

Federal Mediation and Conciliation Service
Case No. 080108-52547-A

C. ALLEN POOL, Arbitrator
Arbitrator's Case No. 8-26-08

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT BETWEEN THE PARTIES

International Brotherhood of Teamsters)
Local Union No. 890)
)
and)
)
Dole Food Company, Inc)
)
Discharge: Manuel Ceja Melchor)
_____)

ARBITRATOR'S
OPINION AND AWARD

October 14, 2008

This Arbitration arose pursuant to Agreement between the INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION 890, hereinafter referred to as the "Union", and DOLE FOOD COMPANY, INC., hereinafter referred to as the "COMPANY", under which C. ALLEN POOL was selected by the parties through procedures of the FEDERAL MEDIATION AND CONCILIATION SERVICE to serve as the Arbitrator. The Parties stipulated that the matter was properly before the Arbitrator and that his decision shall be final and binding.

The hearing was held in the Salinas, California on August 26, 2008 at which time the parties were afforded the opportunity, of which they availed themselves, to examine and cross-examine witnesses and to introduce relevant evidence, exhibits, and argument. The witnesses were duly sworn and a written transcript was made of the hearing. Written closing arguments were timely submitted to and received by the Arbitrator on October 2, 2002 at which time the record was closed.

Appearances:

For the Union:

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For the Employer:

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STIPULATED ISSUE

Did the Company have just cause to terminate Manuel Ceja Melchor? If not, what shall be the remedy?

APPLICABLE HOUSE RULES
BUD OF CALIFORNIA

General Work Rule No. 1

Fighting or attempting to commit or committing bodily injury to another person, threatening, or intimidating other employees while on Company premises or at work.

General Work Rule No. 27

Encouraging, coercing, inciting, bribing or otherwise inducing any employee(s) to engage in any practice in violation of the Company's House Rules.

BACKGROUND

The Company is engaged in the growing, harvesting, and processing of vegetable products in California, Arizona, and other areas of the nation. In this instance, the Company and its Crew, C-22, was engaged in the seasonal harvest of celery in October 2007. The C-22 crew consisted of 23 men most of whom were long-time employees of the Company and long time members of Crew C-22. The Grievant had been working with the Company in Crew C-22 for almost 19 years. Guadalupe Garcia, the crew member involved in the incident with the Grievant, was also a long-time employee of the Company and a member of Crew C-22 for almost 18 years.

The harvest and packaging of the celery takes place around a large, noisy harvesting machine that is propelled through the field. The machine, as it is called, has two long arms with

conveyor belts that extend out from the machine over the rows of celery. About half of the crew, with knives (cutters), move along with the harvesting machine cutting celery bunches and placing the cut bunches on the machine for packing and packaging by the other half of the crew (packers) working at several stations at the arms of harvesting machine. The start and stop and the speed of the harvesting machine is controlled by buttons located at one of the packing stations where an assigned Packer can start, stop, slow down, etc. as needed. Off to the side of the harvesting machine, a portable toilet moves along with the machine.

On the day of the incident, Friday, October 12, 2007 the day's work commenced that morning with the Grievant at his packing station. A fellow crew member, Guadalupe Garcia, arrived a bit late and attempted to ready himself with his gloves, etc. and get in step with the moving machine. He was having difficulty and celery bunches were falling off the machine. He called for the Grievant to stop the machine. The Grievant stopped the machine and helped Garcia pick up some of the fallen celery (Ex-5, Ex-6). The machine started moving again with Mr. Garcia still not in step. He called for the Grievant to stop or slow down the machine but the Grievant did not do so and a verbal exchange ensued between the two men.

This verbal exchange was observed by the foreman, Jaime Aguilar, who was opposite the two men on the other side of the machine. Because of the noise of the machine, the foreman could not hear what was being said between the two men. All he could hear were the loud voices as the two men yelled at each other. The foreman proceeded to move himself around to the other side of the machine where he was approached by Garcia and then the Grievant. They met at a point about 30 to 40 feet away the machine. At that distance, the noise of the machine was not an impediment and they could converse at a normal level.

At this juncture, there was considerable controversy as to what was said by the two crew

members and the interaction between the two men and the Foreman. The Foreman asked them what was going on. The Grievant said nothing was going on. The Foreman said that the two men were very angry and one or both told him that they wanted to go behind the toilet and fight. The Foreman said that he had to separate the two men. The Grievant went back to work at his work station at the harvesting machine (Tr. P. 30-43). Mr. Garcia stayed with the Foreman and the two talked. Afterwards, the Foreman sent Mr. Garcia to his car.

The Foreman called his supervisor, Jose Luis Torres. Mr. Torres called the Company's labor relations manager, Liborio Rodrigriz, who instructed Supervisor Torres to investigate the incident. Supervisor Torres arrived later that morning and talked with the Foreman, the Grievant, and Mr. Garcia. At some point, Supervisor Torres, acting on instructions from Mr. Rodriguez, either before he arrived or after his arrival, instructed the Foreman to get written statements from all witnesses. The Supervisor obtained written statements, in Spanish, from the Grievant, Mr. Garcia, and the Foreman that morning (E-4, E-5, E-6). Mr. Garcia's statement was written by the Foreman because Mr. Garcia was not literate. The Supervisor then placed the Grievant and Mr. Garcia on suspension pending an investigation (Tr. p 43-44). The suspension notice given to the Grievant stated that the reason for the suspension was "unacceptable behavior". (Jt-3)

Five days later, on October 17, 2007 the Grievant was terminated effective that day. The reason given in the termination notice was for violation of House Rule No. 1 and No. 27. The charge was "threatening, intimidating and use of abusive language against a fellow co-worker" (Jt-4). The Grievant's co-worker, Guadalupe Garcia, was also terminated the same day for the same reason. The Union filed a grievance, dated October 17, 2007, contending that the Company did not have just cause to suspend or to terminate the Grievant. (Jt-5) The grievance

was processed to this Arbitration.

POSITION OF THE EMPLOYER

The Company had just cause to suspend and, subsequently, to terminate the Grievant. The Grievant and the other employee, Guadalupe Garcia, were arguing and the two men elevated the argument to a plan to fight. The Foreman had to separate the two men in order to prevent the fight from occurring. The Foreman had every reason to believe and suspect a fight was going to occur behind the toilet. The evidence and testimony of the two combatants overwhelmingly showed that the Grievant and Mr. Garcia were going to engage in a fight. The grievance should be denied.

POSITION OF THE UNION

The Company did not have just cause to suspend and, subsequently, to terminate the Grievant. The facts are not in dispute except whether the Grievant indicated by his words or by his actions that he and Mr. Garcia intended to do violence to each other. The Company failed to provide sufficient evidence to show there was an attempt by the Grievant and Mr. Garcia to fight. The Company's evidence consisted entirely of the impressions of a single witness, the Foreman. The decision to take adverse action against the Grievant was made without conducting a fair and thorough investigation. There was no just cause to terminate the Grievant. The grievance should be sustained and the Grievant be made whole.

DISCUSSION

As a preface to the discussion, a few remarks about the just cause standard are in order. The just cause standard is essentially a system of fairness. Though lacking a precise definition, the standard contains several elements that, depending on the circumstances, serve as a guide in the analysis of a discipline or discharge case to determine if there was just cause for adverse

action. Elements include sufficient proof of misconduct, due process, mitigation, progressive discipline, a fair and thorough investigation, etc.

Among the elements, the one that is nearly inviolable is sufficient proof of misconduct. Absent proof of misconduct, there can be no cause for discipline. A fair and thorough investigation is also necessary in arriving at a determination that there was, in fact, sufficient proof of misconduct.

The Company contended that the Grievant and his co-worker, Guadalupe Garcia argued and that the two men elevated the argument to a plan to fight, and that the Foreman had to separate the two men in order to prevent the fight from occurring. The evidence record does not support the Company's position. The Foreman could not hear them arguing. He testified that he heard that they were arguing (Tr. p. 55-56). There was no doubt he could have heard them yelling. The noise level at the harvesting machine was so high that those working at their positions at the machine have to yell at each other to be heard. At the time when the Grievant and Mr. Garcia were at their work stations, the Foreman was on the opposite side of the machine (Tr. p. 56, 61). The Foreman was unable to hear what was being said.

The two men left the work area. The Company contended that they left the work area to go behind the toilet to fight. Mr. Garcia said that he was going to talk with the Foreman to get him to slow down the machine. The Foreman met up with them at a distance of about 30 feet from the machine. At that distance from the machine, a conversation could be held without yelling.

There was some conflict as what actually occurred when the foreman met up with the Grievant and Mr. Garcia. One version was that they were face to face and very angry. However, the Foreman testified that he saw neither man raised their arms or their fists in a threatening

manner. He testified that he heard neither make any threats toward the other. Nor did he see either man make any threatening or intimidating gestures (Tr. p. 60-61).

The Foreman's testimony was that when he approached the two men he asked what was going on. He testified that the Grievant said nothing was going on and returned to the work area (Tr. p-43). Mr. Garcia stayed with the foreman and they talked. According to the Foreman, Mr. Garcia told him that the Grievant wanted to go behind the toilet where they could not be seen and fight.

The Foreman called his supervisor, Jose Luis Torres. Supervisor Torres then called the Labor Relations Manager, Liborio Rodriguez who told him to investigate the matter. Supervisor Torres instructed the Foreman to get statements from all witnesses.

There were only three witnesses who saw and/or heard anything related to the incident. They were the Grievant, Mr. Garcia, and the Foreman. Statements were obtained. The Foreman wrote his statement, the Grievant wrote his statement, and Mr. Garcia's statement, since he was illiterate, was written by the Foreman. All statements were written in Spanish and later translated into English by an unknown person. The Foreman questioned other members of the crew. He could find no one who saw or heard anything of the incident as it happened. During all this, production did not stop nor was it interrupted.

Supervisor Torres arrived at the work site later in the morning sometime after the morning break. He spoke with the Foreman, the Grievant, and Mr. Garcia. A decision was made to suspend the Grievant and Mr. Garcia pending an investigation (Tr. p. 42-43). The suspension was effective that same day, October 12th. The charge for each man was the same, "unacceptable behavior" (Jt-3).

Two days later Mr. Rodriguez visited the work site. He spoke with the Foreman and to at

least one other worker, Guadalupe Zaragoza. Mr. Zaragoza told him that he did not see or hear anything related to the incident (Tr. p. 30). On October 17th, the Grievant and Mr. Garcia were issued a termination notice.

The charge for both men was violation of House Rule # 1 and # 27. The Union wrote to Mr. Rodriguez questioning Mr. Garcia's termination. In his response to the Union, Mr. Rodriguez stated that witnesses to the incident included himself, Guadalupe Garcia, the Grievant, the Foreman, and Guadalupe Zaragoza (Jt-6). Mr. Rodriguez testified that his investigation consisted of statements by the Foreman, the Grievant, Mr. Garcia, and other crew members and formed the basis for his belief that the Grievant and Mr. Garcia intended to fight behind the toilet.

The Company did not conduct a fair and thorough investigation. Guadalupe Zaragoza told Mr. Rodriguez he was not a witness to the event yet he was listed as a witness (Tr. p. 45). Another worker, Aristeo Hernandez, was questioned by Mr. Rodriguez at the work site. He testified at the hearing, as a Company witness, that he saw and heard nothing (Tr. p. 45, 64).

In addition, Mr. Rodriguez, in his investigation, did not speak with the Grievant or Mr. Garcia before making the determination to terminate the Grievant. He testified that he may have talked with one of the men but could not remember which one (Tr. p. 29). Mr. Rodriguez's decision to terminate the Grievant was based solely on the impressions of the Foreman (Tr. p. 30).

Impressions are not proof and should not be used to terminate a long-term employee with no history of violence or misconduct on the job. There was no evidence that the so-called "combatants" had any intent to fight. The Grievant and his co-workers were long-term friends with a history of "horse play". They both knew the rules against fighting or attempting to fight.

It's beyond belief that they would tell the foreman they were leaving the work area to go behind the toilet so he could not see them and fight. The evidence record was clear. The Foreman saw no threatening intimidating gestures by the Grievant or Mr. Garcia. If the Company had conducted a fair and thorough investigation, the Company would have found that there was no just cause for the Grievant's suspension and termination.

For the reasons discussed in the foregoing, the Arbitrator's conclusion is that the Company did not have just cause to terminate the Grievant, Manuel Ceja Melchor. The grievance is sustained.

AWARD

The grievance is sustained. The Company did not have just cause to terminate Manuel Ceja Melchor.

REMEDY

The Company is directed to reinstate Manuel Ceja Melchor to his position with the Company and to make him whole for all lost income and benefits less other income earned.

The Arbitrator retains jurisdiction over any dispute that may arise in the implementation of the remedy.



C. ALLEN POOL, Arbitrator

Date: October 14, 2008