

\*\*\*\*\*

**In the Matter of Arbitration Between:** )

**ALBERTSON'S** )

**and** )

**UNITED FOOD AND COMMERCIAL** )  
**WORKERS, LOCAL 1564.** )

\*\*\*\*\*

**Issue: Alderete Termination**

**Arbitrator Docket No. 160407**

**BEFORE ARBITRATOR JEANNE M. VONHOF**

**INTRODUCTION**

The undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. The hearing was held on July 29, 2016 in Albuquerque, New Mexico.

Mr. Thomas Stahl, Attorney, of Rodey, Dickason, Sloan, Akin & Robb, represented Albertson's LLC, hereinafter referred to as the Employer, or the Company. Ms. Tanya Sanchez, former Floral Manager; Ms. Debbie Ortega, former Customer Service Manager; Ms. Valerie Armendariz, Front End Assistant; Mr. Eric Duran, Grocery Manager; Ms. Sally Salazar, Scan Clerk; Ms. Claire Murhpy, District Customer Service Manager; Mr. Paul Flintoff, District Loss Prevention Manager; Mr. Darryl Worley, Store Manager, and Ms. Jamie Sturett, Associate Relations Manager, all testified on behalf of the Employer.

Mr. Shane Youtz, Attorney, of Youtz and Valdez, represented the United Food and Commercial Workers, Local 1564, hereinafter referred to as the Union or the Local. Mr. John Bienes, Cashier; Ms. Sandra Ulibarri, Cashier; Ms. Mary Ann Montoya, Business Representative for Local 1564, and Mr. Al Alderete, the Grievant, testified on behalf of the Union.

Each Party had a full and fair opportunity to present evidence at the hearing. Both Parties presented post-hearing briefs, the last of which was received by the Arbitrator on September 21<sup>st</sup>, at which time the hearing was declared closed.

**The Issue:**

Was the Grievant terminated for just cause? If not, what shall the remedy be?

## Relevant Contract Language and Rules

### Relevant Contract Language

**5.2 Discharge.** The Employer shall have the right to discharge any employee for just cause. Any employee who is discharged shall be informed at the time of discharge, of the immediate cause of discharge.

...

**5.3 Warning Letters.** In those instances where an employee's conduct, although not warranting immediate suspension, demotion or discharge, is deemed to be unsatisfactory and if continued will result in suspension, demotion or discharge, and employee must be given a written warning notice prior to the imposition of suspension, demotion or discharge for the offense.

....

d) This Section shall not be construed to require an Employer to issue a written warning notice in cases where discharge or suspension is imposed for just cause on the offense.

...

f) Warnings, both written and oral, shall be effective for a period of one (1) year unless another warning notice of a related or similar offense occurs within that year.

### Relevant Rules

#### Associate Handbook

#### REASONS FOR IMMEDIATE TERMINATION FROM EMPLOYMENT

While all associates at Albertson's are employees at will, which means that either the Company or the associate can end their employment at any time, there are certain types of conduct that may warrant immediate discharge from employment. Examples of such conduct include but are not limited to:

...

- Falsifying Company records or documents, including inventories, employment applications or personnel records.
- Improper use of coupons or the abuse of associate discounts or customer rewards programs.
- Making a false statement or misrepresentation, by either commission or omission, related to Company business, or dishonesty in connection with work.

**Background:**

The Grievant has worked for the Company for 15 years, and has about 22 years in the grocery industry. He has served as a Front End Manager, as well as a Manager in the liquor, deli, and frozen foods departments of stores. For the last ten years he has worked as a Cashier or Checker for the Company. Prior to January 8, 2016, he had never been accused of dishonesty by the Company.

The Grievant testified that on January 8, 2016 he was serving one of his first customers of the day, at about 8:00 a.m. The total amount of the customer's transaction was about \$20.00. The Company was having problems with its debit/credit card machine, according to the Grievant, and the customer grabbed his items and took off walking while the machine was still processing. The Grievant stated that the problems with the machine had been going on for about two weeks; customers had become very frustrated with the problems; and it was causing problems for the Cashiers. According to the Grievant, he tried to hold the customer there by telling him to stop and wait for the transaction to finish, but the customer told him not to worry because he had money on the card.

Because the transaction failed, the Grievant sent the Courtesy Clerk out to the parking lot to see if he could catch the customer. The Grievant testified further that the Company has instructed Cashiers to stay at their machines in this situation. The Courtesy Clerk was unable to find the customer and he returned and told the Grievant that; the Grievant acknowledged that he might have responded by saying, "Son of a bitch."

The Grievant testified that he was pretty upset and he was in a hurry to get the transaction off his register, because he could not process any more transactions until he did so. He testified that he sent the Courtesy Clerk to retrieve the items on the order from the grocery aisles; when

they were retrieved, the Grievant then began voiding them off the register, one by one. He had some meat items amounting to about \$10.00 that could not be voided out in this fashion. He said that he asked another Cashier, Mr. John BIANES, what he should do, and Mr. BIANES said, "Just store coupon it for now," indicating that he should use a store coupon to account for the purchase.

The Grievant testified that he made an honest mistake using this procedure. He said that after listening to the arbitration testimony during the hearing, he realized that he should have just suspended the transaction, and let a Manager know about it later. He stated that in making his decision to handle the transaction differently, he was relying on his experience as a Front End Manager, knowing that the transaction would have to be voided eventually. He also testified that he believed that he had the authority to void the transaction, because he had been given a key and a password that allowed him to do so. He did not call a Manager because the Front End Manager had not yet come in, and he believed that the other Managers present, including the Store Manager, know little about the cash registers or the procedure to follow in such a case. He also stated that if it had been a larger amount, he would have informed the Store Manager.

The Grievant testified that he also made an honest mistake in forgetting to tell the Front End Manager about the situation when she came in at 10:00 or 10:30 a.m. He said that they were pretty busy that day and he simply forgot. He also testified that he has forgotten to tell Management about something on other occasions, but it has not led to termination.

The Grievant testified that he had no motivation to hide the transaction. He testified that he is very honest, and he hates it when someone tries to steal from the store. He testified that he has run out into the parking lot after people, and that he has caught people shoplifting from the

store. He said that if he were reinstated, he could honestly and competently perform his work, as he had been doing before January 8, 2016.

Under questioning from the Company, the Grievant acknowledged that when items are voided out, it means they are back in the store. He admitted that by doing the void and using the store coupon, his register drawer would not show up as short. He also acknowledged that on another occasion when a customer left the store with \$140 in groceries he called the Manager right away and she suspended the transaction.

The Grievant was asked about comments he allegedly made about racial or ethnic origin bias by Store Manager Darryl Worley. He said that he believes that Worley has favorite Employees, and although some of them are Chicano, he believes that Worley favors whites over Hispanic Employees. He admitted that he made a comment about not having the right hair color to a job applicant. The Grievant testified that Worley brought him into his office to discuss the Grievant's comments, and that Worley "was pretty pissed off about" the Grievant's remarks. He said that Worley raised his voice and turned red when he was talking to the Grievant about it. According to the Grievant, Worley told the Grievant not to be a "chicken shit" and to tell him to his face what the Grievant had said. Worley told him that he was not prejudiced and that he had family members who were mixed race. The Grievant believed that in this exchange Worley was angry and wanted to show the Grievant that he was "the boss."

The Grievant testified that in the same meeting, Worley asked him whether he had threatened to beat up Worley in the bathroom, and said that Employees were writing up statements about the alleged threat at that time. The Grievant said he told Worley that he never said that. At the end of the meeting the Grievant was suspended. He said he believed the suspension was due to the hair color comment he had made.

The Grievant also admitted that he has called two Employees in the store a “lambe” or “lambe hete,” or “kiss ass.” He said that it was a joke between himself and two other Employees, who all called each other “lambe.” He said that they did it often and that other Employees had heard it. No one had complained to Management about it.

Mr. Darryl Worley testified that he has worked for the Company for 37 years, and that he has worked as a Store Manager for 22 of those years. He began working in Store 905 in July 2014. He does not perform checking or cashiering duties as part of his job, and relies on others to handle the procedures associated with those functions.

Worley testified that he administers discipline and has help from the Associate Relations or Human Resources department in determining appropriate discipline. He testified that before this incident he had no personal issues or run-ins with the Grievant.

Worley testified that on January 8, his Front End Manager, Debbie Ortega, explained to him what the Grievant had done with the transaction that morning, and Worley that day called the Loss Prevention Office to investigate the incident. He obtained a statement from the Courtesy Clerk but not from the Grievant. He did not suspend the Grievant immediately, but decided to call for the investigation. When asked why he didn’t investigate the situation himself, he said that when they have “something internal like that” they turn it over for investigation to get the facts before taking action.

Worley testified that two other incidents involving the Grievant occurred around the same time, although he was not entirely sure of the order of the events in relation to the investigation of the Grievant for the register problem. Worley said that he was interviewing job bidders from other stores for a Manager's position during this time period. He testified that Employee Tanya Sanchez told him that she overheard the Grievant approaching an applicant and telling him that

he did not have much chance of obtaining this position because he was not Worley's type, because of his hair color. Worley testified that he was told that the Grievant may have said something about being Chicano as well. Worley also testified that he heard from Employee Sally Salazar in a verbal statement that the Grievant had threatened to beat up Worley, if he ever found him in the bathroom.

Worley had a meeting with the Grievant on January 9<sup>th</sup>. He testified that he told the Grievant that if he had a problem with Worley, that he should be "man enough to tell me." He denied calling the Grievant "chicken shit." Worley testified that the Grievant accused him of not supporting Chicanos, and said that Worley "did not have [the Grievant's] back." Worley testified that he believed that this comment was in relation to the investigation of the register problem, which had begun the day before this meeting, but was not discussed in this meeting. Worley said that he brought up his own grandchildren "that are of the Hispanic nationality" that he loves dearly.

Worley testified that he did not raise in this meeting the alleged threat which the Grievant had made towards him, although he had a verbal statement from Salazar about it at that point in time. He said that he purposely did not raise it because he knew of the Grievant's history with anger. Worley testified that he suspended the Grievant at the end of this meeting because of this threat, however, and not because the Grievant had accused him of racial bias.

According to Worley, once the investigation from Loss Prevention was completed, it was sent to Ms. Jamie Sturett in Associate Relations, who called Worley and recommended termination. Worley stated that the bases for the termination were making knowingly false statements, improper use of coupons, and falsifying a Company record. He agreed with Sturett that termination was the appropriate response to these violations, because all of these violations

provide grounds for immediate termination without progressive discipline, according to the Company handbook. Worley testified that the fact that the Grievant had accused him of racial bias did not weigh into the decision to terminate him. He called the Grievant and terminated him without further incident.

The Union questioned Worley about prior discipline he had had for touching a female Employee; he said he touched her on the shoulder in order to direct her to wait on a customer. He denied that he calls Latino employees "Paco." He also denied that he ever told Dennis Quintana, when looking at a picture of a Black man, "My Pappy used to own one of these."

Under further questioning from the Union, Worley said that he was first told about the threat by Ms. Salazar on the 8<sup>th</sup>, and about the Grievant's comment to the prospective employee on the 9<sup>th</sup>. He denied that during the meeting on the 9<sup>th</sup> he was upset about the Grievant accusing him of racism or about not saying it to his face. He said that he did not recall raising his voice and that his face is always red. Worley said that he did not raise the threat in this meeting and did not tell anyone else about the allegation because it was confidential, until Monday the 11<sup>th</sup>, when he said he reported it to Mr. Paul Flintoff from Loss Prevention.

Mr. Flintoff, District Loss Prevention Manager for the past six years, investigates matters of violation of Company policy and oversees the security needs for his area. He testified that on January 8, 2016 he received a call from Worley telling him that a customer had come through the Grievant's cashier line and left with merchandise, and that the transaction was not properly processed by the Grievant. Worley also told him that the items were taken off of the transaction to appear as though the items never actually left the store. Flintoff prepared a report of his investigation, which was not provided to the Union before the arbitration hearing.



The report stated that Flintoff found that during the incident in question, the Grievant "had conducted a transaction for a customer in which he allowed the customer to leave with merchandise that had not been paid for." The report found that the Grievant had rung up several grocery items and then voided them off, followed by a "hand keyed store coupon of \$-10.34... This brought the transaction to a zero balance which canceled out any shortage to the register caused by the customers (sic) unpaid for merchandise."

In the report, Flintoff stated that he was also notified by Worley on January 11<sup>th</sup> that the Grievant had made inappropriate comments about him. According to Worley, the Grievant had stated that he "doesn't like Chicanos... Does nothing for them... and that in order to get anywhere with Worley [the applicant] had to have blonde hair." In addition, Worley reported that the Grievant had commented that if he caught Worley in the restroom or outside of work he would beat him up. Worley told Flintoff that he suspended the Grievance pending investigation because of the comments regarding "Chicanos, threats and blond hair."

Flintoff could not recall much about the investigation without looking at his report. That report says that he interviewed the Grievant on the 12<sup>th</sup>. The report states that the Grievant said that he engaged in the procedure at the register because the customers in line were getting upset because the transaction was pending on his register. When asked why he did not call a Manager, he stated that he should have done so. The Grievant was asked whether such an incident had ever occurred in the past and the Grievant raised an incident where he had previously been disciplined for a customer leaving the store without paying and Management was "nasty" to him about it. The report says that Flintoff asked the Grievant whether he engaged in this procedure in order to avoid discipline and he replied, "so I wouldn't be short." According to the report, the Grievant admitted that he made a comment about hair color but that it was not a racial comment and that

he did not feel that Worley was a racist. He also denied making any comments about wanting to beat up Worley in the restroom or outside of work.

Ms. Tanya Sanchez, who was a Floral Manager at the time of the incident, testified that at about 8:10 on the day in question she saw a man leave the store as she was coming in. She said that she witnessed the Grievant tell Courtesy Clerk Nelson to stop the person because his debit card had not gone through. She said that Nelson came back in and told the Grievant that the customer was gone, and that the Grievant said, "Son of a bitch!"

Sanchez testified that she saw the Grievant showing Courtesy Clerk Nelson a receipt a few minutes later and then call Nelson over to the register. She testified that she was familiar with the screen and it looked like the Grievant was voiding the order even though the customer had already left with the product.

Sanchez also testified that she overheard the Grievant telling a job applicant for a manager position that "he didn't want to come work there; that the Store Director, Darryl, didn't like Chicanos, and that if you didn't have blonde hair or that you weren't white that you didn't get anywhere with him." Sanchez reported both the transaction and these comments to Worley.

Under questioning from the Union, Sanchez acknowledged that she had never completed a full shift as a Checker, and was not really aware of the procedures. She also testified that she did not know where Management received the idea that the Grievant did nothing to try to stop the customer from leaving without paying, since she had told them that the Grievant had sent the Courtesy Clerk out of the store after the customer.

Ms. Sally Salazar, Scan Clerk, read a statement she had written on January 10, 2016, saying that she had heard the Grievant say many times that he did not like Worley. According to Salazar, the Grievant also told her on the day before, that if he were to catch Worley outside of

the workplace or in the men's room he would beat him up. Salazar's statement indicates that she asked the Grievant whether it would be worth it to get fired, and he allegedly told her that it would be worth it to him to see Worley on the floor. Salazar said that it took her a day or two to write up the statement after the conversation.

Several Company Witnesses described the procedure that the Grievant should have used at the register on the day in question. Ms. Claire Murphy, District Customer Service Manager at the time of the incident, was responsible for all "front end" operations of the stores in New Mexico and the eight stores in El Paso, Texas. She testified that a Checker should get a Manager involved to handle any major situation or one that the Checker is not sure of how to handle. She said that Checkers know this through on-the-job training. She also testified that the Checker in this situation could suspend the transaction, which is the fastest way to clear the register, so that the transaction can be handled later. The transaction must be handled by the end of the day. In addition, she stated that the transaction could be cashed out eventually, which would show that the product left the store and that the Company did not collect payment for it. Then a note should be written and placed in the register for the bookkeeper, to explain the transaction. Alternatively, a notation could be made on the yellow sheet that is kept at the register.

When asked whether it would be acceptable for a Cashier to suspend the transaction on his own, Murphy testified that it would be acceptable if the Cashier had an override key, as long as the Cashier then told the Manager later what had happened. She testified that there is an override key left with the early morning Cashiers, which they use primarily to check that the balances of the cash drawers were calculated correctly the night before. She said that the Cashier would be able to use that key to perform the override function to suspend the transaction.

Murphy also testified that it has not been acceptable for Cashiers to void out the transaction, because that procedure does not indicate that the product has left the building and that the Company has not received payment for it. Voiding out a transaction makes it appear as though the transaction never occurred. She testified further that it is not the practice of the Company for Cashiers to force-balance their drawers using coupons or voids. Using coupons in this way violates Company coupon policy and it is difficult to detect a shortage if a drawer has been force-balanced, according to Murphy.

Murphy testified further that the Company keeps a monthly tracking log which accounts for shortages in drawers, which are typically assigned to several Cashiers within the course of a single day. Once there are three variances in a 30-day period on a drawer, each Cashier is placed on their own till, which may lead to discipline if the variances continue. If a customer leaves without paying and the drawer is short, a Cashier may be held responsible for the shortage, depending on the circumstances.

Under questioning from the Union, Murphy stated that the procedure used by the Grievant is only proper after cashing out the amount when the items are still in the store. She also testified that suspending a transaction is usually performed when the customer realizes they don't have a proper method of payment with them and leaves the groceries behind. She testified that a situation where the customer leaves the store with the product without paying for it does not happen very often. She also testified that if Mr. Bienes believed that Cashiers were responsible for voiding out the transaction by the end of the day, he misunderstood the procedure.

Murphy also testified that it is not Company policy to require Cashiers to leave the register and run after a customer who has left without paying. She testified that the Cashier is

expected to stay at the register but ask the customer to return. Murphy said she did not know whether the Grievant did that in this situation.

Ms. Debbie Ortega, formerly Customer Service Manager at the store in question, provided similar testimony to Ms. Murphy about the proper procedure the Grievant should have followed on the day in question. She stated that the Grievant could have suspended the transaction himself and then retrieved it later. She also stated that he could have cashed out the order and held onto the receipt until a Manager came in. She said that the Manager would then either refund the order to leave it as is and show that the till was short. Employees are disciplined if they are found to be responsible for the shortage. She acknowledged that during the time period in question the store was having difficulty with the electronic transaction system, causing transactions to take longer than normal.

Ms. Ortega presented a warning notice dated July 2014 which the Grievant received as a result of a situation which she said was similar to the one which occurred in this case. A customer left the store with about \$142 worth of groceries and the other person with her stayed to pay. When that customer's cards failed, the Grievant called over Ms. Ortega to handle the situation. The customers left and Ortega suspended the transaction and then cashed it out, showing that the drawer was short, because the customers had left the store without paying for the product. The Grievant received a written warning for this incident, but the Union noted that the Company may not consider this as valid discipline at this point, because it has dropped off his record due to a provision in the contract. Ortega also reported that the Grievant received a write-up in October 2015 for a missing check in his till.

The Grievant discussed his past discipline in his testimony. He stated that in the July 2014 situation where the woman left the store with \$140 worth of groceries, and the man walked

out after her, the Grievant accepted the written warning, even though he did not feel that he did anything wrong. He also did not challenge a documented verbal warning he received for the missing check in his register. He noted that several other Cashiers shared the register that day. The Grievant said that he would have expected the next step in the disciplinary procedure to be a written warning, for a register violation.

Ms. Valerie Armendariz, Service Operations Assistant or Front End Assistant, said she spent about 16 to 17 years as a Checker. She testified that in the situation at issue here the Checker should have suspended the order and called the Manager. If the customer left the store with the items, the Manager would then cash out the order, and the drawer would be short. She testified that it was not okay to force-balance the drawer by using coupons or voiding out the order.

Under questioning from the Union, Armendariz testified that she could not recall any written policy which instructs Checkers on what to do in a situation where a customer leaves without paying for the groceries. She also confirmed that there were problems with the electronic transaction machines during this period, which sometimes made customers frustrated.

Mr. Eric Duran, Grocery Manager for Store 905, testified that he has worked there for about three years, and has been with the Company since 1990. He testified that he was called up to the front end of the store on August 9, 2015, where he witnessed the Grievant and a customer engaged in an argument about the price of some items. Each person was accusing the other of being rude, and in order to defuse the situation, Duran took the customer away from the register for about 5 to 10 minutes. Duran apologized to the customer, even though she was wrong about the pricing situation. He testified that when he returned to the front of the store with the customer, the Grievant came away from his check stand and confronted the customer again,

asking her why she had to be so rude, and saying something like, "How do you like being talked to like that, bitch?" Duran said that he was present when Worley talked to the Grievant about this incident; that the Grievant admitted that he knew he had a temper and Worley gave him a phone number to call for assistance with this problem. Duran admitted that the Warning Notice does not mention that the Grievant used the word "bitch."

Worley was involved in disciplining the Grievant for the incident with the customer in September 2015. He said that he administered only a written warning for this incident because the Grievant had no discipline for similar incidents in his file, and he did not know about the allegation that the Grievant had called the woman a "bitch" until this arbitration hearing. He said that he did offer the Grievant help through the Employee Assistance Program when the Grievant admitted, in the meeting over that incident, that he has anger problems.

The Grievant acknowledged that he came back over to the customer and Worley, after Worley took the customer from his register, because he felt that the customer should pay for bakery items she had damaged. He said that he was upset, and admitted that he told Worley, during a meeting over his discipline for this incident, that he has difficulty controlling his temper at times. He denied that Worley offered him assistance through the Company's Employee Assistance Program. The Grievant admitted that he probably deserved a written warning for the altercation he got into with the customer. He testified that he did not remember whether he called her a "bitch," and until the arbitration hearing in this case no one ever accused him of doing so.

Ms. Mary Anne Montoya, Business Representative for Local 1564, testified that she serviced another Albertson's store at which Employees brought her reports about racial comments made by Worley when he was Store Director there. The Company asked several Witnesses, including Sanchez, Ortega, Armendariz, Duran, and Salazar whether they ever had

any indication that Worley treated Hispanic Employees differently than he did other Employees. They said "no" and that they had never heard Worley refer to Hispanic males as "Paco. " Several Witnesses, including Sanchez, Ortega and Armendariz said that they had overheard the Grievant calling Employees (particularly Jerome and Jesse) "lambe," which means "kiss ass."

Ms. Jamie Sturett, Associate Relations Manager for Arizona and New Mexico at the time of the events giving rise to this dispute, testified that she typically recommends discipline, and that Mr. Worley has never rejected one of her recommendations. She testified that she did not know at the time of the Grievant's written warning that he had used the word "bitch" towards a customer, and it might have changed the discipline given to the Grievant. She noted, however, that he had no prior write-ups for poor customer service or being angry with customers.

Sturett recommended termination after receiving the report from the Loss Prevention Department in this case because she believed that it indicated the Grievant had tried to cover up the fact that his register was going to have a shortage. She also testified that he misused the coupon. According to Sturett, she never considered that the Grievant had made a mistake, but rather considered his actions as willful.

Sturett testified further that she did not investigate an Employee's allegation that the Grievant had claimed that the Store Director was biased against Hispanics, because the Grievant had stated in the Loss Prevention interview that he never made such a statement. In addition, she stated that the threat of violence did not play a role in the termination decision because the Grievant was going to be terminated anyway for the violation of rules regarding the cash register transaction. She also testified that the Company did not provide the Loss Prevention report to the Union before the arbitration, and normally does not do so because this is an internal report which the Company does not provide to third parties.



Mr. John Bianes, subpoenaed to testify for the Union, testified that he has worked for the Company for 25 years, and has worked as a Cashier since about 1996 or 1997. He testified that in his experience a mistake involving a small amount of money, like \$20, does not usually result in termination. He also testified that during the time period in question the store was experiencing delay problems with its electronic transactions at the check stands. He also testified that neither Worley nor Duran knew much about dealing with transactions at the check stands. He testified that during the period in the early morning before the Front End Managers come in, the Cashiers resolve register issues as best they can.

Bianes testified that on January 8, 2016, the Grievant told him that a customer had just left the store and his debit or credit card transaction did not go through. Bianes said that the Grievant was trying to find the items to void them out, but when he could not void out the entire transaction that way, Bianes told him to "store coupon it for now. Just take care of it later." Bianes testified that there were customers in line and "you could tell they were getting agitated" so his advice was given in haste. He testified that although the Grievant should have suspended the transaction, the transaction had to be "voided out" by the end of the day, by taking items listed on the transaction and individually voiding them off. He said that this is what he would have expected a Manager to do. Under questioning from the Company he acknowledged that in 99% of the cases when a transaction is suspended, the groceries are left in the store. He also stated that usually if a customer is deliberately trying to scam the store by leaving without paying, the overall amount of the order would most likely be more than \$20.

Ms. Sandra Ulibarri testified that she has worked in the grocery industry as a Checker for 33 years, nine of them with Albertson's. She testified that there were problems with the delay in the electronic transactions at the time in question. She also testified that the Store provided no

guidance about how to handle that situation. She also testified that the Store did not provide any written instruction on how to handle the situation which arose in this case, where a customer leaves without paying.

She testified that she did not believe that the way the Grievant handled the situation here was the best way, but she did not expect it to result in his termination. She also testified that if a Manager had been called, the Manager probably would have suspended the transaction and then voided it out by collecting the items from the shelves, as the Grievant did. In addition, she testified that she has never faced the situation where a customer left, took the items with them, and failed to return and pay for them. She also acknowledged that if the Checker does not know what to do with a transaction, the Checker should call a Manager.

#### **Position of the Employer**

- Albertson's maintains clear policies that any of the following are grounds for immediate termination: dishonesty, falsifying company records, and misuse of coupons. These policies are laid out, in unambiguous language, in Albertson's Associate Handbook.
- Albertson's policies are appropriate and enforceable.
- It is widely recognized that employee dishonesty is grounds for summary discharge. Neither the Union nor the Grievant has argued otherwise.
- The Grievant had knowledge of Albertson's policies. These policies were published in the Company's Employee Handbook. The Grievant has received multiple copies of this handbook over the years.
- The Grievant also signed Albertson's Coupon Acceptance policy, which states that coupons must be redeemed only by purchasing qualified items. There is no evidence that the Grievant was confused by this policy.
- The Grievant violated the policy against falsifying Company records. The Plaintiff admits that when a product is scanned out at the register, that action indicates to the store that the product is no longer in inventory.

- The Grievant admits that it would be improper for an employee to enter false data into the inventory tracking system.
- By his own admission, the Grievant used the register's coupon function to force balance his drawer after the customer left without paying for the products. This violates the Company's coupon policy.
- These actions on the part of the Grievant constituted a knowingly false statement.
- Attempts by the Grievant to portray his actions as innocent mistakes are not credible.
- The Grievant took deliberate steps to hide his failure to collect payment from a customer in an attempt to avoid repeated discipline for poor work performance.
- The Grievant's explanation that the debit card system was malfunctioning does not excuse violation of Company policy on dishonesty, use of coupons, or creation of false records.
- The Grievant was not a key carrier.
- John Bienes did not instruct the Grievant to violate Company policy. The Grievant failed to follow Bienes' recommendations in addressing the situation.
- If one considers the Grievant's two stints at Albertson's, he may be viewed as a long-term employee; however, his performance was not exemplary. He received three disciplinary actions in the last two years, and threatened violence against his store director shortly before discharge.
- The decision to discharge the Grievant was in no way arbitrary, capricious, or discriminatory.
- The Grievant's claims about Worley's relationship with Hispanic employees further weaken his credibility.
- Discharge was not too severe a penalty for the Grievant's dishonesty and policy violations. He violated clear policies in a manner which exposed his dishonesty.
- No company should be expected to retain dishonest employees. In this case, the Grievant's disregard for Company policies, along with his attempts to cover up his actions and his disingenuous testimony at arbitration, show him to be untrustworthy.
- For the reasons stated here, Albertson's requests that the Arbitrator deny the Union's Grievance.

**Position of the Union;**

- There is no written policy supporting the Employer's position that employees should handle the transaction for which the Grievant was terminated in a certain way.
- The Employer witnesses stated that the action to be taken was clear. However, no such instruction was provided to the Grievant. The evidence established that the proper course of action was a matter of opinion.
- The Employer's claim that the Grievant manufactured a fraudulent transaction is hyperbole. "Cashing out" the transaction would also have created a false record.
- Although the Employer argues that the Grievant manufactured a false record, his conduct does not suggest dishonesty warranting termination.
- There is substantial evidence indicating that voiding the transaction was in fact the appropriate measure. Sandra Ulibarri—a Checker for 33 years—believes that Management would have voided the transaction. Voiding the transaction with a store coupon was the procedure directed by John Bianes, a senior employee and Cashier with 25 years' experience.
- The Grievant realized at arbitration that he likely should have suspended the transaction and informed Management. This was an honest mistake and he simply forgot to inform his Manager.
- The Grievant comes to the Arbitrator with no record of dishonesty.
- Even if it is decided that the Grievant did mishandle the transaction in question, this does not warrant termination.
- The parties' CBA confirms the progressive nature of discipline for the events addressed in this arbitration.
- At the time of termination, the Grievant had one valid disciplinary notice from October 1, 2015 for which he received a documented verbal for a missing check.
- Just cause includes principles of progressive discipline. It further requires "reasonable proportionality between the offense and the penalty" and consideration of mitigating factors or extenuating circumstances.
- The Grievant's termination was unfair, and the most likely explanation stems from events which transpired just after the transaction in question. Two days after this transaction, Store Director Darryl Worley confronted the Grievant about statements he had made to another employee suggesting that Worley did not treat Hispanic employees fairly.

- The Employer's other grounds for termination should not be considered in the Arbitrator's just cause determination.
- Once an employee has been discharged for specific conduct under a particular rule, just cause principles of due process do not allow the Employer to change the reasons for discharge at arbitration.
- The Union requests that the Arbitrator declare the Grievant's discharge without just cause and reinstate him to his former position with all benefits and seniority intact.
- The Union further requests that the Employer award full backpay to the Grievant, with all benefits and interest, from the date of termination to the date of reinstatement, and that the Arbitrator retain jurisdiction over any disputes.

### **FINDINGS AND DECISION**

The Grievant, a Cashier for the Company, was terminated on the basis of a cash register transaction that occurred on January 8, 2016. The Grievant has worked for Albertson's for 15 years, the last 10 of them as a Cashier. He has worked in the industry for at least 22 years.

At the arbitration hearing, the Employer raised three rules that it alleges the Grievant violated, leading to his termination: falsifying Company documents; improper use of coupons; and making a false statement or misrepresentation related to Company business. The Company citing these rules, coupled with the testimony of Company Witnesses, demonstrates that Albertson's terminated the Grievant for dishonesty. Honesty is important in every employment relationship. Rules regarding honesty are particularly important in the retail store and grocery industry, where a Checker such as the Grievant handles many financial transactions and thousands of dollars for the Employer. Albertson's rules regarding falsification, and the testimony of its Witnesses demonstrate the importance of this concern.

Thus, a finding that an Employee in the grocery industry has engaged in significant dishonest conduct in the course of his employment may substantially affect the Employee's career, making it difficult to secure employment. Because of this likely consequence from a

termination for dishonesty, arbitrators often require that a heightened standard of proof be applied to charges of dishonesty, such as proof by clear and convincing evidence. A strict standard of proof is especially warranted when the terminated grievant is a long-term employee with no prior record of dishonesty.

Many of the facts regarding the transaction here are not in dispute. On January 8, 2016, the Grievant was working as a Cashier on a checkstand early in the morning at Store 905. A customer left the checkstand with his groceries before his credit card was finished processing, on an order worth about \$20.00. When the payment was not approved, the Grievant told the Courtesy Clerk to look for the customer who had just left, to attempt to get him to return. The Courtesy Clerk went out into the parking lot but could not locate the customer.

The Company's Loss Prevention report and several Company Witnesses stated that the Grievant permitted the customer to leave without paying. Cashiers are instructed not to leave their checkstands to chase after customers who may be shoplifting or otherwise leaving the store with groceries for which they have not paid. The Grievant testified that he did request that the customer stay until the transaction was completed, although the customer was irritated about the slow card processing machine. It appears that Management jumped to the conclusion that the Grievant had not requested the customer to stay, without directly asking him or the Courtesy Clerk if that was the case, prior to the Grievant's termination. In addition, it is clear that the Grievant took additional steps to obtain payment, once it became clear that the transaction was not going through. On the basis of this record, there is not convincing evidence that the Grievant permitted the customer to leave without paying and did nothing to secure payment.

After the customer left, the Grievant was left with a transaction that had to be completed on his register before he could move on to the next transaction. The evidence demonstrates that

the transaction could have been rung off his register in one of several ways. He chose the method of having the Courtesy Clerk collect the items on the order from the grocery shelves and then ringing each item through the register individually and pushing the refund button. He could not address the entire order in this manner, however, because there was a meat item, the price of which was calculated by weight. At that point the Grievant said that he had people waiting in line and he consulted with another Checker, Mr. John Bienes, about what he should do to finish the transaction quickly. Bienes suggested that he use a store coupon to refund that item and the Grievant did so.

The Company produced testimony from several Witnesses about how the Grievant should have handled this transaction instead of the way in which he did so. A number of Witnesses testified that he should have immediately called the Store Manager or another Manager present to address the situation. Additionally, he could have suspended the transaction, using the key and password to which he had access as an early-morning Cashier, who use these tools to handle the drawers before the Front End Manager arrives. Having suspended the transaction, he could have addressed the transaction later in the shift, with the assistance of a Manager, either cashing out the transaction, or voiding it as he did.

The Grievant testified that, after listening to a day's worth of testimony of Company Witnesses at the arbitration hearing, he realizes that he should have suspended the transaction and reported it to the Front End Manager when she came into work several hours later. However, at the time at which the incident occurred, he made a decision to handle the situation differently. The question before the Arbitrator is whether by choosing the method he did, the Grievant committed misconduct that supports termination, under the just cause standard.

The transaction which the Grievant handled on that date is not one which occurs regularly; in fact, the evidence shows that it is extremely rare. The Company presented evidence that in 99% of cases where a customer fails to pay for groceries, an uncommon event in itself, the products remain in the store. Several other long-term Cashiers testified that they had never faced the situation the Grievant faced on January 8<sup>th</sup>.

There is no written procedure provided for Employees regarding what to do in this situation; nor was there evidence of any specific training about how to handle this situation. Several Witnesses testified reasonably that the best course of action when a Cashier does not know how to handle a situation is to call a Manager. However, other evidence in the record indicates that there was not a Manager on duty at that time of day who would have been likely to understand how to handle this highly unusual transaction. The Front End Manager was not in the store yet at that time of the morning. The Grievant testified that he had been a Front End Manager himself and did not believe that the other Managers present knew how to handle the situation. Store Manager Worley admitted to relying upon others to handle cash register operations, and suggested that he had pretty limited knowledge of the operations.

These factors lend support to the Grievant's decision in the moment that he should handle the transaction on his own, and not immediately call a Manager. The Grievant said that he handled the transaction the way that he believed a Front-End Manager would do, and thought it would be better to take care of the entire transaction immediately, rather than suspend it and wait to do it later. There were a number of different ways for a Cashier or a Manager to handle such a transaction, both in the moment when it occurred, and later on, in order to account for the transaction in the register. Several Witnesses testified that the way in which the Grievant handled it is one way that a Manager would have handled it.



intended to deceive the Employer through his initial handling of the transaction immediately after the customer left the store.

The way that the Grievant handled the transaction made it appear as though there was no shortage on his register, however, even though product was taken from the store without payment. It is true, as the Union argues, that other methods of handling these transactions, even by a Manager, creates a "fiction" in a sense—that payment has been received for groceries, or that the groceries have been returned to the shelves, when that is not the case. Nevertheless, when a Manager—or a Cashier—undertakes one of these methods, a separate record must be made that groceries have left the store without payment being received, and therefore, there is a shortage in the register. The Grievant failed to account for any shortage that was created by this transaction, either by telling a Manager, or by leaving a note in his register that day. The Company argues that this fact--coupled with the Grievant's statement made during the investigation that he felt Management treated him badly when he was disciplined for another incident where a customer left without paying for groceries -- lead to the inevitable conclusion that the Grievant was trying to hide the transaction on January 8<sup>th</sup> in order to avoid further discipline.

The Grievant testified that he simply forgot to tell the Front End Manager about the transaction when she came in several hours later. The Grievant testified that if the amount had been larger, he likely would have remembered to report it. This is probably true, but the entire event was unusual enough that it would be reasonable to expect the Grievant to remember and report it later in the day. And there can be little question that a Cashier understands that even a \$20.00 shortage in his register must be accounted for.

Nevertheless, this is an Employee with 15 years' tenure with this Employer, with no prior record of dishonesty of any kind. This is not a case of an Employee stealing from the Employer, or misusing a coupon to give an improper discount to himself or anyone else. The Employee's conduct did not result in any financial gain to him, or any loss to the Employer; the loss was caused by the customer leaving the store without paying. The Grievant has established a long track record of honesty. The only motive he could have had for trying to hide this transaction from the Employer was to avoid discipline, and only then if he were found accountable for the customer leaving the store without paying. The level of that discipline, considering the contract's progressive discipline clause, was likely to be something less than a suspension. It does not seem likely that the Grievant would try to conceal the entire transaction in order to avoid minor discipline. Taking into account these facts, and that the Grievant did not try to hide his initial handling of the incident, there is not sufficiently clear and convincing evidence that his failure to report the transaction that day demonstrated a clear intent to defraud his Employer, as opposed to carelessness.

However, it is this failure to report which is the most troubling aspect of the Grievant's conduct and that which reasonably raised the Company's concerns about the Grievant's overall handling of the transaction. The evidence in this case demonstrates that this very experienced Cashier clearly understood the importance of accounting for payment for product that leaves the store. He had a responsibility to remember to report this unusual transaction to Management, and the cash shortage it created. His failure to do so helped create a question about his honesty and demonstrated a level of negligence in the performance of his duties that is subject to discipline.

The question then is whether termination is the appropriate penalty for the Grievant's negligence. As discussed above, the Grievant was terminated for dishonesty in relation to the

register transaction, and the evidence does not establish that he was dishonest. However, the Employer has raised several other factors which it suggests demonstrate that the Grievant is a poor Employee, and support his termination, or perhaps a remedy that does not involve reinstatement.

One factor is the evidence presented by an Employee that the Grievant threatened the Store Manager a day or two after the cash register incident at issue here. The Company investigated this allegation before terminating the Grievant. However, the investigation was not very thorough. The Store Manager said he chose not to raise the alleged threat at all with the Grievant, when he brought the Grievant to his office to discuss the Grievant's comments alleging racial bias, even though the Store Manager testified that he suspended the Grievant that day in part based on the allegation of a threat. The Loss Prevention Department took a statement from the Employee who said she heard the threat, along with the Grievant's denial. No other Employees were questioned to determine if anyone else had overheard such a threat.

Most importantly, it is clear that the Grievant was not terminated for threatening the Store Manager. It is difficult to believe that the Company would not have terminated the Grievant for threatening physical harm to his Store Manager, if Management believed that there was persuasive evidence to support such a charge. If the evidence of a threat were sufficiently clear to argue that the Grievant should not be reinstated, it should have been convincing enough to form part of the basis for termination. Because it did not form any basis for the discharge, and because of the absence of a thorough investigation into the alleged threat, the allegation cannot be considered as a basis for upholding a penalty of termination.

The Company also has raised the allegation that the Grievant made a comment to a job candidate about the Store Manager's alleged racial bias. The Grievant has presented various

versions of what he actually said. However, he has not denied making comments to the job candidate, and considered as a whole, the evidence supports the view that he made some sort of charge of racial bias against the Store Director in these comments.

The Union suggests that it was these comments that so angered the Store Director that it is likely that this was the underlying reason for the Grievant's termination. Both Parties presented conflicting evidence regarding whether or not the Store Manager actually has demonstrated discrimination at work. It would not be surprising if a Manager of a diverse workforce might be upset about a charge that he had demonstrated racial or ethnic origin bias in his dealings with his Employees. The Union points out that the Store Manager brought the Grievant in to discuss these comments, although Worley said that normally he leaves the investigation of Employee misconduct up to Associate Relations. Other evidence also suggests that Worley was upset in this meeting, challenging the Grievant to "be a man" and to state his charge against Worley directly to his face.

The Company presented evidence that the recommendation for termination came first from Associate Relations, after it completed its investigation, and that this is the normal way in which the process works. Sturett testified that the recommendation of termination was based upon the cash register transaction only. Worley also testified that he has never disagreed with a recommendation from Associate Relations. It is possible that Management's conclusion that the Grievant's conduct merited termination was influenced by his allegation of racial bias against Worley. However, on the basis of this record there is not sufficiently convincing evidence to establish that the Grievant was in fact terminated on the basis of his comments about racially-motivated treatment by Worley. On the other hand, the Employer may not now rely upon the evidence of these comments as support for the Grievant's termination, if Management did not

consider the conduct as a basis to terminate the Grievant initially. Therefore, the evidence concerning these comments does not support termination or a decision not to reinstate the Grievant.<sup>1</sup>

The Company also introduced evidence of past discipline of the Grievant. The discipline of July 2014 may have involved negligence in handling a transaction when a customer left without paying. However, that discipline has dropped off the Grievant's record, due to a contractual provision, and cannot be considered as part of his record. He does have another warning in his record for a check missing from his register, consideration of which is not time-barred under the contract. However, that situation is also different from what occurred here. The warning regarding the incident with the irate customer is not sufficiently related to the negligence at issue here; in addition, it is not clear why evidence suggesting that situation was more serious than Management realized when they disciplined the Grievant was raised for the first time at arbitration and not when the discipline was imposed. In any event, the Employer has not argued that the level of discipline here was the result of progressive discipline, but rather involved immediate discharge for dishonesty.

On the basis of this record, there is not sufficient evidence to support the termination of the Grievant. The Grievant was terminated for fraudulent or dishonest activity, and there is not sufficient persuasive evidence in the record that he intended to defraud the Employer, so as to substantiate such a charge. It is unlikely that the Employer would have terminated the Grievant for the register transaction, if Management had concluded that he was not engaging in intentional

---

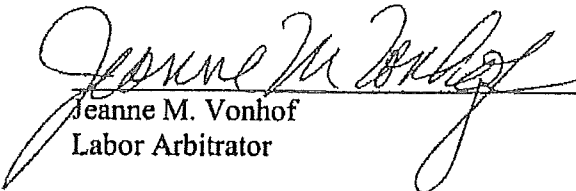
<sup>1</sup> Whether the Grievant's alleged claim of racial bias would have been protected by laws or policies prohibiting retaliation against an Employee for raising such a claim need not be addressed here, because the evidence does not support a conclusion that the Grievant was terminated on this basis.

dishonesty. The other factors introduced by the Employer do not support termination, or a decision not to reinstate the Grievant.

However, due to the significant nature of the Grievant's failure to report the unusual transaction here, and the way this conduct contributed to raising a question of dishonesty in the way he handled the transaction, there is just cause for a suspension for the Grievant's negligence. A suspension should be sufficient to impress upon the Grievant and other Employees the importance of promptly reporting any highly unusual transactions to Management. Therefore, the termination will be reduced to a one-day suspension.

#### AWARD

For the reasons discussed above, there is not just cause for the termination of the Grievant. However, there is just cause for discipline. The discharge shall be reduced to a one-day suspension. The Grievant shall be reinstated and made whole for all lost wages and other benefits resulting from the discharge, other than wages for the one-day suspension. The Arbitrator will retain jurisdiction solely over the remedy portion of this Award.

  
Jeanne M. Vonhof  
Labor Arbitrator

Decided this 28th day of November, 2016.