AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION PANEL

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In the Matter of the Arbitration

-between-

GILA'S JEWEL, INC.
d/b/a THE BOX TREE
("Company")

-and-

LOCAL 100, HOTEL EMPLOYEES AND
RESTAURANT EMPLOYEES UNION
("Union")

Case No. 13-300-02261-01

**ARBITRATOR'S AWARD AND OPINION**

Re: Discharge of Fernando Vasquez, Grievant

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Before: Jay Nadelbach, Esq., Arbitrator

Under the parties' collective bargaining agreement, the discharge of Grievant Fernando Vasquez was grieved and taken by the Union to arbitration. A hearing was held before me on December 27, 2001 at which time the parties were given a full and fair opportunity to present testimony, evidence, and arguments in support of their respective positions. Richard A. Wilsker, Esq. of Ross & Hardies represented the Company and Jamin R. Sewell, Esq. represented the Union.

## ISSUE

The issue posed by the Union: Was there just cause for the discharge of the Grievant, Fernando Vasquez? If not, what shall the remedy be?

The Company disagreed with the issue presented by the Union, noting as set forth below that the Grievant remains eligible to be re-hired or to return to work once he properly documents a lawful status to be employed. The Company pointed out that it has consistently held open the same offer and opportunity to the Grievant.

## BACKGROUND

In March 2001, the Company received notice from the Social Security Administration

(hereinafter "SSA") that social security numbers of eight (8) of its employees that were provided via Company payroll records did not agree with the information maintained by SSA. Known as a "no-match" letter, the notice to the Company included the following statements:

> "We need more information about the names and Social Security numbers (SSNs) on the Wage and Tax Statements (Forms W-2) you reported for tax year 2000. You should provide us the corrected information within 60 days.
>
> **We Need Correct Names/SSNs**
>
> The name and/or Social Security number (SSN) on one or more of the Forms W-2 you reported doesn't agree with our records. It is important that we have the correct names and SSNs of your employees. We have included a list of SSNs that do not match our records. If the list shows you have "MORE" SSNs to correct than listed, please call us at 1-800-772-6270 for assistance.
>
> We realize there could be a number of reasons why the reported information doesn't agree with ours, such as:
> - Record transcription or typographical errors
> - Incomplete or blank name or SSN reported
> - Name changes
>
> This letter does not imply that you or your employee intentionally provided incorrect information about the employee's name or SSN. It is not a basis, in and of itself, for you to take any adverse action against the employee. Any employer that uses the information in this letter to justify taking adverse action against an employee may violate state or federal law and be subject to legal consequences."

The notice went on to list a series of guidelines the Company could follow in checking and/or correcting its records.

Gila Baruch, the Company's owner, testified that upon receiving this notice, she spoke to each of the eight employees (8) employees to determine if there was a simple mistake (eg, a typographical error) that could be rectified. She also compared whatever information the Company had been given by each employee to the information received from

SSA. In addition, she called the Social Security toll-free number to verify that the Company had indeed supplied no-match numbers. Several of the employees, in response to Baruch's inquiry, indicated that they were in the process of obtaining new social security numbers. The Company agreed to wait and, within two (2) months, all employees except the Grievant received their new documents and submitted the corrected SSA information.

The Grievant too, Baruch testified, first stated that he was in the process of obtaining "new papers." She told him he could remain employed so long as the new Social Security papers were furnished "within 60 days." By June 2001, however, nothing had been submitted. Baruch then waited another month, but the Grievant still did not provide a new SSN. As far as Baruch knew, he apparently had taken no corrective action. On July 18, 2001, therefore, the Grievant was let go (with Baruch noting in her testimony that business in the summer was "dead" and the other employees who were retained were all "lawfully" employed). The Company then provided to the Union (and currently still holds open) an unconditional offer of reinstatement whenever the Grievant submits "valid documentation indicating his ability to work in the United States" (see Company exhibit #1, letter dated July 24, 2001 from Company attorney Wilsker to Union Representative Monterosa).

## POSITION OF THE PARTIES

Company Position

The Company maintains it had legitimate and lawful reasons not to permit the Grievant to continue his employment. Simply put, the SSN provided by the Grievant was invalid. If he does not have a valid SSN, the Grievant is not legally employable in the United States and cannot be permitted to work. He was given a fair and reasonable amount of time to correct whatever problem he may have with the SSA. The Grievant was and is seemingly unable to do so. He did not show that he made any effort to correct his SSN discrepancy. Thus, the Company had just cause to release him.

In support of its position, the Company cites portions of the Federal Immigration Reform and Control Act. Section 1324a of the Act generally discusses the unlawful

employment of unauthorized aliens or the continuation of employment of an individual who has become an unauthorized alien with respect to such employment. It goes on to set forth in subsection (e)(4) the various civil monetary penalties that an employer may face upon a determination that there has been or continues to be a violation of this Section of the Act. In view of its potential, serious liability under IRCA, the Company argues, it had no choice but to prohibit the Grievant from continued employment until he could clear up his social security status.

In addition, the Company again points out that the Grievant has an opportunity to reclaim his job. All he had to do is provide proof that the SSN problem has been addressed. Thus, the Grievant lost his job and continues to be without one through his own inaction or inability to submit the required information.

Union Position

The Union called no witnesses in presenting its case. Rather, it simply argued that the Company had failed to establish just cause for the discharge.

Notwithstanding the no-match letter, the Company was unable to prove that the Grievant was an unauthorized alien or not legally allowed to work. The Company conducted no investigation beyond its receipt of the SSA letter and could not, therefore, introduce any additional or independent proof to support its claim.

Insofar as the no-match letter is concerned, it does not by itself provide just cause for termination. In fact, it specifically advises that employers may not take "any adverse action" against an employee based solely on the letter. The no-match letter is strictly informational. Once an employer advises an employee of the SSN discrepancy, the issue is to be taken up and resolved between the employee and the SSA.

Moreover, absent any proof of wrongdoing on the Grievant's part, discharge was totally unwarranted. The Company here improperly sought to shift the burden to the Grievant to justify his continued employment, rather than meet its duty to prove it had just cause to discharge.

In support of its position, the Union also cites a prior arbitration award in *Hotel Employees and Restaurant Employees Union, Local 2 and San Francisco Central Travelodge Joint Venture* (AAA Case #74-300-63-99). In that case, Arbitrator Luella Nelson overturned the discharge of housekeeping employees who were let go following that employer's receipt of "no-match letters." The employer had terminated the employees for their alleged refusal to comply with its order to secure a letter from the SSA indicating the problem had been corrected. Notwithstanding the employer's concerns regarding potential liabilities, the Arbitrator found there was an insufficient basis to discharge the employees.

## DISCUSSION

I have carefully reviewed the underlying facts, the parties' arguments, and the IRCA provisions cited. For the reasons set forth below, I find the Company did not have just cause to discharge the Grievant, Fernando Vasquez.

As the Union correctly pointed out, the Company had the burden of proof to demonstrate that at the time the Grievant was terminated (ie, from the date he was no longer kept on payroll, as Baruch characterized his status), it had just cause to bar his continued employment. To meet that standard, the Company needed to establish that the Grievant was not legally allowed to work.

The specific facts presented, however, show that the Company was unable to meet its burden. In sum and substance, the Company relied solely on the no-match letter it received from the SSA (which by itself and by its very terms does not permit adverse action against an employee) and the lack (after the passage of several months) of corrective measures. Yet, these circumstances standing alone, I find, do not amount to clear or convincing proof that the Grievant was not legally entitled to work. They merely evidence the fact that the SSN problem had not yet been corrected. They do not sufficiently support the notion that the SSN problem could not be corrected because the Grievant was an unauthorized alien. Absent additional proof that needed to be supplied by the Company, just cause to discharge is

lacking.

In addition, I am sympathetic to the Company's concerns regarding potential fines should it employ or retain an unauthorized alien in its employment. Nevertheless, that possibility is mere speculation (and also not a sufficient reason to discharge an employee) when solid proof of "unauthorized alien" status still has not been shown to exist. The true status of the Grievant at the time of the Company's action was at best unknown or unclear, and the conclusions drawn by the Company were simply unsupported.

For these reasons, the discharge was without just cause.

**AWARD**

The grievance is upheld. The Company did not have just cause to discharge the Grievant, Fernando Vasquez.

The Grievant shall be reinstated to his prior position and made whole for lost wages and benefits, minus any interim earnings.

Dated: February 19, 2002
New York, New York

JAY NADELBACH

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

On the 19th day of February 2002, before me personally came JAY NADELBACH, to me known and known to me to be the person who executed the foregoing instrument, and acknowledged to me that he executed the same.

Notary Public

MURIEL G [illegible]
Notary Public, State of [illegible]
No. 41-4894361
Qualified in Queens County
Certificate Filed in New York County
Commission Expires [illegible]