

STATE OF CONNECTICUT
DEPARTMENT OF LABOR
STATE BOARD OF MEDIATION AND ARBITRATION

IN THE MATTER OF
PEPSICO BEVERAGES NORTH AMERICA
and
TEAMSTERS LOCAL 145

Case 2023-A-0033

Hearing Date(s): December 6, 2022 and January 3, 2023
Hearing Location: Zoom videoconference
Date of Award: April 14, 2023

APPEARANCES:

Attorney Andrew T. Williamson
Kilpatrick Townsend & Stockton LLP
1100 Peachtree Street NE Suite 2800
Atlanta, GA 30309-4528
For Management

Attorney John M. Walsh, Jr.
Licari, Walsh & Sklaver, LLC
322 East Main Street, Suite 2B
Branford, CT 06405
For Union

ARBITRATION AWARD

This arbitration arises from a dispute between PepsiCo Beverages North America (“Employer”) and Teamsters Local 145 (“Union”) regarding termination of the Grievant, Tommy Tosado. Hearings were held on December 6, 2022 and January 3, 2023 via Zoom videoconference.

On behalf of the Employer, Attorney Williamson made an opening statement, offered nine exhibits which were marked as full exhibits absent objection, and presented four witnesses who were questioned and cross-examined under oath: Carlos Salgado (“Warehouse Manager”); Victoria Fecteau (“HR Associate Manager”); Frank Shannon (“Sales Operations Manager”); and Marc Gilkes (“Daytime Warehouse Supervisor”).

On behalf of the Union, Attorney Walsh made an opening statement, offered four exhibits which were marked as full exhibits absent objection, and presented two witnesses who was questioned and cross-examined under oath: Tommy Tosado (“Grievant”); and Dennis Novak (“Union Principal Officer”).

On rebuttal, Employer recalled Sales Operations Manager, HR Associate Manager, and Warehouse Manager who were again questioned and cross-examined under oath.

The parties waived oral closing arguments in favor of written briefs which were submitted simultaneously on February 27, 2023.

ISSUES

Did PepsiCo have just cause pursuant to Article 8 of the Collective Bargaining Agreement to terminate Tommy Tosado?

If not, what shall be the remedy?

RELEVANT FACTS

1. The Employer and Union entered into a Collective Bargaining Agreement (“CBA”) for the period October 1, 2019 to September 30, 2023. (Exh. E-1)
2. Employer’s Stratford facility is a distribution facility. They receive product from the manufacturing facility and sell and distribute the product to customers. (Testimony of Warehouse Manager)
3. Grievant was employed by Employer for eighteen years with a clean disciplinary record. As of July 2022, he was an Inventory Clerk Specialist and a member of the Union. (Testimony of Grievant, Daytime Warehouse Supervisor)
4. Warehouse day crew employees arrive at work at different times: two employees arrive at 3:00am; one arrives at 4:00am; and one arrives at 7:00am. There are no managers on site when the two earliest shifts arrive. Employees have two paid 15-minute breaks and one unpaid 30-minute break during their eight-hour shift. They are required to clock out for the unpaid break. (Testimony of Warehouse Manager, Daytime Warehouse Supervisor, Grievant)
5. Warehouse Manager usually arrives at work between 6:00 and 7:00 in the morning. (Testimony of Warehouse Manager, Grievant)
6. Daytime Warehouse Supervisor arrives at 9:00am. He is Grievant’s direct supervisor. (Testimony of Warehouse Manager, Daytime Warehouse Supervisor)
7. Grievant’s shift starts at 3:00am. His first assigned task is to load UCV coolers into trucks with assistance of another employee. That task takes about one hour. (Testimony of Warehouse Manager, Sales Operations Manager, Daytime Warehouse Supervisor, Grievant).
8. Grievant typically takes a break and goes to Dunkin Donuts after loading the UCV coolers. It takes about ten minutes round trip to go to Dunkin Donuts. (Testimony of Grievant)
9. After loading the UCVs, Grievant conducts a warehouse inventory with an electronic scan gun. That task normally takes 2.5 to three hours to cover eight aisles, the wall, the canopy, and the reserves. Grievant is very good at the inventory scan. (Testimony of Warehouse Manager, Sales Operations Manager, Daytime Warehouse Supervisor, Grievant).
10. Warehouse Manager reviews the inventory scan and instructs Grievant to make any necessary corrections. The correct inventory must be reported to the national system by 9:00am so that they can determine how much inventory is needed for the following day. (Testimony of Warehouse Manager, Grievant)
11. On July 25, 2022¹, Warehouse Manager walked through the warehouse a little after 6:00am and noticed that Grievant was doing inventory scans on aisle two and thought that he should be further ahead. Warehouse Manager told Sales Operations Manager that Grievant was running late and that they had a “potential situation.” They did not ask Grievant why he was only on aisle two at that time. (Testimony of Warehouse Manager, Sales Operations Manager)
12. Employer maintains security cameras inside and outside of the Stratford facility. Video recordings from the security cameras are maintained for 21 days and then automatically deleted. (Testimony of Warehouse Manager)

¹ All dates are 2022 unless otherwise indicated.

13. Warehouse Manager and Sales Operations Manager reviewed the security camera footage for the period starting at 3:00am that day. They observed Grievant leave the facility at 3:53am without clocking out. Grievant walked past the time clock when leaving and returning to the facility. Grievant got in his vehicle and drove away. At 4:07am, Grievant returned to the parking lot in his vehicle. Grievant re-entered the building at 4:37am. He began his first inventory scan at 5:54am. (Exh. E-2; Testimony of Warehouse Manager, Sales Operations Manager)
14. After reviewing the security camera footage, Warehouse Manager and Sales Operations Manager spoke with HR Associate Manager about a potential time theft situation and they decided to investigate further. (Testimony of Warehouse Manager, HR Associate Manager, Sales Operations Manager)
15. At 3:00am on July 26, Warehouse Manager, Sales Operations Manager, HR Associate Manager, and Daytime Warehouse Supervisor positioned themselves at various spots around the facility and at the Dunkin Donuts that Grievant frequents. They observed Grievant walk out of the facility at 4:01am; drive away in his vehicle at 4:03am; drive back into the parking lot at 4:13am; sit in his car until 5:08am; enter the building at 5:09am; walk past the time clock without clocking in or out; and start his first inventory scan at 5:18am. (Testimony of Warehouse Manager, HR Associate Manager, Sales Operations Manager, Daytime Warehouse Supervisor)
16. After observing Grievant, Warehouse Manager, Sales Operations Manager, HR Associate Manager, and Daytime Warehouse Supervisor met in the conference room to discuss what they witnessed. Daytime Warehouse Supervisor then asked Grievant to come to the conference room to discuss the situation. The Union Steward attended the meeting. (Testimony of Warehouse Manager, HR Associate Manager, Sales Operations Manager, Daytime Warehouse Supervisor)
17. During the meeting, HR Associate Manager questioned Grievant about his daily routine and about the events that they observed that morning. Grievant said that he stacks his two paid and one unpaid break and takes that at the same time and that his long absence that morning was a one-time occurrence. (Testimony of HR Associate Manager, Sales Operations Manager, Daytime Warehouse Supervisor, Grievant)
18. Grievant was suspended without pay pending further investigation. (Testimony of Warehouse Manager, HR Associate Manager, Grievant)
19. Union Steward informed Union Principal Officer of the meeting and suspension. Union Principal Officer telephoned HR Associate Manager to discuss Grievant's situation. He stated that Grievant, a loyal employee, was very upset and should be given a suspension or warning letter or be granted a leave of absence to take care of his personal business. (Testimony of Union Principal Officer)
20. On July 26, Grievant filed a grievance alleging that his suspension was not for just cause. HR Associate Manager denied the grievance on August 10. (Exh. U-1; Testimony of Union Principal Officer)
21. On July 27, Grievant filed a grievance alleging that Employer violated Article 4 of the CBA by interfering with Union grievances and threats of retaliation. HR Associate Manager denied the grievance on August 10. (Exh. U-2)
22. Sales Operations Manager reviewed security camera footage from July 8 to July 25, which was as far back as the videos were maintained. He saw a pattern of Grievant being away from the building for periods of time that exceeded his allotted paid breaks without

- clocking out. Sales Operations Manager and HR Associate Director reviewed Grievant's time records and saw that he clocked out for his 30-minute unpaid break later in the day on the days that he took an extended morning break. (Exh. E-3; Testimony of HR Associate Manager, Sales Operations Manager)
23. Sales Operations Manager made a note of the times that Grievant came and went on the security camera footage and submitted it to HR Associate Manager. (Exh. E-7; Testimony of Sales Operations Manager, HR Associate Manager)
 24. Employer's Code of Conduct applies to all employees. It is provided to new hires and all employees are required to review and sign off on it annually through the online platform. Grievant most recently signed off on the Code of Conduct in late 2021. He received a physical copy of the Code of Conduct ten years ago. (Exh. E-4; Testimony of HR Associate Manager, Grievant)
 25. The Code of Conduct states, *inter alia*:
 - a. One of the key behaviors of the PepsiCo Way is *Acting with Integrity* in everything we do. That's because integrity is among PepsiCo's most valuable assets.
 - b. You should never falsify, omit, misstate, alter or conceal any information, or otherwise misrepresent the facts on a company record or encourage or allow anyone else to do so.
 - c. Accurate financial reporting means you should never falsely report time worked to earn more pay or to avoid discipline for being late or absent from work.(Exh. E-4)
 26. Employees are required to record their time correctly so that they are properly compensated for time worked. (Testimony of HR Associate Manager)
 27. Grievant was aware that time theft is not permitted. (Testimony of Grievant)
 28. Employer determined that Grievant committed time theft. On July 28, HR Associate Manager recommended that they terminate Grievant. (Testimony of HR Associate Manager, Sales Operations Manager)
 29. Employer representatives did not have another meeting with Grievant or Union prior to terminating Grievant. HR Associate Manager notified Union Principal Officer that Grievant was being terminated. (Testimony of HR Associate Manager, Union Principal Officer)
 30. HR Associate Manager prepared a termination letter. Warehouse Manager reviewed and signed the letter. (Testimony of Warehouse Manager, HR Associate Manager)
 31. The termination letter states that Employer conducted a thorough review of Grievant's reported work hours and work activity; that they concluded that he violated the Code of Conduct, specifically regarding theft of company time; and that his employment is terminated effective July 28. (Exh. E-5)
 32. Sales Operations Manager telephoned Grievant on July 29 to inform him of the termination. (Testimony of Sales Operations Manager, Grievant)
 33. Grievant received the termination letter on August 1. (Testimony of Grievant)
 34. On August 1, Grievant filed a grievance alleging that he was not given a proper hearing before being terminated. HR Associate Manager denied the grievance on August 10. (Exh. E-6, U-3; Testimony of HR Associate Manager, Grievant, Union Principal Officer)
 35. In October, two other employees were recommended to be terminated for one incident of time theft. At the Union's request, they were permitted to resign in lieu of termination.

(Exh. E-8, E-9; Testimony of HR Associate Manager, Sales Operations Manager, Union Principal Officer)

36. Another employee was investigated for multiple incidents of time theft. Employer sought termination of that employee who resigned during the investigation. (Testimony of HR Associate Manager, Sales Operations Manager)

RELEVANT CONTRACT LANGUAGE

Article 2 – Management Rights

The management of the Employer's Facility, the direction of the working forces and the exercise of all rights customarily possessed by management are vested exclusively in the Employer, except to the extent that any such right may be specifically surrendered to [or] abridged by an express provision of this Agreement.

Article 8 - Discharge

No Employee shall be discharged or otherwise disciplined except for just cause. If within one (1) week the Union disputes the discharge or other discipline imposed on the Employee, the parties shall attempt to resolve the dispute, but if they fail to agree, the dispute shall be finally determined in arbitration under this contract, with the arbitration tribunal empowered to direct reinstatement with or without back pay or to issue such other award as may be appropriate under the circumstances of the particular case.

Article 17 – Time Records and Bulletin Board

Section 1. Suitable time records shall be provided by the Employer on which the Employee shall be required to record their "in" and "out" time. All time record shall be kept on file by the Employer for at least eight (8) weeks and shall be accessible to an authorized representative of the Union.

EMPLOYER POSITION

The Employer argues that this is a straight forward case of Grievant being terminated for committing fraud in the form of time theft; that Grievant engaged in multiple instances of time theft, one of which was witnessed by Employer representatives; that Employer conducted a thorough investigation that included interviewing Grievant; that Grievant was not forthcoming and did not acknowledge his actions; that Employer has a code of conduct that covers falsification of records; that, due to his length of service with Employer, Grievant should have known that his conduct was fraudulent; that Employer had just cause to terminate Grievant for time theft; and that Employer has repeatedly enforced the policy by terminating all known violators.

UNION POSITION

The Union argues that discharge is the most severe penalty that an employer can mete out and that it is equivalent to economic capital punishment; that Employer must prove, by clear and convincing evidence, wrongdoing and that the punishment was justified; and that just cause for termination does not exist. The Union further argues that Grievant was not warned of the consequences of his conduct; that the investigation was not fair and objective and did not produce substantial evidence of time theft; and that the degree of discipline was not reasonably

related to the seriousness of the offense, Grievant's length of tenure, and lack of disciplinary record.

DISCUSSION

Grievant was allotted two 15-minute paid breaks each shift. Grievant contends that he was permitted to stack his two 15-minute paid breaks to take one longer break; Employer denies that stacking was permitted.

Employer claims that the time between Grievant finishing loading UCV coolers and starting the first inventory scan is time theft. Exhibit E-7 shows both a) the time that Grievant was out of the building or sitting in the breakroom and b) the time between Grievant's reentry to the building and when he began the first inventory scan.

Grievant testified that on July 25 and July 26, he was on the phone with his wife regarding a personal matter in the time between his return to the building and the beginning of the inventory scan and that he was embarrassed to tell Employer's representatives about the personal matter when meeting with them. Grievant admitted that on July 25 and 26 he took breaks in excess of his allotted paid break time without clocking out or telling his manager or supervisor that he forgot to clock out. Those breaks amounted to 41 minutes and 68 minutes, respectively. There is no evidence that Grievant took any other paid breaks during his shift, supporting his testimony that he stacked his paid breaks. Subtracting 30 minutes of allotted paid break time from the time Grievant was not working, Grievant's paid breaks exceeded his allotment by 11 and 38 minutes, respectively, on July 25 and July 26.

The evidence shows that Grievant took the following paid breaks (time that he was out of the building or sitting in the breakroom while on the clock):

- July 8: 4:09-4:49 – 40 minutes
- July 11: 4:20-4:34 – 14 minutes
- July 12: 4:16-4:51 – 35 minutes
- July 13: 4:38-5:09 – 31 minutes
- July 15: 4:26-5:11 – 45 minutes
- July 18: 4:24-5:15 – 51 minutes
- July 19: 4:26-4:56 – 30 minutes
- July 20: time that Grievant returned to building is not noted
- July 21: 4:42-4:51 – 9 minutes
- July 22: time that Grievant returned to building is not noted
- July 25: 3:56-4:37 – 41 minutes
- July 26: 4:01-5:09 – 68 minutes

The evidence also shows that, on the above dates, Grievant began inventory scans between 5:10 and 5:28am.

Employer investigated dates prior to July 25 after Grievant was suspended and did not give him or the Union an opportunity to discuss or respond to the findings before terminating him. On the dates between July 8 and July 22, there is no evidence as to whether Grievant was working - putting on safety equipment or performing other tasks - or idling during the time between returning to the building and beginning the inventory scan.

Grievant testified that he is aware that time theft is not permitted. He admitted that he took extended breaks on July 25 and July 26 without clocking out and that the breaks were longer than the 30 minutes he is allotted per shift for paid breaks because he was on the phone with his wife regarding a personal matter. Prior to investigating and surveilling Grievant, Employer did not ask Grievant why he was starting his inventory scan late on July 25.

Warehouse Manager testified that when he arrives at work between 6:00 and 7:00 in the morning, he walks through the warehouse and that during his walk-through on July 25, he noticed that Grievant was only in aisle two. If, as Employer claims, Grievant was not working for extended periods throughout the month of July, it is inconceivable that Warehouse Manager did not notice until July 25.

Warehouse Manager and Daytime Warehouse Supervisor each testified that it was out of the ordinary for Grievant to be starting the inventory scan so late on July 25, which seems inconsistent with their claim that Grievant regularly took breaks of up to two hours prior to beginning the inventory scan.

The evidence shows that on July 25, Grievant left the building at 3:56, returned to the parking lot from Dunkin Donuts at 4:07, sat in his car for 30 minutes, and returned to the building at 4:37 – a period of 41 minutes away from the building. He began his inventory scan at 5:54. Grievant testified that he spent the time in between talking to his wife about a personal matter.

It is not clear why Warehouse Manager did not question Grievant about his inventory progress at the time but instead reported to Sales Operations Manager that they had “a potential problem.” Instead of asking Grievant about his progress, Sales Operations Manager, Warehouse Manager, Daytime Warehouse Supervisor, and HR Associate Manager reported to work at 3:00am the following day to conduct surveillance on Grievant without asking him what was going on.

The evidence shows that on July 26, Grievant left the building at 4:01, returned to the parking lot from Dunkin Donuts at 4:13, sat in his car until 5:08, and returned to the building at 5:09 – a period of 68 minutes away from the building. He began his inventory scan at 5:18. Grievant testified that he spent the time in between talking to his wife about a personal matter.

Credible evidence supports a finding that Grievant, an 18-year employee with no previous disciplinary record, violated Employer’s published Code of Conduct and trust by taking extended breaks on at least six occasions in July 2022 while on the clock. This evidence supports a finding that the Employer had just cause to discipline Grievant for his violations.

In evaluating the severity and appropriateness of the discipline, treatment of other employees is considered. HR Associate Manager and Union Principal Officer testified that in October, other employees were terminated for one instance of time theft and were permitted to resign in lieu of termination. Each of these instances were two months after Grievant’s termination. There is no evidence in the record of discipline of other employees for time theft prior to Grievant’s termination to determine if Grievant’s treatment was in line with other cases, was discriminatory, arbitrary or capricious, or put Grievant on notice of the consequences.

Grievant testified that after the meeting on July 26, he asked Daytime Warehouse Supervisor why he wasn’t given a verbal warning as was done with drivers and that, in response, Daytime Warehouse Supervisor “put his hands in the air like he didn’t know.” No Employer witnesses rebutted that testimony.

Union Principal Officer testified that there are usually two or three meetings between Employer and Union before a termination and that they discuss suspension or a last chance

agreement, especially for a long-tenured employee. Union Principal Officer and HR Associate Manager each testified that there was no meeting between Employer and Union after the suspension pending investigation and before the decision to terminate. There were such meetings for the employees who were permitted to resign in lieu of termination in October.

The panel finds that termination is too severe in this case given the following factors:

- Grievant's eighteen-year tenure with no disciplinary record;
- Employer's failure to question Grievant about their concerns at the time of the incident;
- Lack of evidence as to whether Grievant was working or idling between his return to the building and start of the inventory scan from July 8 to July 22;
- Terminating Grievant without giving him an opportunity to hear or respond to the investigation of activity prior to July 25;
- Terminating Grievant without speaking with Union Principal Officer as in other cases.

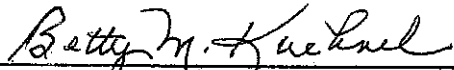
A period of suspension is appropriate for an employee who violated the Code of Conduct and trust of the Employer by taking extended paid breaks despite knowing that it was inappropriate.

AWARD

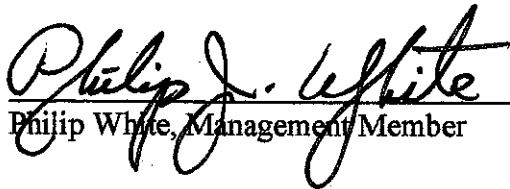
PepsiCo Beverages North America did not have just cause to terminate the Grievant, Tommy Tosado. For the reasons stated in the Discussion, the Arbitration Panel finds that PepsiCo Beverages North America did have just cause to suspend the Grievant for three months, and, accordingly, the termination shall be reduced to a three-month suspension. Grievant shall be reinstated and made whole for any lost wages and benefits consistent with this Award.



Janis C. Jerman, Chair and Neutral



Betty Kuehnel, Labor Member



Philip White, Management Member