge [REDACTED] on August 23, 2022?²
2. If not, what shall the remedy be?

Facts concerning the discharge of [REDACTED]

Encore operates a large casino and hotel in Everett, Massachusetts which includes many bars and restaurants; one of these is the On Deck Burger Bar restaurant (“On Deck”), a sports bar and restaurant. [REDACTED] worked as a Cook 1 at On Deck beginning in early 2021 following a COVID related lay-

¹ Agreement, Appendix C, ¶12, which provides in part as follows: “The parties ... agree to comply with any order of the arbitrator, which shall be final and binding....”

² Article 17, Discipline and Discharge provides:

Employees may be discharged, suspended, or disciplined by the Employer for just cause. The parties agree that the policy of progressive discipline shall be used in all cases where warranted but egregious matters may result in suspension pending investigation (SPI) or termination with no prior discipline.

off from working in the same position at the Waterfront restaurant, a job he began on June 19, 2021. On Deck managers scheduled [REDACTED] to work from 9 a.m. to 5 p.m. five days a week with a one-hour paid meal break.³ The Employer operates a back of the house cafeteria, Le Café, open twenty-four hours a day, which provides a full menu of hot and cold food and beverages. In addition to the one-hour meal break during an eight hour shift, the Employer authorizes employees to eat a meal one hour before any shift and one hour following the completion of each scheduled shift.

Encore issues employees a photo identification card for entry to building and maintains an extensive video recording system throughout the back of the house. Video recordings are kept by Encore Security for thirty days and, unless there is a reason to preserve the video recordings, the video is recorded over. On Deck maintains a timeclock near the employee entrance to record employees' time in and time out. However, employees do not use the timeclock to record their one-hour break time; instead, On Deck uses a daily sign-in/sign-out sheet on a clipboard hung above the timeclock. Encore's policy with respect to the timeclock is that employees may sign-in not more than seven minutes early or more than seven minutes late in order to be paid for the full eight-hour day.

On Friday, August 12, 2022, [REDACTED] punched in on time and worked on the hot-line cooking food orders. On that day, On Deck Manager Cinthia Flores gave [REDACTED] an "award card" for his positive attitude and outstanding performance.⁴ [REDACTED] worked straight through his shift until approximately 3:40 p.m. On Deck was very busy that day and [REDACTED] had no time to take his break until after the second shift Cook 1 reported for work at 3:30 p.m. At about 3:40 p.m. [REDACTED] asked the Chef De Parti ("CDP") Keyrah Kilgore, the most senior chef working at the time, if he could take his break and go home as the second shift Cook 1 was available to take over the hot line. CDP Kilgore gave him the requested permission. At that time Manager Flores and the relatively newly installed (since mid-July) Executive Chef, Sebastian Navarrete, were attending a meeting outside of the restaurant. [REDACTED] did not punch out at the timeclock but wrote on the sign-in/sign-out sheet that he left at 4 p.m.

At 3:55 p.m. Manager Flores and Executive Chef Navarrete returned to On Deck and did not see Mr. [REDACTED]. Chef Navarrete asked Ms. Flores to see what happened to Mr. [REDACTED]. Ms. Flores checked the timeclock and discovered that Mr. [REDACTED] had not punched out but had written on the sign-in/sign-out sheet that he had gone on break from 4 p.m. On the time sheet, Mr. [REDACTED] drew a line through the words "early out" and listed his time out as 5 p.m. and signed his name. Manager Flores requested Encore

³ Article 6, Hours and Overtime provides in relevant part:

Each employee working a minimum 8 hour shift shall be provided with the opportunity to have one paid duty-free meal break of not less than sixty (60) minutes.

⁴ Award cards are used by employees to enter a contest for Encore provided incentives, including cash or prizes.

Security to retrieve the video recordings of the back of the house for August 12th. Upon her review of the video footage, Ms. Flores observed Mr. [REDACTED] at the timeclock at 3:42 p.m. and observed him writing on the timesheet on the clipboard but not punching out. She also observed that Mr. [REDACTED] had a burger to go box and drink in hand. Mr. [REDACTED] entered the stairwell behind the On Deck and came out of the stairwell with an empty burger to go box at 3:48 p.m. and threw away the to go box at 3:49 p.m. He took the elevator to the second floor where he deposited the positive attitude card in a box located near the Le Café at 3:53 p.m. Mr. [REDACTED] entered the bathroom at 3:54 p.m., exited at 3:56 p.m. and left the property at 4:00 p.m. Encore's Security Department clipped [REDACTED] movements from different cameras and edited them together as a continuous video. Ms. Flores asked Encore Security to examine the video showing inside the On Deck kitchen which they did. According to Ms. Flores, the video showed Mr. [REDACTED] preparing the burger and covering it with a to-go container. Encore Security did not clip or save this video.

The following day, August 13th, Flores interviewed [REDACTED] with a Union representative present. [REDACTED] told Flores that he went on break at 4 p.m. and left the building between 4:30-4:45. Flores also told [REDACTED] that she saw he had taken some food with him when he left and [REDACTED] responded that he had taken French-fries in a to go container but said nothing about a burger. Flores accused [REDACTED] of theft of time and product (a hamburger). [REDACTED] denied both accusations. Flores informed [REDACTED] that he was suspended pending investigation. Flores reported the results of her investigation into [REDACTED] activities on August 12th to Employee Relations. Employee Relations sought a written statement from [REDACTED] but [REDACTED] and the Union refused. On August 18th [REDACTED] sent an email to Employee Relations' investigator Shelley Abru-Yuen stating that the Executive Chef Sebastian Navarrete had asked [REDACTED] to taste the hamburger as a possible new menu item. The Executive Chef denied giving [REDACTED] permission to take a hamburger for the purpose of tasting a new product. After further review by Human Resources and the Law Department, Encore terminated for "Theft/Misappropriation."

Arbitration Hearing

In addition to the above facts, the Union presented additional evidence concerning the Company's claims of [REDACTED] violation of the sign-in/sign-out policy and [REDACTED] theft of product. The Union also presented evidence with respect to the Company's application of its progressive discipline policy in other cases and its failure to apply the policy with respect to Mr. [REDACTED] in this case. Turning, first to the sign-in/sign-out policy, the Union demonstrated that the daily sign-in/sign-out sheets rarely reflected the exact time employees signed in or signed out. The Union proved that employees [REDACTED] [REDACTED] and [REDACTED] along with [REDACTED] simply wrote their regularly scheduled start time of 9 a.m. and finish time of 5 p.m., even if their timeclock punch in varied from those times. [REDACTED] frequently did

not write any hours on the daily sign-in/sign-out sheet completing it only thirteen times between July 1st and August 12th during which he worked thirty-one shifts. In terms of punch-ins and punch-outs the Union provided evidence that a number of employees failed to punch out and managers frequently corrected this shortcoming by punching out for them.

With respect to cooks or other staff eating food prepared at On Deck or at other restaurants, the Union presented numerous examples of prior discipline where employees were provided written warnings for such conduct. None were terminated. Encore consistently issued warnings consistent with its obligation to follow progressive discipline. The Union also produced testimony and video evidence that the employees of On Deck routinely partake of some food while working at On Deck; none of this was considered “theft” of food and the Executive Chefs never admonished employees for doing so.

Decision

This matter has all the trappings of an employee leaving work early without permission and stealing Encore’s product under circumstances that would certainly lead one to believe that the Employer had just cause to fire the employee. I regularly find just cause to terminate employees who engage in theft. Particularly in this case where Encore has gone out of its way to make meals available to employees before, after and during every employee’s shift. Le Café amounts to a first class cafeteria open twenty-four hours a day; its presence makes theft of food particularly unnecessary. The absolute prohibition against theft, however, has to bend when circumstances warrant. In this case there are such circumstances which [REDACTED] and the Union raised early in the grievance procedure and which the Union through due diligence presented during the arbitration. It is this evidence that has convinced me that, despite all of [REDACTED] camera recorded activities, he did not steal time or product from the Employer and that his actions warrant fair warning, made applicable to him via Encore’s contractual commitment to progressive discipline. These circumstances require full explanation, which follows.

Ms. Flores is a very competent, resourceful manager who testified clearly and without hesitation. However, she admitted that prior to the incident involving Mr. [REDACTED] she had not been involved in the discipline of kitchen employees. The Executive Chef took responsibility for keeping his employees in line. This changed when Executive Chef Navarrete approached her a few weeks after he took over seeking help when Cook 1 [REDACTED] left work early on August 12th. The Executive Chef’s inquiry lead Ms. Flores to viewing the Encore Security’s video recordings as described above. Ms. Flores lack of experience with the expected behavior of the kitchen staff lead her to firmly believe that what she witnessed on August 12th was [REDACTED] theft of time and a hamburger. Someone who did not know the prior history or practices of the kitchen at On Deck cannot be faulted by being very much surprised by what appeared on the video prepared by Encore Security. Ms. Flores’ astonishment could

not be reined in by the newly appointed Executive Chef Navarrete because he, too, was unfamiliar with the more lenient practices of the previous regime's attendance requirements and self-help to food products.

It would appear that that the prior Executive Chef or his assistant, the Sous Chef, and the Chef di Parti, as the third in command, would release a Cook 1, an hour earlier than their scheduled departure time when the Cook 1 had worked straight through their entire shift without a break. The senior chefs recognized that the demand for service at On Deck could not be throttled back so that a mid-shift lull would allow the Cook 1 to take a well-earned break in routine for an hour. For this reason, when the second shift Cook 1 reported for work at 3:30 p.m., the first shift Cook 1 could be relieved without interrupting the continuity of cooking for On Deck's patrons. The senior chefs, prior to Executive Chef Navarrete, allowed the first shift Cook 1 to take their one hour meal break at the end of the shift and go home, leaving at 4 p.m. without punching out, an activity the more senior chefs remedied by punching out for the cook. Chef Navarrete certainly had not spent sufficient time at Encore to learn or understand the nuances of the On Deck practices when he complained to Flores that Cook 1 [REDACTED] had not returned from his break which he took at 3:42 p.m. It was this notice to Flores which kicked off the entire series of events leading to Encore's termination of [REDACTED]

It is also pretty clear that [REDACTED] stretched his one hour break by 18 minutes, an event that may warrant discipline. It is likely that the previous Executive Chef or Sous Chef, as [REDACTED] testified, allowed him to leave work a few minutes before his official break time could start at 4 p.m. so he could depart work altogether. This leeway, however, was certainly within the Executive Chef's (of his designee's) discretion and, from the former Executive Chef's point of view, with the second shift Cook 1 in place, he did not require a second Cook 1 and he did not mind rewarding [REDACTED] for staying on the job seven hours straight without a break. Chef Navarrete may take a very different approach to how he handles this very same situation, but from an employee's viewpoint, his approach has to be made clear and specific. Employees tend to carry on the culture to which they have grown accustomed until a different approach or policy is brought to their attention.

The situation with the claimed stolen hamburger also must be considered in the same limelight. [REDACTED] testified that the hamburger he cooked and ate was a new product that had not been introduced on the menu. According to the evidence, Chef Navarrete had informed [REDACTED] that he was considering a new meat product and that he should taste it. This appears to have been told to [REDACTED] early in his shift on August 12th. According to Chef Navarrete, when he tries a new menu item, such as a new hamburger meat, he carefully cooks the meat and dresses it with all the trimmings he would use as if it were on the menu. He then asks others, including the Sous Chef, the Chef di Parti and the cooks to taste

it but to do so they would simply taste a small portion of the fully prepared dish. According Chef Navarette this procedure is precisely why it is called a “tasting” within the culinary industry. According to [REDACTED] this was not how the prior Executive Chefs handled new menu items who simply left it up to the cook to prepare and eat the new product as a taste test.

Even if one accepts [REDACTED] claim, how does his removal of the “new” hamburger from the kitchen and eating it in the stairwell square with his claim that he had explicit permission to “taste” the new product. [REDACTED] removing the hamburger from the kitchen and hiding it from the security cameras and scoffing it down on the stairwell are actions classically associated with someone hiding his activities. One would be hard pressed to find a more sure fired way to bring on heightened concern by an observer that [REDACTED] was stealing the burger. The Union’s argument is that [REDACTED] was going to Le Café with the hamburger but changed his mind while in the stairwell and simply gobbled it down rather than wait the five minutes or so to reach the second floor where Le Café is located. But how does this make any sense when [REDACTED] emerged from the stairwell and immediately took the elevator to the second floor to use the bathroom and depart the Encore. These activities are highly suspicious and, as the Employer has forthrightly argued, makes [REDACTED] explanation questionable as pure fantasy. If he lied, then the story about cooking the sample was a complete lie, he stole product and Encore had just cause to fire him.

The Union’s evidence in this case shows video of many circumstances where On Deck employees are taking advantage of being in a restaurant and eating food that would normally go to waste or was otherwise available. Thus, for example, mistaken food orders may be eaten by staff; cooked items left over at the end of the night may be shared among employees; sometimes food was available to staff when there was food prepared and no customers to eat it. In short, the Executive Chef, the Sous Chef and Chef di Parti were not adamant that no one should partake of the On Deck food at any time. This is not to say that the On Deck kitchen was wasteful, but that it was acting reasonably when there was simply food available that would go to waste if not otherwise eaten.

With this somewhat freedom of access to food within On Deck along with the new Executive Chef’s instruction to [REDACTED] that he should taste the new burger product, it seems to me that there is sufficient doubt that [REDACTED] intended to steal the hamburger at issue. Why he ate it out of sight of Encore’s omnipresent cameras in the stairwell raises serious questions about [REDACTED] intent. However, given Manager Flores’ newly assumed obligation to discipline kitchen staff and that Chef Navarette was so new to the On Deck kitchen that he had not had the opportunity to impart his own style and expectations on the staff, I conclude that Encore did not meet the higher level of proof required for cases involving theft of product. For these reasons I sustain the grievance and render the following Award.

Award

The following his hereby awarded:

1. Encore did not have just cause to discharge [REDACTED] on August 23, 2022.
2. Encore had just cause to issue [REDACTED] a written warning for failing to obtain instructions from the Executive Chef about tasting a new product proposed for the menu at the On Deck restaurant; and,
3. Encore shall reinstate [REDACTED] to his former position with full seniority and shall make him whole for lost wages and benefits since August 23, 2022.

April 25, 2023

/s/ James S. Cooper
James S. Cooper