IN THE MATTER OF THE ARBITRATION BETWEEN
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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 305, UNION,	)	ARBITRATOR'S OPINION AND AWARD
and	)	****** TERMINATION GRIEVANCE
UNIFIED WESTERN GROCERS, INC., EMPLOYER.	)	

BEFORE: JOSEPH W. DUFFY
ARBITRATOR
PO BOX 12217
SEATTLE, WA 98102-0217

REPRESENTING
THE UNION: PAUL C. HAYS
CARNEY, BUCKLEY, HAYS, MARSH & GIBSON
1500 SW FIRST AVENUE, SUITE 1015
PORTLAND, OR 97201

REPRESENTING
THE EMPLOYER: DAVID N. WILLAUER
WILLAUER & ASSOCIATES
46471 MANITOU DRIVE
INDIAN WELLS, CA 92210

HEARING HELD: MARCH 13 & 16, 2007
MILWAUKIE, OR

OPINION

Introduction

International Brotherhood of Teamsters, Local 305 ("union") serves as exclusive bargaining representative for a bargaining unit of employees who work for Unified Western Grocers, Inc. ("employer"). The union and the employer ("parties") submitted this dispute to arbitration under their April 2, 2005 through and including April 5, 2008 collective bargaining agreement ("Agreement"), a copy of which they introduced at the hearing as a joint exhibit. (J1) The parties selected me to arbitrate this dispute by mutual agreement.

The grievance in this case arose from the indefinite suspension on or about March 30, 2006 followed by the employment termination on or about April 12, 2006 of Mr. ******. (J2)

The hearing took place at the employer's offices in Milwaukie, OR. At the beginning of the hearing, the parties agreed that the grievance is properly before me for a final and binding decision on the merits. (TR4) The parties agreed that I would retain jurisdiction to aid in the implementation of the remedy should I rule for the union. The parties agreed that either party can invoke my jurisdiction to address remedy issues for sixty days after I issue my Award, and I will then retain jurisdiction until the dispute is resolved either by agreement of the parties or by my ruling. (TR5)

The hearing proceeded in an orderly manner. The advocates did an excellent job of presenting the respective cases. A court reporter transcribed the hearing and made a copy of the transcript available to the parties and to me. Each party had a full opportunity to call witnesses, to make arguments and to introduce documents into the record. Witnesses were sworn under oath and subject to cross-examination by the opposing party.

The parties submitted three joint exhibits (J1-J3), six union exhibits (U1-U6) and eighteen employer exhibits (E1-E18). Following the hearing, the parties agreed to add employer's exhibit 19 to the record. (E19) A total of ten witnesses testified at the hearing, including the grievant. At the close of the testimony, the parties agreed to set a mutually agreeable deadline and submit post-hearing briefs by simultaneous submission to me and to each other postmarked by that deadline. (TR276) I received the briefs, postmarked by the agreed deadline of June 1, 2007, and closed the record on June 4, 2007.

Issue for Decision

The parties agreed that the issue for decision is stated as follows:

> Was the grievant suspended and discharged for just cause under the terms of the labor agreement? If not, what is the appropriate remedy? (TR5)

Background

The employer became known as Unified Western Grocers following the 1999 merger of United Grocers and Certified Grocers of California. The employer operates approximately five warehouses on its property in Milwaukie, OR, including the frozen food warehouse where this grievance arose.

The grievant, Mr. ******, began work for the employer at the employer's warehouse in Milwaukie, OR in October 1990. At the time of his termination, which was effective on April 12, 2006, the grievant was a seniority employee working the swing shift and his regular hours were 3:00 p.m. to 11:30 p.m. (TR244) The grievant had no active written warning notice on file at the time of his termination.[1]

Beginning in July 2003, the employer first introduced the computer driven production standards system called the Triceps system to the frozen food warehouse. At the time, the frozen food warehouse operated on a mechanized system. Beginning in January 2004 and ending in May or June of that year, the employer removed the mechanized system equipment and converted the warehouse to a conventional system using Triceps. (TR31-35)

The employer did not institute production standards in the frozen food warehouse when the employer first introduced Triceps in 2003. The employer had implemented production standards in other warehouses, but in the frozen food warehouse in Milwaukie, the standards for forklift drivers using the Triceps system have only been in place since late 2004.

The Triceps system relies in part on radio frequency ("RF") forklift equipment. Each forklift has a computer screen and key board. Employees had to be trained in the operation of the RF forklifts. The employer initially provided a two-hour training session to the forklift drivers in about July 2003. The employer provided the employees with written procedures during that training session. (E7, TR34) For about two weeks, beginning about July 12, 2003, management representatives observed and worked with the employees who were using the RF

[1] The record shows that the grievant received a written warning in 1991. (TR245) The Agreement provides that written warnings sunset after nine months. (J1, Section 4.2, p. 3) The grievant also received a verbal warning on February 21, 2006 for not cutting the shrink wrap on a pallet and not rotating the stock properly. (E11; TR117-119)

forklift system for the first time. (TR35-36) The grievant testified that he attended the July 2003 two-hour training session, but at the time he did not work as a forklift driver. He worked as an order selector in July 2003. (TR246) The materials distributed in the 2003 training do not contain any information on the use of tags when performing non-standards work. (E7)

More than a year after first introducing Triceps, the employer provided additional training on the RF system during meetings held with the employees in October 2004. (TR38) This training focused on the production standards (aka labor standards) that had been developed for the RF forklift drivers in the frozen food warehouse. (E4) The employer then implemented the production standards in about December 2004. Management representatives also held a meeting in December 2004 to answer questions. (TR42-44, 69)

The training materials used to introduce the production standards to the RF forklift drivers included the statements: "The operator must sign off the computer for all indirect jobs such as battery changes, lunch, breaks, assignment complete, and end of shift. **Before signing on to any other indirect tasks, you must have Manager approval.**" (emphasis by bold in original)(E4, #14) The materials also contain the statement:

> **DO NOT LOG OFF THE RF UNIT FOR ANY REASON, OTHER THAN WHAT IS STATED ABOVE, WITHOUT FIRST OBTAINING APPROVAL OF A SUPERVISOR.**
> **FAILURE TO COMPLY WITH ANY OF THE ABOVE POLICIES/RULES OR ANY MISREPRESENTATION OF DELAY TIMES MAY RESULT IN DISCIPLINARY ACTION UP TO AND INCLUDING TERMINATION.** (all caps and bold in the original) (E4)

The grievant acknowledged the policy but declined to sign a copy of the procedures on October 24, 2004. The materials contain no mention of the use of tags with indirect work.

In the simplest terms[2], the words production standards mean that the employer has established, through time/motion studies, a specific amount of time for completing each task that forklift drivers perform in the warehouse. The work performance of the forklift drivers is measured against the times, meaning that a driver who completes a task within the prescribed time is performing satisfactorily and a driver who takes more time than the standard time to complete a task is performing unsatisfactorily. The Triceps system allows the employer to observe in detail the tasks that the fork lift drivers perform and the time the drivers take to

[2] My description of the RF system, the production standards and wage incentives is intended as a brief overview of the much more detailed information contained in the record in this case.

perform the tasks. The system also can produce reports that show these details for each forklift driver. The system provides the employer with detailed information on labor costs and productivity that the employer uses to operate its business and to plan and budget.

In late 2004, the employer also introduced a "wage incentive" system designed to reward forklift drivers who exceed the production standards according to certain prescribed terms. The wage incentive comes in the form of supplemental pay that is paid periodically to the employee. (E5; TR38-39)

Order selectors at the frozen food warehouse operate under a similar but separate set of production standards and wage incentives.

RF forklift drivers working the swing shift sign onto the Kronos time keeping system when they arrive at work and then they attend a shift meeting. After the meeting, the forklift drivers sign onto the RF system on their forklift and begin carrying out the assignments that appear on the RF computer screen.

Forklift drivers working in the frozen food warehouse perform three primary functions: 1.) Replenishment (aka letdowns or drops) involves moving pallets (aka boards) of product from a reserve or storage location to an area where the order selectors have access to the product (aka pick slot). 2.) Put away (aka receiving) involves moving product from the loading dock to the reserve locations in the warehouse. 3.) Full-pallet selection (aka PSL or Hog) involves moving an entire pallet of product from the reserve location directly to the loading dock.

The grievant worked in replenishment at the time of his termination. During his employment with the employer he also worked as a loader and as an order selector.

As a replenishment RF forklift driver, the grievant received messages on his RF screen directing him to go to a certain reserve location and move a pallet to a certain pick slot. The task of moving the product to the correct location also includes placing the pallet in the slot, cutting away and removing the plastic wrap from the pallet, moving stray cases of product, removing damaged product and removing empty pallets from the pick slot, as well as other incidental tasks. (TR45-50; E4, E7, E8) When performing this replenishment task, the grievant was working on "standards" meaning that he was performing the type of work directly attributable to his position. A replenishment driver might also be taken "off standards" to perform other work, such as loading. The forklift driver also goes off standards and signs off the RF unit when taking breaks or lunch and at the end of the work day.

In the fall of 2005, about six months or less prior to the grievant's termination, the employer introduced a system of "tags", which provide a method of accounting for time spent by the RF forklift drivers performing tasks not covered by the standards (aka indirect work). (E9; TR58-59; TR87-94; TR103:25-104:8) Previously, the employer did not have a method for tracking the time spent on indirect work. With the addition of tags to the requirements, a RF forklift driver who had no work coming up on the computer screen was not only supposed to contact the supervisor to find out what needed to be done but also to get a tag that showed the type of non-standards work being performed. (E4) If, for example, the forklift battery needs to be changed, the RF forklift driver is supposed to obtain a "battery tag" from the supervisor's office or the shipping office. The tag has a code that is entered into the system to show what the RF driver is doing while the driver is on the tag. Therefore, the time spent changing the battery will be designated for that purpose and will be separated from the driver's performance on "standards" work, thus not affecting the assessment of the driver's productivity.

Mr. P reinforced the need to use the tags in meetings with employees. (TR88) Mr. H testified that he discussed the use of tags with the swing shift employees at the shift meeting three times in the fall of 2004. Mr. H also testified as follows:

> Q. And what did you tell the employees with respect to the tag procedure during these three meetings?
> A. I told them that they were not to clock off, to clock out of their computer, unless they had supervisor approval; and that the only time they were allowed to is if they had to do a battery change. And then I told them that if I was not available and then they had a hard time finding a foreman, that they could go on an indirect task and then when they saw myself or a foreman that they let us know that they were on one at that time or that they had to go on one at whatever time it was that they had to go onto a tag. (TR105:23-106:9)

Mr. H testified that he has two bargaining unit foremen who work on the swing shift and they also can give permission to drivers to use tags. He also testified that sometimes he shuts down the computer in his office when he's not there and employees would have to go to the shipping office to scan a tag for a battery change, for example. Mr. H also testified:

> Q. Do you frequently have to leave the office to go out into the frozen food warehouse?
> A. Yes.
> Q. Do you also leave the warehouse to go to another warehouse?
> A. Yes.
> Q. What would cause you to do that?

> A. At that time there was some newer supervisors in grocery department and so I'd go over there and help them out or I may bring some cross dock cases over to deli or grocery so they could get on the trailers that they're being loaded onto. Sometimes help with the invoices or bills, take them over to the grocery shipping office…. (TR107:17-108:5)

On cross-examination, Mr. H testified as follows:

> Q. And have you left instructions as to what to do if they [the forklift drivers] can't find you, the foreman or the assistant foreman?
> A. Yes. Then they clock off, go onto a tag, and generally what the practice has been is they will get onto a sanitation tag for extra sanitation duties outside their forklift sanitation duties and they'll generally sweep the dock.
> Q. So you've authorized them to log off the system; is that correct?
> A. Uh-huh.
> Q. Get a tag and scan in that tag on their own if they can't find any of the three of you?
> A. Yes.
> Q. Okay. What are they supposed to do after that?
> A. Then they go onto—Like I said, the past—the practice has been that they go onto the sanitation tag and they will start sweeping the dock. The dock does get pretty messy on the shipping shift, and they'll sweep that up, and then when they see myself or one of the foremen they'll let them know that they're on a sanitation tag and then we'll either direct them to do something else or instruct them to continue what they're doing. (TR112:20-113:17)

This dispute arose because the employer determined from studying reports generated by the Triceps system for the period February 12, 2006 to March 16, 2006 that the grievant had signed off the RF system without the permission of a supervisor and without using a tag over one hundred times during that period for a total of about 633 minutes. (E12, E13; TR124-140) In a meeting with the employer, the grievant admitted that he had not used the tags or obtained supervisory approval. (U1) In his testimony at the hearing, the grievant explained that he sometimes used tags but he also sometimes forgot to use them. He testified that he often did not use tags if the indirect work that needed to be done was right in front of him. He testified that he found it more efficient simply to log off and do the work rather than go to the supervisor's office or try to find the supervisor in the warehouse. The grievant also explained that he sometimes logged off the system when he had no work to perform so that he could sweep the area and do other non-standards work.

The grievant received incentive pay for the period January 29, 2006 through April 1, 2006 in two checks (March 9; $62.53 and April 12; $143.48) totaling $206.01. (E19) Some of that incentive pay can be attributed to the February 12, 2006 to March 16, 2006 period covered by the employer's investigation that led to the grievant's discharge.

The employer's investigation and review of reports for the period February 12, 2006 to March 16, 2006 revealed that other employees also logged off the RF system without the use of tags. The union studied the records and concluded that Mr. N logged off for 412 minutes and Mr. S for 611. The employer contends that the union misinterpreted the reports and asserts that Mr. N logged off for 307 minutes and Mr. S for 453 minutes during the relevant period. (U2- U5, E17, E18; TR195-200; TR268-269)

The employer interpreted the grievant's actions in logging off the system as falsification designed to gain an advantage under the wage incentive system. The employer also considered the grievant the "worst offender" among the workers who logged off without using tags. (TR188:16-190:25) The employer suspended the grievant indefinitely following a meeting with him on March 29, 2006 and then terminated his employment. (U1, J2) The employer's stated the reason for termination as: "…you violated company rules, and by so doing, falsified information having a significant, material impact on company reports and records." (J2)

When the parties could not resolve this dispute in the grievance procedure, this arbitration followed.

The Agreement

The Agreement contains the following provision:

> **ARTICLE 4 – DISCHARGE OR SUSPENSION**
>
> 4.1 The Employer may discharge or suspend an employee for just cause, but no employee shall be discharged or suspended unless written warning notice shall previously have been given to such employee of a complaint against him concerning his work, conduct, or violation of Company rules, except that no such prior warning notice shall be necessary if the cause for discharge or suspension is dishonesty, drinking related to his employment, illegal use, selling, transportation, or possession of drugs, gross insubordination, recklessness, carrying unauthorized passengers, or the willful, wanton or malicious damage to the Employer's property or such other misconduct which is so serious in nature as to justify discharge or suspension without prior warning notice. Company rules shall be made available to employees in writing. (J1, p.3)

Discussion

The Just Cause Standard

The Agreement provides that the employer may discharge or suspend an employee for just cause. The parties did not define just cause, which is not uncommon in collective bargaining agreements. The terms just cause, justifiable cause and sufficient cause, as well as other similar terms, often are used interchangeably in the collective bargaining context. The terms have developed a specific meaning in labor arbitration based on numerous arbitration decisions issued over many years under many different collective bargaining agreements in a wide range of industries and employment settings.

Arbitration decisions often refer to the "seven tests" of just cause developed by Arbitrator Carroll R. Daugherty. (see *Enterprise Wire Co.*, 46LA359; Daugherty:1966; *Moore's Seafood Products, Inc.*, 50LA83; Daugherty:1968) The seven tests have been widely used and also criticized. (see *1989 Proceedings of the National Academy of Arbitrators*, Chapter 3, p.23) Leading arbitrators have taken issue with mechanical or automatic application of the seven tests except where the parties have specifically agreed on that approach.

In a 1947 arbitration decision, Arbitrator Harry Platt made the following observation about cause as applied by labor arbitrators in termination cases:

> It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires "sufficient cause" as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrongdoing and, if so, to confirm the employer's right to discipline where its exercise is essential to the objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge. To be sure, no standards exist to aid an Arbitrator in finding a conclusive answer to such a questions and, therefore, perhaps the best he can do is to decide what reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just. (*Riley Stoker Corp.*, 7L.A.764; Platt:1947)

Generally, a common understanding has developed in the field of labor/management relations that just cause requires: 1.) Notice to the grievant of the rules to be followed and the

consequences of non-compliance; 2.) Proof that the grievant engaged in the alleged misconduct; 3.) Procedural regularity in the investigation of the misconduct, and; 4.) Reasonable and even-handed application of discipline, including progressive discipline when appropriate. (see Hill & Sinicropi, *Remedies in Arbitration, 2nd Ed.* (BNA Books; 1991) p.137-145) I have, therefore, considered the facts of this case against the just cause standard as that term is commonly understood in the field of labor/management relations.

The Grievant's Conduct and the Just Cause Standard

No question exists that the grievant engaged in conduct that warranted some form of corrective action by the employer. The grievant knew the employer wanted RF forklift drivers to use tags when logging off to perform non-standards work and the grievant testified that at times he purposely did not use tags when logging off during the months that preceded his termination. He also testified that he used tags at times and sometimes forgot to use them. He testified that he sometimes did standards work when logged off. (TR250:7-9; U1)

The employer has the right to establish reasonable work performance standards and to require employees to follow the standards. The central issue in this case is whether the grievant's conduct gave the employer sufficient reason to impose summary discharge without engaging in progressive discipline.

The Agreement contains a strong commitment to progressive discipline. The concept of progressive discipline is based on the premise that an employee's conduct can be improved and corrected over time through the application of escalating penalties. Progressive discipline gives the employee an opportunity to understand the seriousness of the performance problem and to reflect on the need for and the method for correcting the problem. Employers and employees both benefit from the rehabilitation and retention of employees through the use of corrective action.

At the same time, certain acts of misconduct represent such a severe problem that immediate discharge without corrective action is justified. Intoxication on duty presents a clear example of the kind of behavior that justifies immediate discharge. The Agreement allows summary discharge for certain types of misconduct, such as dishonesty, illegal drug use, and "…such other misconduct which is so serious in nature as to justify discharge or suspension without prior warning notice." Deciding where the line should be drawn between misconduct that justifies immediate discharge and misconduct that is subject to progressive discipline can be

difficult, and reasonable people may disagree about where that line should fall in particular cases.

Labor arbitrators generally hold that employers must apply progressive discipline except in cases of the most extreme behavior that breaches the fundamental understanding on which the employment relationship between the employer and the employee is based. Stated another way, summary discharge is justified if the employer's legitimate management interests cannot be protected by applying lesser discipline because: l.) The employee's past record shows that the unsatisfactory conduct will continue, or; 2.) The most stringent form of discipline is needed to protect the system of work rules, or; 3.) Continued employment of this employee would inevitably interfere with the successful operation of the business. (Abrams & Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 85 Duke Law Journal 594 (1985), as quoted in St. Antoine, *The Common Law of the Workplace, 2nd Ed.*, p. 186 (BNA Books; 2005))

Therefore, in examining the facts of this case, the first question to ask is whether the grievant's misconduct represented such an extreme breach of the employment relationship that progressive discipline need not be applied.

The charge for which the employer terminated the grievant's employment is falsification of company records. The employer's General Rules of Conduct provide that falsification of company records "may result in disciplinary action, up to and including termination of employment." (E1) The employer contends that the grievant's conduct also fell within the class of offenses designated in the Warehouse Working Rules as "severe infractions" for which suspension or discharge shall result. (E2) The employer also contends that the grievant's conduct constitutes dishonesty, which is designated in the Agreement as an offense that justifies summary discharge.

The employer contends that the grievant not only logged off the RF system without authorization and without using tags on numerous occasions, but he also performed standards work while logged off. The employer contends that the grievant engaged in willful and repeated violations of known procedures, which resulted in material falsification of production reports, which in turn led to the payment to grievant of incentive pay to which he was not entitled.

The union contends that the grievant's suspension and discharge were without just cause. The union contends that the grievant did not intend to falsify any records and he did not seek any profit or gain from not using tags. The union argues that the rules related to the use of tags were

not in writing and were not consistently enforced. The union also argues that the employer treated the grievant more harshly than other employees who engaged in similar conduct. The union contends that the grievant's conduct did not justify summary discharge and the employer should have applied progressive discipline.

The tag system rules that the grievant violated had been introduced in the warehouse only a few months before his termination. The record clearly shows that the grievant was not the only employee who did not use the tags during the period in question. The employer did not want to discharge all the offenders, so in effect the employer discharged the grievant to send a message to others about the importance of the tag system. The employer apparently did not consider the possibility that several employees not using tags as required might indicate a problem either with communication of the rules to the employees or with lax or inconsistent enforcement of the rules.

The records produced under the Triceps system clearly have an essential purpose for the employer in operating its business. The employer has a strong, reasonable interest in maintaining the integrity of its records, but the tag system was relatively new to the frozen food warehouse and problems of implementation commonly occur with new systems. Introducing a new management system to any workplace always involves challenges. Managers almost always have a better understanding of the new program than employees do and some reinforcement is often needed to obtain the necessary level of compliance with the new rules.

Inevitably some employees will not understand the importance of a new system and will not adapt to it immediately. In a few cases, employees will resist a new system because they don't like change or because they haven't bothered to understand it.

My impression of the grievant's failure to comply with the tag procedure is more a question of laxity on his part rather than hostile resistance. The record does not contain any evidence of defiance, hostility toward management or arguments with supervisors from the grievant. In some instances the grievant believed he was working more efficiently by not making a trip to the office to get a tag when the work was right in front of him to do. (TR249:11-24)

The record also does not establish that the grievant signed off the RF system in order to hide out or avoid work. He testified persuasively that when he clocked off the system without using a tag he usually swept the aisles and did other clean up work. (TR252:5-23) Some of that sanitation work was standards work (E8) but some was not. (TR255:9-256:23) Mr. H testified

that when a forklift driver ran out of standards work and no supervisor was available, the driver could log onto a sanitation tag and do additional sanitation work until the employee encountered a supervisor. The grievant essentially short circuited this process and did sanitation work on his own initiative rather than looking for a supervisor and getting permission and a tag. Although wrong, the grievant's actions were consistent with the work the supervisor would have assigned to him at least some of the time.

The grievant received some additional pay for the period in question, but the record does not establish that he understood in any depth how the extra pay was calculated. For example, he testified he did not understand that he received travel time credit every time he signed off the system. (TR248:13-17; TR250:3-251:5; TR257:16-258:2) A system that's clearly understood by managers and production engineers is not necessarily understood as well or in as much detail by the employees working under the system. (E5)

Is it consistent with progressive discipline to make an example of one employee as a means of drawing the attention of the workforce to the need for strict compliance with a recently established rule? I don't think so. The employer could easily have taken the intermediate step of reinforcing with all employees the expectation of strict compliance and the consequences of non-compliance rather than terminating the grievant to send a message.

The employer attempted to characterize the grievant as the worst offender and the outlier among those who didn't use tags for indirect work. The other two examples cited also involved a significant amount of time, even relying on the employer's figures that are lower than the union's. (E17, E18) The employer contends that a better explanation existed for the indirect work done by the others, but I think the bigger issue here is that the tag system was not being consistently enforced in the months after it was introduced. The employer had records that were readily available from the Triceps system through which the employer could have detected problems with drivers logging off the system inappropriately. The employer did not take action to monitor the use of tags by the forklift drivers until the grievant's termination.

Similarly, would Mr. N, Mr. S and possibly Mr. E all put their jobs at risk by not complying with the tag procedure if they clearly understood that non-compliance would result in immediate termination without progressive discipline? I don't think they would have, therefore, I question whether the consequences of non-compliance with the tag system had been clearly communicated to the employees.

In my judgment, the grievant's misconduct here did not rise to the level of misconduct that breaches the fundamental understanding on which the employment relationship between the employer and the employee is based. Therefore, I find that summary discharge was not warranted. I find that the employer's legitimate management interests can be protected by applying lesser discipline. In addition, the Agreement requires the employer to issue a written warning notice to the employee prior to suspension or discharge when the misconduct does not qualify as the most serious type of misconduct. Furthermore, the grievant has a record of satisfactory performance over more than fifteen years. The grievant does not have the type of negative performance record that would suggest that progressive discipline would fail to correct the problem.

The employer argues that to set aside this termination would be to grant clemency and clemency is within the sole discretion of the employer. Mitigation and clemency are two different things, however. Arbitrators have the authority under a just cause standard to modify discipline that is not reasonably proportionate to the offense involved. (see St. Antoine, *supra*, p. 184 and Elkouri, *supra*, p. 963) I find that the grievant's long service, his clean record and the circumstances related to the recent introduction and the enforcement of the tag system are significant mitigating factors that justify setting aside the discharge and reinstating the grievant.

Conclusion

Based on the entire record submitted by the parties I find that the grievant was not suspended and discharged for just cause under the terms of the labor agreement. I find that the appropriate remedy is to: 1.) reduce the suspension and termination to a written warning, and; 2.) reinstate the grievant to his former position with full seniority, and; 3.) make the grievant whole for lost wages and benefits.

IN THE MATTER OF THE ARBITRATION BETWEEN

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 305, UNION,	)	ARBITRATOR'S AWARD
and	)	****** TERMINATION GRIEVANCE
UNIFIED WESTERN GROCERS, INC., EMPLOYER.	)	

For the reasons set forth in the Opinion that accompanies this Award, the grievance must be and it is sustained. The employer shall:

1.) reduce the suspension and termination to a written warning, and;

2.) reinstate the grievant to his former position with full seniority, and;

3.) make the grievant whole for lost wages and benefits, and;

4.) as the losing party in this arbitration, pay the arbitrator's fee and expenses.

I will retain jurisdiction for sixty (60) days from the date of this Award for the sole purpose of aiding the parties in the implementation of the remedy. During that sixty (60) day period, either party may invoke my jurisdiction in writing with notice to the other party. Once jurisdiction is invoked, I will continue to retain jurisdiction until the dispute over the remedy is resolved either through agreement of the parties or by a ruling by me, even if that process takes longer than sixty (60) days.

Dated this 5th Day of July 2007

_____

Joseph W. Duffy
Arbitrator