
ARBITRATION IN THE MATTER	*	
	*	Grievant: David Rinehart
Between	*	
	*	Issue: Discharge
ALAMO RENT A CAR, INC.	*	
	*	
and	*	
	*	
The International Brotherhood of Teamsters, Local 995	*	Arbitrator: Judy A. Gust,
	*	
	*	

PRELIMINARY STATEMENT

The hearing in this matter was held on November 1, 2002, in Conference Room 6B at McCarran International Airport, 5757 Wayne Newton Boulevard, Las Vegas, Nevada. The parties stipulated that the matter was properly before the arbitrator for a final and binding decision. The parties also agreed that the arbitrator retain jurisdiction over any remedy should the Union prevail. During the course of the hearing the parties presented evidence through exhibits and the sworn testimony of witnesses who were subject to cross-examination. The hearing was tape recorded by the arbitrator although her notes constitute the official record of the hearing. The hearing was closed on November 1, 2002, following oral arguments by the parties' representatives.

APPEARANCES & WITNESSES

For the Company

Glenn M. Price Counsel and Spokesperson, Sr. Counsel Labor Relations,
ANC Rental Corporation

Jim Black. Las Vegas City Manager, Alamo Rent A Car

Ramona Preston. Human Resources Manager/Translator

Alice Norton Service Agent

Elise Ricardo Service Agent

For the Union

Adam N. Stern Counsel and Spokesperson, Levy, Stern & Ford

Glenn Roark Business Representative, International Brotherhood of
Teamsters, Local 995

David Rinehart Grievant

BACKGROUND AND FACTS

On September 13, 2001, the Grievant, David Rinehart, Lead Service Agent, was involved in an altercation with Service Agent Irwin Rain. Business was slow that day following the September 11, 2001, terrorist attacks on New York City and Rinehart was instructed to ask the Service Agents for volunteers to go home. If there were not enough volunteers, Rinehart was to relieve Service Agents from duty except for the ten most senior Service Agents. Rinehart asked Rain if he wanted to go home. Rain stated that he did not, choosing to remain working. Shortly thereafter, Rinehart saw Rain in the break room and instructed him to return to work. At that time, Rain indicated that he was going home. An argument ensued with varying versions reported of which of the two was the aggressor and whether physical contact occurred between them. Both Rinehart and Rain were suspended on the day of the incident to provide time to conduct an investigation. On September 17, 2001, Rinehart and Rain met separately with Jim Black, the Manager, and a shop steward. The suspensions were extended to investigate further. Following further investigation, Black determined that both Rinehart and Rain should be discharged for threatening and provoking violence in the workplace. Rinehart was discharged on September 26, 2001. (Co. Ex. 4)¹

ISSUE

The parties agreed upon the following issue: Was the discharge of David Rinehart for just cause? If not, what shall be the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 4 CONDUCT OF EMPLOYEES

SECTION 2. The Employer will not discharge or suspend any employee without just cause and shall give said employee at least one warning notice in writing, with a copy to the Union. Warning notices shall expire after nine (9) months and be removed from the employee's file. No warning notice need be given in the case of dishonesty; being in possession of, trafficking in, or under the influence of alcoholic beverages, narcotics, illegal drugs, illegal substances, or abuse of prescription drugs while on duty and/or on Company premises; failure to promptly report any accident

¹ Employer's exhibits are abbreviated Er' Ex.; Union's exhibits are abbreviated Un. Ex.; and Joint Exhibits are abbreviated Jt. Ex.)

which has resulted in personal injury or property damage; willful destruction of Employer's customers or public property or property of fellow employees; reckless driving; refusing to carry out a direct order of the City Manager or Supervisor; using an Employer's vehicle or equipment for personal use without permission; falsification of Company documents or records, including employment applications and time records; fighting, threatening or provoking violence in the workplace or off premises in view of the workplace; possession of a lethal weapon; discrimination; sexual harassment; and indecent conduct. Discharge or suspension must be by proper written notice to the employee affected, with a copy to the Union. All general disciplinary action must be issued within fourteen (14) calendar days after the infraction is brought to the Employer's attention.

POSITION OF THE COMPANY

The Company believes that there was just cause for discharging the Grievant and relies on the language of Article 4, Section 2, as noted above, to support its position. Specifically, the Grievant was discharged for threatening and provoking violence in the workplace. Discharge without a previous written warning is permitted for fighting, threatening or provoking violence in the workplace. The Company argued that Rinehart admitted the prohibited conduct. Two witnesses testified for the Company that Rinehart was the aggressor, that he pushed Rain with his chest and two open hands, used foul language and invited Rain to go outside to fight. The Company concluded that Rinehart was completely out of control and that his conduct on September 13, 2001, constituted threats and provoking violence as he was the one who invited Rain to go outside to fight. (Co. Ex. 4)

To the Union's implication that other, more serious incidents had occurred without consequence, the Company argued that there was no support for this inference of disparate treatment by the Union. The Company pointed to testimony from Manager Black that the other incidents referred to were learned too late to take any action under Article 4, Section 2 of the collective bargaining agreement. Further, the Company argued that these incidents did not occur on Company property implying that the Company had no jurisdiction to take any disciplinary action. Lastly, according to Manager Black, when he did inquire about the incidents that were reported by Rinehart, no other potential witnesses or parties would admit that any altercations occurred. The Company also pointed out the unrebutted testimony from Manager Black that another employee, Aaron Carter, had been terminated for fighting on the job and suggested that

Rinehart was not in a position to know whether or not other employees had been disciplined for similar treatment.

In summary, the Company argued that Rinehart provoked the altercation, pushed and shoved Rain, and was the one who invited Rain outside to fight. It asserted that the consequence was just in that both parties, Rinehart and Rain, were discharged from employment. The Company asked that the grievance be denied.

POSITION OF THE UNION

The Union's position is that there was not just cause for Rinehart's discharge as mitigating circumstances were not considered when determining the punishment. The Union also argued that Rinehart was subjected to disparate treatment because other, even more serious, incidents of threatening or provoking behavior by other employees did not result in any form of discipline.

The Union made clear that it does not condone Rinehart's behavior with Rain. However, the Union offered mitigating evidence with regard to Rain's behavior that provoked the argument between the two that led to Rinehart's invitation to Rain that they take their dispute outside. Rinehart was Rain's Lead worker who charged with the responsibility to see to it that the Service Agents did their jobs. Rains' failure to return to work when asked to do so by Rinehart, after previously claiming his seniority right to remain at work, provoked Rinehart into an increasingly aggressive posture in order to get Rain to comply with his directive by returning to work. In short, Rinehart became frustrated and lost his temper while attempting to carry out his legitimate duties as the Lead Service Agent.

The Union also argued that Rinehart's long tenure of approximately seven years with the Company and his clean record should also mitigate against this most severe of punishments. Rinehart had worked his way up to the Lead Agent role and had a good working relationship with Manager Black. Black testified that he did not review Rinehart's personnel file and or Company history before making his decision to discharge Rinehart but did admit that Rinehart was a good employee. Thus, the Union argued that these mitigating facts were also ignored when determining the appropriate level of penalty for this one-time mistake.

Next, the Union pointed out that although the Company gathered 11 witness statements during its investigation, it chose to "cherry pick" two witnesses to present at hearing. The Union argued that these two witnesses testified to facts beyond that which was included in their written statements at the time of the investigation thereby implying that either their recollection or their credibility should be questioned. Black testified that there were various inconsistencies about what occurred in the 11 witness statements. Because the Company bears the burden of proof in this matter, the Union argued that any inconsistencies should be resolved in favor of the Grievant.

Rinehart testified that he was wrong and should not have lost his temper or used his hands to remove Rain's hand and arm from his face. However, Rinehart denied pushing Rain with his chest or throwing a radio as testified to by the two Company witnesses.

In the Union's opinion, these mitigating circumstances and inconclusive witness statements do not warrant a penalty as severe as discharge.

Further, the Union raised an issue of disparate treatment. It presented evidence that Rinehart had reported misconduct of a physical nature by other employees for which no discipline was issued. Rinehart was privy to the outcome of attempted investigations into some of these other incidents because he was also the Union Steward who sat in on the investigatory interviews with the involved employees. As a result, Rinehart knew whether or not disciplinary action had been taken. Additionally, the Company failed to produce any evidence that disciplinary action had been taken in the incidents that were presented involving Mike and Rain, Thomas, Mark, the Dillon brothers, Leonard and Mike, Terry Hart and Richard, Hart and Gina. The conduct reported in these incidents included an employee chasing another employee around the premises with a baseball bat, an employee kicking another employee in the eye, an employee throwing a radio, and an employee hitting another employee in the forearm with a metal pipe that broke the employee's arm. The employee who had been hit reported to work in a cast the following day. In one of the incidents, a police report was filed. The Union finally argued that this evidence of more serious conduct was un rebutted and was without any disciplinary

consequence. From that view, the Union asked that Rinehart be reinstated to his former position and be made whole for all losses.

DISCUSSION

Because this is a discharge case, the burden rests with the Company to prove that it had just cause to discharge the Grievant, David Rinehart. In this case, there is no dispute that Rinehart had a disagreement with another employee that got out of hand. Rinehart admitted to yelling, cursing and pushing Rain's hands away from his (Rinehart's) chin). Rinehart also admitted that he was frustrated and angry, lost his temper and invited Rain to go outside to continue the disagreement. He clearly admitted his culpability in the altercation and apologized for his inappropriate conduct.

Although the collective bargaining agreement permits discharge for just cause and further permits discharge without a prior written warning notice for ". . . fighting, threatening or provoking violence in the workplace or off premises in view of the workplace;" inherent in the concept of just cause is the principle that the penalty for an infraction be fair and reasonable. In fact, this was the basis for Rinehart's written grievance: "I protest that my termination was unfair and unjustified". (Co. Ex. 6) Rinehart's demeanor and testimony at the hearing demonstrated that he felt unjustly singled out for discharge when other more serious behavior between other employees brought no disciplinary action of any kind.

Manager Black testified that he had heard about other incidents that Rinehart testified to concerning fighting and threatening behavior between other employees. He excused the lack of investigation and lack of any disciplinary action in these other incidents to an alleged prohibition in the collective bargaining agreement that precluded taking action after 14 days. The language in the collective bargaining agreement states: "All general disciplinary action must be issued within fourteen (14) calendar days after the infraction is brought to the Employer's attention". (Jt. Ex. 1, pp. 2) [emphasis added] Although there was contradictory testimony about how soon after the incident Black was notified of the baseball bat incident, that fact is irrelevant. The collective bargaining agreement does not preclude taking disciplinary action based upon when management was notified of the incident in relation to the date of the incident. The contractual

limitation of 14 days begins *after* the Company has knowledge of the infraction. When the actual incident occurred is also irrelevant in regards to management's ability to take corrective or disciplinary action.

Black offered another reason why disciplinary action was not taken in a few of the incidents. He testified that he was told that the incidents occurred at the property line or just outside the property. Black relied on the language in Article 4, believing it to cover only "on-premises" behavior. Again, the actual language of the Agreement includes violence in the workplace "or off premises in view of the workplace". (Jt. Ex. 1, pp. 2) A few of these incidents were clearly in view of the workplace as other employees witnessed the events, including the Grievant, Mr. Rinehart, who reported the events to management.

This arbitrator is fully aware that violence in the workplace is a serious issue that requires prompt and thorough investigation and corrective action, including discharge where appropriate. Violence in the workplace is a serious fact of contemporary society that cannot be condoned or overlooked. Even more significant in this case is the fact that a Lead Agent was involved. While a lead position is not officially a management position, it does carry the responsibility for directing work and should be seen as a role model for other employees. Investigating reports of alleged disputes, physical or otherwise, is also a serious responsibility that rests with management. Uncooperative witnesses need to be admonished about the seriousness of Company's inquiry and its expectation that they will be forthcoming and honest. Mere questions about what someone may have seen and a manager's acceptance of denials in the face of other objective evidence such as a black eye does not meet a company's obligation to provide a safe and violence-free workplace.

Management has a responsibility to assess the credibility of witnesses and take action based thereon. In this case, although Black testified that he did not believe witnesses in one incident, he should have continued questioning witnesses and checked with his Lead Agent, Rinehart, for any knowledge that he might have had. Black's testimony with regard to these many other incidents left the impression that he was eager to find a reason not to investigate fully, either dismissing the incidents as "too late" to be able to take any disciplinary action or occurring off premises. As noted above, the time limit is only imposed after management's

knowledge of the event. Even if an event occurred off Company premises, physical altercations are also precluded when they occur in view of the workplace premises. Regardless of such preliminary reports, alleged incidents of the severity reported should be investigated thoroughly to determine what happened and when, where it occurred, who was involved and any potential witnesses. If it is later determined that the conduct cannot be disciplined for some technical reason, at least all the involved employees can be reminded again of the rules of conduct and potential consequences for violation.

In this case, the Grievant clearly violated the conduct provisions of the collective bargaining agreement by arguing with an employee and challenging that employee to step outside to fight. That conduct is cause for discipline although the "justness" of the cause in terms of the severity of the penalty must be reviewed. This arbitrator is usually reluctant to disturb a Company's penalty decision once an infraction of this type is proven or admitted. However, just cause does require that the severity of the penalty be in proportion to the infraction and be consistent with the penalties imposed in similar situations. As noted above, violence in the workplace is a serious and legitimate concern of an employer. Generally, the penalty of discharge would be justified where a Lead worker has been involved and, arguably, even provoked a physical altercation. In this case, the Company's failure to take disciplinary action in previous, more serious physical altercations, at best diluted, if not negated, the specific language of the Agreement regarding management's right to discharge without warning an employee for fighting, threatening or provoking violence. How was Rinehart to know that his first and brief lapse of judgment in yelling and perhaps even touching another employee or inviting him outside to fight would result in discharge? He had observed far more serious behaviors that physically injured other employees on or in view of the Company premises that received no discipline.

Although as a Lead worker, one might argue that he should have known better, other, more serious incidents, had not only passed without discipline, in many cases they passed without even a thorough investigation.

Black also testified that one employee, Aaron Carter, had been discharged for fighting; however, he was unsure as to whether or not that discharge occurred prior to or following Rinehart's discharge. Without proof that Carter had been discharged for fighting before

Rinehart's discharge, there is no evidence that Rinehart was aware of the seriousness of his lapse of judgment or that he could lose his job as a result. Just cause requires that an employee be aware of the potential consequences for conduct that violates the terms of the Agreement or Company policies. Accordingly, the provision in the collective bargaining agreement that permits discharge for the type of behavior exhibited by Rinehart was nullified by the Company's inaction on similar incidents prior to Rinehart's discharge.

Just cause also calls for consideration of the totality of the circumstances, including the employee's history and work record with the Company. Black testified that he did not consider Rinehart's employment history or consult his personnel file. Rinehart was a fairly long term employee of some seven years who had worked his way up to Lead Agent. Black testified that Rinehart was a good employee with no discipline in his record² and none taken by Black himself. Even though there was some allusion that Rinehart may have had prior written warnings (because written warnings are removed after nine months), it is clear that Rinehart had no serious discipline beyond a written warning in his record. Further, there was no testimony or evidence that Rinehart had been involved in similar behavior in the past.

Based upon the Company's failure to consistently investigate and apply discharge in other cases of similar behavior and its failure to consider Rinehart's employment record and length of service with the Company, the imposition of discharge is found to fall outside the just cause standard that the Company is burdened with meeting. However, because Rinehart clearly violated Company policy with regard to violence in the workplace, and in consideration of his Lead Agent role, his conduct merits a substantial form of discipline. Accordingly, Rinehart will be ordered reinstated and his discharge reduced to a suspension without pay for 20 work days.

AWARD

Based upon the foregoing, the Company did not have just cause to discharge David Rinehart. To remedy the violation of the Agreement that was proven, the Company shall reinstate Mr. Rinehart to his former position. Because of Rinehart's admitted poor judgment and conduct in the incident with Irwin Rain, Rinehart's discharge shall be replaced with a 20 work-

² The Company pointed out that warning notices can be removed from an employee's file after nine months.

day suspension noting that the suspension has already been served. Additionally, the Company shall make Rinehart whole for all lost wages, benefits, and seniority, less the 20 work day suspension and less his actual interim earnings between September 26, 2001, and his date of reinstatement. Finally, as agreed by the parties, the Arbitrator shall retain jurisdiction over this matter for the sole and limited purpose of resolving any disputes that may arise between the parties concerning the interpretation, application, or implementation of this award.

Judy A. Gust, Arbitrator

Ramona, California
November 4, 2002