AMERICAN ARBITRATION ASSOCIATION
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In the Matter of the Arbitration

between

LOCAL 804, IBT

and

UNITED PARCEL SERVICE

Case No. 13 300 01264 11
Case No. 13 300 01265 11
(discharges of G. Moy and G. Fitzpatrick)

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OPINION AND AWARD

Pursuant to the terms of a collective bargaining agreement, the undersigned Arbitrator was selected in accordance with the rules of the American Arbitration Association to hear and decide a dispute between the parties. Hearings were held on June 17, July 11, and August 9, 2011, at the offices of the American Arbitration Association in New York City, at which both parties appeared through counsel who presented evidence and made arguments. The Union was represented by Louie Nikolaidis, Esq., and the Company was represented by Aaron Schindel, Esq. The parties also filed post-hearing briefs and reply briefs. Based on the evidence presented, and arguments made, the Arbitrator renders this Opinion and Award.

Issue

At the outset of the hearing, the parties agreed to the following issues:

> 1. Was there just cause for the discharges of Gerald Moy and Greg Fitzpatrick? If not, what shall be the remedy?
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> 2. Did the Company violate the collective bargaining agreement by refusing to allow Mr. Moy and Mr. Fitzpatrick to remain on the job until or unless their discharges were sustained through the grievance procedure? If so, what shall be the remedy?

Facts

Most of the relevant facts of this case are not in dispute. To the extent there was contradictory testimony from witnesses, the Arbitrator makes these findings of facts based on his assessment of all the evidence presented. On May 4, 2011, the Company had issues with two drivers, Ray Cuevas and Eric Borrero, who worked out of the Huntington center in the Melville building. Mr. Cuevas was in the second day of an OJS ride when, among other problems on the ride, he claimed that he was unable to physically deliver a package because it was too heavy for him to lift. Mr. Borrero brought his package car in at about 9:15 p.m., with 25 packages undelivered, after he was told he should stay out until 10 p.m. to deliver these packages. The issues related to Mr. Cuevas and Mr. Borrero are not relevant except as the backdrop to what happened the next day, May 5.

On the morning of May 5, Mr. Cuevas and Mr. Borrero were not on the list of drivers scheduled to work that day. The Company

asserts that their absence on the list that day was an error, but the evidence reveals that William Quinn, the Division Manager, had them removed from the list because he had decided he was going to "put them on the street," i.e., remove Mr. Cuevas and Mr. Borrero from the payroll. That morning, Mr. Quinn had informed Daniel Laturza, the Huntington center manager, of his intention, and Mr. Laturza alerted a security supervisor to be at the office because two drivers were going to be "put on the street." David Oringer, the Union business agent for the Melville building, was present that morning handling other issues when, at about 8:15, Mr. Laturza told Mr. Oringer he wanted to have a meeting at 9 a.m. Mr. Oringer asked why, but Mr. Laturza said he would find out at 9 a.m. Mr. Oringer pressed Mr. Laturza for the reason for the meeting, and, after an exchange, Mr. Laturza said that he was going to put two drivers on the street. Mr. Oringer replied that this not allowed under the Agreement, but since he received no satisfactory response, he went to speak to Mr. Quinn.

Mr. Quinn told Mr. Oringer that he was not firing anyone, that Mr. Borrero had quit. Mr. Oringer asked Mr. Quinn if had spoken to Mr. Borrero, and Mr. Quinn said he had not. It is not clear if there was a discussion about Mr. Cuevas, but Mr. Oringer felt that the supervisors were not telling him what they were going to do, so he called the Union President, Timothy Sylvester, and told him that the Company was going to put Mr. Borrero on the street. At about 8:35, Mr. Sylvester called Matt Hoffman, the District Labor Manager, and told him that drivers were being put on the street. Mr. Hoffman said he would look into it, and get back to Mr. Sylvester. Mr. Hoffman spoke to Mr. Quinn who acknowledged he was going to put Mr.

Borrero on the street. Mr. Hoffman told Mr. Quinn that this was not the proper way to handle the issue, that he had to investigate, and then put Mr. Borrero on a 72-hour notice of discipline if warranted. Mr. Hoffman called Mr. Sylvester to say that no one would be put out on the street. Mr. Sylvester thanked Mr. Hoffman, and then told Mr. Oringer that Mr. Hoffman said no one would be put on the street.

At about 9 a.m., Mr. Oringer, and Alex Monaco, one of the shop stewards, met with Mr. Laturza. By this time, Mr. Borrero had been placed on the driver list for work that day. Mr. Oringer asked Mr. Laturza if Mr. Cuevas was going to work that day, and Mr. Laturza said "No," that the Company was sending Mr. Cuevas for a medical evaluation. Mr. Oringer asked if Mr. Cuevas was going to be paid, and Mr. Laturza said "No." Mr. Quinn had not told Mr. Laturza that Mr. Hoffman said that Mr. Cuevas and Mr. Borrero had to be placed on 72-hour disciplinary notices, nor did Mr. Laturza tell Mr. Oringer that Mr. Cuevas and Mr. Borrero would be placed on 72-hour notices of discipline. In any event, when Mr. Oringer heard that the Company would not pay Mr. Cuevas, and believing, apparently, that the Company was going to put drivers on the street, he directed shop stewards Gerald Moy and Greg Fitzpatrick to gather the drivers who were about to leave to make deliveries for a meeting. Mr. Moy, Mr. Fitzpatrick, and some others, alerted drivers that Mr. Oringer wanted to meet with them, and many of them did not do their work, but, instead, attended the meeting held by Mr. Oringer.

Mr. Oringer told the drivers that the Company could not require them to drive when they were fatigued, which related to the reason Mr. Borrero gave for bringing packages in early the previous

night. Mr. Oringer spoke to the drivers for about ten minutes, and, after he had a conversation with Mr. Sylvester, he directed them to return to work. Since this meeting was during work time, the Company concluded that it was an illegal work stoppage. The next day, the Company met with the Union, and announced that it was immediately discharging Mr. Moy and Mr. Fitzpatrick, that it was suspending each driver who participated in the stoppage for five days, and that it was seeking damages from the Union for this job action. The Union filed a demand for arbitration challenging the discipline imposed. The parties agreed that the suspensions would be held in abeyance while the discharges of Mr. Moy and Mr. Fitzpatrick were heard, and that damages would be addressed after a decision on this issue. At the hearing, there was testimony regarding other phone calls between Mr. Hoffman and Mr. Sylvester on the morning of May 5, but they have no bearing on the outcome of this case, and need not be addressed.

Positions of the Parties

The Company asserts that it is undisputed that the shop stewards, Mr. Moy and Mr. Fitzpatrick, at the direction of the Union business agent, Mr. Oringer, called the drivers to a meeting with Mr. Oringer after the work day began. The Company contends that under the language of the Supplemental Agreement with the Union, once it has been established that an employee has participated in a work stoppage that is not permitted under the Agreement, the case is over, and that the Arbitrator has no authority to modify the penalty the Company has imposed. The Company maintains that whatever the cause may have been for the work stoppage is irrelevant, that the Union's

sole remedy for resolving disputes is through the grievance and arbitration procedure, and that a work stoppage is permitted only if the Company refuses to participate in the arbitration process or refuses to comply with an arbitrator's decision.

The Company argues that for decades, the Agreement between the parties, set forth in Article 18, "has contained a very broad and clearly worded prohibition on work stoppages of any kind, and has expressly granted to the Company the right to discharge any employee who participates in a work stoppage in violation of the contractual provision." The Company points out that a number of arbitration decisions, including one by this Arbitrator, have held that the Company's decision to discharge an employee who participates in a work stoppage is not subject to review, and that once an arbitrator finds that the employee has participated in the work stoppage, the discipline imposed by the Company must be sustained. The Company further argues that these arbitration decisions also hold that a steward who participates in an impermissible work stoppage is subject to the discipline imposed by the Company.

The Company contends that a work stoppage is not permitted even if the Company does not follow the proper procedures when it discharges an employee. The Company cites a decision by Arbitrator Eva Robins which held that a work stoppage was not permitted where the Company had summarily discharged an employee without giving the required 72-hour notice. The Company maintains, citing other arbitration decisions, that although the Union has characterized the work stoppage as a "meeting" to discuss issues related to driver fatigue, which the Company contends is not supported by the evidence,

the reason for a meeting does not make it a permissible work stoppage since, in this case, Union officials called the drivers to congregate after the work day had begun, which constitutes a work stoppage in violation of the Agreement. For these reasons, the Company submits that the grievance on behalf of Mr. Moy and Mr. Fitzpatrick should be denied, and that the Arbitrator should declare the work stoppage of May 5 a breach of the no-strike provision, and schedule a hearing on the Company's application for monetary damages.

The Union argues, first, that there was no unauthorized work stoppage on May 5, that the brief meeting, of maybe six minutes, "was a legitimate and reasonable response to safety concerns," i.e., to advise drivers about the importance of not driving commercial vehicles while fatigued, in response to the Company disciplining Mr. Borrero for bringing his package car in early the night before when he was fatigued. The Union contends that the Company disregarded federal law and the safety of its employees when it "summarily discharged Mr. Borrero on the bogus charge that he quit" without complying with the procedural requirement of giving him a 72-hour notice of proposed discipline, and trying to remove him from the payroll in violation of the cardinal infraction provision of the Agreement. The Union asserts that Mr. Oringer's response was restrained considering the Company's "outrageous conduct." In addition, the Union contends that there was no evidence of any damage to the Company, nor did the actions on May 5 constitute a "strike" as that term is defined since all Mr. Oringer did was to inform drivers of their legal right not to drive while fatigued.

The Union further argues that even if the Arbitrator finds

the six minute safety meeting constitutes a work stoppage, that a work stoppage was permissible because the Company violated the dispute settlement procedures of the Agreement by refusing to comply with the procedural requirements before imposing discipline. The Union maintains that the "plain meaning rule" required the Company to provide 72-hour notices to Mr. Borrero and Mr. Cuevas before they could be disciplined, and to keep Mr. Borrero and Mr. Cuevas on the job until their proposed discipline was upheld in arbitration. The Union contends that the Company decided to discharge Mr. Cuevas and Mr. Borrero without following the contractual procedures, and that the Company's deliberate violation of these procedures "abrogates the prohibition against work stoppages contained in Article 18" of the Agreement.

The Union also argues that it is illegal for the Company to impose discipline on the shop stewards in a discriminatory manner, citing a Supreme Court decision and arbitration decisions supporting its position. The Union argues that the contract provision relied on by the Company imposes no affirmative obligation on shop stewards to enforce the no-strike clause, that there is no evidence that Mr. Moy or Mr. Fitzpatrick led or instigated a work stoppage, and that their participation in the events of May 5, was no greater than that of other employees. According to the Union, this case "is a classic example of an employer discriminatorily terminating union stewards for their participation in an alleged work stoppage." The Union insists that legal precedent and arbitration decisions point to the conclusion that the Company did not have just cause to discharge Mr. Moy and Mr. Fitzpatrick for their participation in the six minute

meeting on May 5.

Finally, the Union argues that the arbitration decisions cited by the Company, including the five cases involving the parties, do not support the conclusion that there was just cause for these discharges. The Union contends that two of the decisions impose higher standards on shop stewards directly contrary to the Supreme Court's decision, that two of the decisions upheld the discharge of employees who left work in direct violation of a supervisor's orders whereas, here, there is no evidence that Mr. Moy or Mr. Fitzpatrick refused any orders, and that the fifth case involved the suspension of 220 employees after a one-day strike as contrasted to a six minute meeting where employees were told not to drive when fatigued. The Union maintains that the facts of the other decisions are "markedly" different, and do not support the discriminatory discharge of shop stewards for engaging in a brief meeting over valid safety concerns. For all these reasons, the Union submits that the Agreement was not violated, that the Company suffered no damages, that there was no just cause for the discharges of Mr. Moy and Mr. Fitzpatrick, and that they should be reinstated with full back pay and benefits.

Discussion

The applicable contract provisions are found in Article 12, entitled "SUSPENSION OR DISCHARGE," and in Article 18, entitled "GRIEVANCE AND ARBITRATION PROCEDURE," of the parties' Supplemental Agreement. Article 12, in relevant part, states:

> Section 1 - Immediate Suspension or Discharge
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> The following shall be causes for immediate

suspension or discharge of an employee: drinking, or proven or admitted dishonesty....

In cases not involving the theft of money or merchandise, an employee will remain on the job until a hearing is held with the business agent. Such hearing will take place within 72 hours.

Section 2 - Notice of Suspension or Discharge

In all other cases involving the suspension or discharge of an employee, the Company will give three (3) working days' notice to the employee of the discharge or the suspension and the reason therefor. Such notice shall also be given to the Shop Steward and the Local Union office....

Article 18, in relevant part, states:

Section 4 - No Strikes or Lockouts

(a) The Union agrees that it will not cause or permit its members to cause strikes of any kind, stoppages, or any other interference with any of the operations of the Company during the term of the Agreement, so long as the Company abides by the procedure prescribed for the settlement of disputes and differences and the decisions of the arbitrators as provided in this Agreement....

Section 5 - Illegal Strikes

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It is agreed that in all cases of unauthorized strikes, slowdown, walkout, or any unauthorized cessation of work in violation of this Agreement, the Union shall not be liable for damages resulting from any unauthorized action of its members. While the Union shall promptly undertake every reasonable means to induce said employees to return to their jobs during such period of unauthorized stoppage of work mentioned above, it is specifically understood and agreed that the Employer shall have the sole and complete right of discipline, including the sole and complete right to discharge any employee participating in any unauthorized strike, slowdown, walkout or any cessation of work and such employee shall not be entitled to have any recourse to any other provision of this Agreement.

Although there is little doubt that on May 5, the Company's

managers did not properly handle the issues regarding Mr. Cuevas and Mr. Borrero, there also is little doubt that Mr. Oringer did not act appropriately. The managers acted improperly by deciding, early in the morning of May 5, to put Mr. Cuevas and Mr. Borrero on the street without giving them 72-hour notices of discipline. Mr. Cuevas and Mr. Borrero had been removed from the work list, and since they were not being accused of cardinal offenses, the Company was required to keep them on the payroll until the disposition of any imposed penalty through the grievance process. In any event, when Mr. Oringer was told that morning of the Company's intentions to put drivers "on the street," he reported this to Mr. Sylvester, the Union president, who immediately called Mr. Hoffman, the Labor Manager for the area. Within a few minutes, Mr. Hoffman told Mr. Sylvester that nobody was going to be put on the street, and Mr. Sylvester promptly provided Mr. Oringer with this information.

That should have been the end of this matter. At very high levels of the Company and the Union, the issue had been resolved. Mr. Hoffman told Mr. Sylvester that 72-hour notices would be given to any employee who might be disciplined, and, in fact, the Company abided by the dispute settlement procedures of the Agreement. Unfortunately, when Mr. Laturza told Mr. Oringer that Mr. Cuevas was going to be sent for a medical evaluation, and would not be paid, Mr. Oringer decided to call a meeting of the drivers during work time, and he directed the shop stewards, Mr. Moy and Mr. Fitzpatrick, to gather the drivers. Mr. Oringer claims that he called the meeting to discuss driving while fatigued, the issue related to Mr. Borrero, and the evidence confirms that Mr. Moy and Mr. Fitzpatrick gathered the

drivers, and that Mr. Oringer talked about driver fatigue at this meeting. Nevertheless, this meeting constituted an unauthorized work stoppage for about ten minutes, and violated the clear language of the Agreement under which the Union agreed not to cause "stoppages or any other interference of any operations of the Company."

The fact that at this meeting with the drivers the topic Mr. Oringer discussed was driving while fatigued did not make this an "authorized" stoppage. The language of the Agreement authorizes the Union to engage in a job action only if the Company fails to abide by "the procedure for the settlement of disputes and differences," and, as noted above, the Company abided by the settlement procedures. It appears that Mr. Laturza was wrong when he said that Mr. Cuevas would not be paid for the period related to the medical evaluation, but the Union was required to resolve that issue by grieving it through the settlement procedures of the Agreement, not by interfering with the Company's operations. Moreover, by 9 a.m. on May 5, the dispute relating to Mr. Borrero's potential discipline was not an issue that required any further discussion that morning, and, in any event, driving while fatigued, which is a legitimate topic of concern, was not such an immediate issue that justified Mr. Oringer's interference with the Company's operations that morning.

Perhaps the Union's strongest argument is its claim that the Company's decision to discharge the shop stewards was improper discrimination under the law that prohibits the Company from treating stewards in a disparate manner for offenses also committed by others unless there is clear language in the Agreement which permits harsher treatment of stewards. The Union asserts that drivers other than the

discharged shop stewards alerted drivers to attend the meeting called by Mr. Oringer, but that the Company discharged only the stewards. There is case law, including a Supreme Court decision, prohibiting disparate treatment of shop stewards in the absence of clear contractual language, but the language in Article 18, Section 5 clearly states that the Company has the "sole and complete right of discipline, including the sole and complete right to discharge any employee participating in any unauthorized (activity) and such employee shall not be entitled to have any recourse to any other provision of this Agreement."

As a result of this clear language, the Company has the right to treat shop stewards more harshly that other drivers who have engaged in similar activity. The prior arbitration decisions cited by the Union interpreted the language in Article 18 this way, and at a point closer in time to when the parties negotiated this language, which the parties agreed upon, apparently, to avoid the possibility of work interruptions in a highly competitive industry. There has been no change in the language, and there have been no cases for many years; thus, there is no basis for this Arbitrator to interpret the language as the Union suggests. However, the issue for decision as stipulated by the parties to the Arbitrator is whether there was just cause for the discharges of Mr. Moy and Mr. Fitzpatrick. Although the language of the Agreement clearly gives the Company the rights it asserts, the stipulated issue in this case gives the Arbitrator broad authority in rendering a decision since, as just noted, the issue is whether just cause exists for the discharges. As explained below, the Arbitrator has concluded that just cause does not exist in this

case.

The evidence establishes that the shop stewards, Mr. Moy and Mr. Fitzpatrick, engaged in conduct that violated the Agreement, however, their conduct, in the context of the events that occurred on May 5, does not warrant discharge. It was Mr. Oringer, the Union business agent, who acted irresponsibly by causing the interruption in the Company's operations that day, and it would be unfair, and disproportionate to what they did, for Mr. Moy and Mr. Fitzpatrick to lose their jobs for their actions, particularly since they did not disobey any order from a supervisor, i.e. they did not engage in insubordinate conduct as others did who were discharged in the past, and since the evidence reveals that other drivers also helped to gather drivers to attend the meeting with Mr. Oringer. Nevertheless, the language in Article 18 is clear, and every employee is on notice that any future violation of Article 18 may result in him/her being discharged, but the Arbitrator will not sustain the discharges of Mr. Moy or Mr. Fitzpatrick in this case.

Finally, the portion of Article 18, Section 5, which provides that employees who engage in unauthorized actions shall have no "recourse to any other provision of the Agreement" gives the Company the right to immediately remove employees from the payroll who violate Article 18, and such employees are not entitled to back pay for these actions unless their activity is authorized under the Agreement. Therefore, based on the facts and circumstances of this case, and for the reasons explained, the Arbitrator issues the following

Award

There was not just cause for the discharges of Gerald Moy or Greg Fitzpatrick. The Company did not violate the Agreement by refusing to allow Mr. Moy or Mr. Fitzpatrick to remain on the job until or unless their discharges were sustained through the grievance procedure. The Company shall reinstate Mr. Moy and Mr. Fitzpatrick to their former positions, forthwith, without back pay. The period between their discharges and their reinstatement shall be considered a suspension. The Company's request for damages resulting from the work interruption on May 5, 2011, shall be scheduled for a hearing in accordance with the parties' normal scheduling procedures.

It is so ordered.

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RICHARD ADELMAN

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, RICHARD ADELMAN, do hereby affirm upon my oath as Arbitrator, that I am the individual who executed the foregoing instrument, which is my Opinion and Award.

Dated: March 21, 2012

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RICHARD ADELMAN