

IN RE ARBITRATION BETWEEN:

UNITED STEELWORKERS, AFL, CLC, LOCAL 1028

and

CUTLER MAGNER, Co.

DECISION AND AWARD OF ARBITRATOR

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January 19, 2009

IN RE ARBITRATION BETWEEN:

USW Local 1028,

and

DECISION AND AWARD OF ARBITRATOR
Melvin Heinrich grievance

Cutler Magner, Co.

APPEARANCES:

FOR THE UNION:

John Rebrovich, Business Representative
Melvin Heinrich, grievant
Greg Shaul, Laborer, Local 1028
Steve Jezierski, Auto Pack Operator Local 1028
Mark Hill, Local 1028

FOR THE EMPLOYER:

Donald Erickson, Attorney for the Employer
Paul Lee, Grievant's Supervisor
Mark LaLiberte, Plant Superintendent
Stephen LaLiberte, Sales Manager

PRELIMINARY STATEMENT

The hearing in the matter was held on December 9, 2008 at 10:00 a.m. at the Holiday Inn in Duluth, MN. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on December 31, 2008 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement dated May 1, 2007 through April 30, 2009. The grievance procedure providing for binding arbitration is contained at Article V. The parties agreed there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUE

Was there just cause for the discharge of the grievant Melvin Heinrich? If not what shall the remedy be?

COMPANY'S POSITION

The Company took the position that there was just cause for the grievant's termination for failure to perform specific duties as directed and for the failure to communicate that he failed to perform those duties. In support of this position the Company made the following contentions:

1. The Company acknowledged that the grievant is a long-term employee and has been with the Company for more than 30 years. His disciplinary record however is not good. The Company pointed to four other violations for carelessness and failure to follow the clear directives of his supervisors in a 9-month period prior to the incident that gave rise to the termination.

2. The Company pointed to an incident that occurred on December 1, 2007 where the grievant failed to follow his supervisor's instructions to leave work no later than 5:00 p.m. and to contact the supervisor regarding the status of some railcars that were on the Employer's premises. He failed to do either and failed to communicate his whereabouts to the supervisor despite repeated attempts to contact him. The supervisor had to drive to the Company's plant in a snowstorm and was contacted by the employee just before 9:00 p.m. and was informed that the grievant was still at work. The grievant had no explanation for this violation and was given a written warning pursuant to the Company's disciplinary policy, discussed below. See Company Exhibit L

3. The grievant was disciplined in February of 2008 when he blatantly disobeyed a directive to crush and sort certain salt pellets. He decided to do something entirely different and made a managerial decision without consulting his supervisors. He was given a one-week suspension for this incident. See Company Tab K.

4. In March of 2008, the grievant drove a rented forklift into a fall protection canopy damaging the lights. This was bad enough since he failed to check the height to make sure it would fit however he then failed to report this incident to the Company. He was given a written warning for this incident since under the discipline policy this was treated as a carelessness incident rather than one involving a failure to follow supervisor's directives. The Company pointed to this as another example of the grievant's cavalier attitude toward Company's policy and one which it argued should be taken into account when determining the appropriate penalty in this case. See Company Tab J.

5. In May 2008, a mere two months prior to the incident under consideration, the grievant was given a two-week suspension, the last step of the discipline policy prior to discharge, for engaging in some unauthorized work. The grievant had rigged a 150-pound chute suspended some 20 feet in the air. The Company asserted that this unauthorized work was again another example of the grievant's penchant for undertaking things on his own without communicating with his supervisors. He was specifically informed as the result of this incident that any further failure to follow supervisor's directives would result in his discharge. See Company Tab I

6. The grievant was terminated for his actions on July 28, 2008. He was directed to move a pile of fine grain salt inside due to an impending rainstorm. He had been told earlier in the day to screen a pile of salt in anticipation of a Mr. Bob Olson coming to pick it up later. At around 10:30 that day he was told by his supervisor that Mr. Olson would not be coming that day and to "move that pile inside."

7. The grievant did not move the fine salt pile inside and left it outside despite a clear directive to do so. Moreover, he never communicated to anyone that he had not done so even though he has a two-way radio and could have easily communicated this to the supervisor before he left so the oncoming shift could have moved it. He also never said anything to the supervisor even though his office is only a few feet away from the time clock. Due to the grievant's failure to follow directives the pile was ruined because of rain and the customer who came to pick it up the following day complained about it as it was not usable for their purposes.

8. The Company further asserted that the grievant's excuses for failing to perform the duties as directed that day were unfounded. At first he claimed that he did not have time due to having to unload some rail cars yet the records do not show that there were any railcars there that day. Further despite saying earlier that he had to unload some trucks he later admitted there were no trucks to unload either. See Company Exhibits E and M. The Union did not take issue with these facts.

9. The Company asserted that it would not have taken the grievant as long as he claimed to screen the load and that he could have done it in far less time making his defense of not enough time not credible. In fact the grievant admitted that he did not start to move the salt inside until approximately 40 minutes before his shift. He started with the coarse and medium coarse salt and should have known that the fine salt should have been moved first as it the most vulnerable to rain. Instead of following the clear directives of his supervisor, he simply went off on his own, as he has done in the past, and decided to move other piles first.

10. In response to the defenses raised by the Union the Company further asserted that Mr. Hill did not tell Steve or Mark LaLiberte that the fine salt pile had not been moved since if he had they would have told him to move it inside. Instead what is more likely given the facts is that, whether Mr. Hill noticed the pile or not, management was left with the impression that the fine salt had been moved and were not aware it had not been moved since the grievant never told them that it had not been moved.

11. The Company in its Brief went through the standard seven tests for discipline and argued that more than adequate notice had been provided to the grievant of the consequences of further failures to follow directives. The Company further asserted that the rules were fair and reasonable as was the order that was given that day. There was no reason offered why he couldn't perform it other than he ran out of time. The Company asserted that notice, the reasonableness of the order and the fact that the order was not performed were not contested.

12. The Company further argued that the investigation was fair and objective. All personnel involved were interviewed. The Company provided clear proof that the grievant failed to follow the order. In fact the grievant admitted at the hearing that he got the order, understood it and failed to comply with it and then neglected to tell anyone he had failed to comply with it.

13. With regard to the question of disparate treatment, the Company asserted that while others have not been disciplined for failing to follow directives those situation are distinguishable. In one case cited by the Union the employee refused to perform work on the grounds that it was unduly dangerous. In the other case cited by the Union, while the work was not performed, the employee notified the Company that it had not been done; thus presenting a vastly different scenario than that presented here. Moreover, in that other situation no product was damaged as was the case here. This case is thus not the same as the ones cited by the Union and should not be used as the basis for a disparate treatment defense.

14. Finally, with regard to the penalty, the Company cited the discipline policy, see Company Tab C and noted that it was followed to the letter here. The grievant was given a warning for failure to follow directives, a one-week suspension for another such violation and a two-week suspension for yet another violation in only a 9-month period. The policy clearly states that discharge follows the two-week suspension phase and the grievant was clearly notified of that. As if that were not enough, he was also given a written warning for the March 2008 incident, which the Company did not characterize as failure to follow directives of management. The Company did not try to characterize that incident as terminable, even though arguably it might have.

15. The Company acknowledged the contractual authority of the arbitrator to fashion a remedy but implored the arbitrator not to “split the baby” here. To do so would in the Company’s view, undermine the clear and consistently enforced disciplinary policy and send the wrong message to employees that repeated failure to follow clear and legitimate orders can be ignored. The Company argued that even though the grievant is a long-term employee, with his record termination is the only reasonable alternative here.

The Company seeks an award denying the grievance in its entirety.

UNION'S POSITION:

The Union took the position that there was insufficient cause for the grievant's discharge. In support of this the Union made the following contentions:

1. The Union asserted that when the grievant first appeared for work on July 28, 2008 he performed his usual maintenance of the screen plant and spent about an hour doing that. At around 10:30 his supervisor gave him the order in question as follows: "When he was finished screening the salt, he was to move it inside the building."

2. When he got that order he immediately began to comply with it by continuing to screen the salt. That took him until about 2:15 that day. When he finished he then began doing exactly what his supervisor instructed him to do, namely, moving the piles inside. Since he was not given any specific orders as to which piles he was to move first, he began with the coarse and semi coarse salt. The Union countered the claim by the Employer that he somehow should have guessed which pile to move first based on the value of the fine salt.

3. The grievant was not able to complete the job by the end of his shift at 3:00 p.m. and, since he had been instructed not to work overtime unless specifically directed, he punched out. The Union acknowledged that the fine pile was still outside but that it was in plain sight in the yard.

4. The Union acknowledged that the grievant got the order but argued that the grievant did in fact comply with it. The Union was adamant that the grievant did what he was told. He screened the salt and then began moving it inside; just as he had been directed. The Union further countered the Employer's claim that he should have been able to screen the salt faster than he did and argued that the Employer's witnesses have never in fact done this operation. The Union further argued that the grievant screened the salt exactly as he had done in the past and that there was no evidence to suggest that the grievant was loafing or failing to do his job.

5. The Union further asserted that the fine pile was out in the open and that everyone could see it. Had the second shift operator been directed to move it he certainly could have and would have. The Union further asserted that management was told or at least were aware the fine pile was still outside after the grievant left yet did nothing to direct others to move it inside. The supervisor who gave the order never checked to see if the fine pile had in fact been moved and that this failure certainly also contributed to the fact that it was left out in the rain.

6. The Union further asserted that the salt in question came from a different mine than the Company's data sheet showed. The Union also disputed that the customer complained about the quality of the salt that was delivered to him the following day. There is no question that the customer came the next day and that the customer in fact used the salt for the tanning process it was intended for.

7. The Union also noted that the grievant has been with the Company for more than 30 years and as such is at compensation level that is considerably higher than more junior employees. As will be discussed further below, there was some discussion that his termination may well be motivated by a desire to rid the Company of its higher wage earners, like the grievant.

8. The Union argued that the Employer is guilty of disparate treatment and pointed to several other employees who have either flatly refused to perform directed tasks or have, like the grievant simply miscommunicated or forgotten to perform such tasks who have not been even disciplined much less fired.

9. The Union took issue with the prior disciplines. In the case involving damage to a rented loader, the Union argued that the grievant never even knew he had damaged the loader and would certainly have reported it if he had. In another case, the matter involving the chutes, the grievant was in fact trying to repair it in order to increase production and increase efficiency. The Union took umbrage over the allegation that the grievant was simply goofing off in any of these instances.

10. The essence of the Union's claim is that the grievant's actions on July 28, 2008 even when viewed in the context of the prior discipline does not arise to the level of a justifiable termination. Contrary to the Employer's assertions, the record reveals that the grievant has been continually trying to further the interests of the Employer rather than engage in any sort of intentional misconduct. The grievant never left his job nor did he decide to goof off. The Union argued that all of the discipline has occurred in the past 9 months and ignores more than 30 years of loyal service to this Company. There is simply insufficient grounds to discharge a 57-year-old employee with more than 31 years of service based on these kinds of allegations.

MEMORANDUM AND DISCUSSION

Many of the salient facts were not in dispute. The grievant is a front-end loader operator and has been with the Company for approximately 31 years. The record showed that he has a number of prior disciplinary actions, including, several disciplinary suspensions over the course of this time but the record also reveals that these have all occurred in the last 9 months of his employment. There was no explanation for this but it seems somewhat anomalous that after more than 30 years of service the employee's record would suddenly become so tarnished. The impact of the grievant's record will be discussed more below.

The operative events giving rise to the grievant's termination occurred on July 28, 2008. He appeared for work that day and was initially told that a customer, Mr. Bob Olson, would be in later that day to pick up a load of fine salt. The Company is in the business of distributing salt and the evidence shows that there are several grades of salt, coarse, semi-coarse and fine salt. The evidence showed that the latter is the most expensive on a per unit basis. Mr. Olson did not testify at the hearing but the evidence showed that his business is preserving and tanning animal hides and that he uses fine salt in that process.

On the morning in question the grievant was instructed to start screening the fine salt in anticipation of the load to Mr. Olson. The parties disagreed on how long this process should take but the grievant's version of this was accepted as more credible. The Company's representatives had a different version of this but it was clear they do not perform this operation. There was no evidence that the grievant did the screening any differently than he always did in the past nor was there any evidence that the grievant was lollygagging or goofing off when he should have been screening salt.

At approximately 10:30 a.m. Mr. Paul Lee, the grievant's supervisor, informed the grievant that Mr. Olson would not be in that day due to some impending rain. There was considerable dispute about the exact wording of the order. Mr. Lee testified that he told the grievant that Mr. Olson would not be in and to "move the salt inside." He believed that he was clear and that the grievant understood that he was to move the fine salt inside and that the customer would not accept wet salt.

The grievant had a slightly different take on what Mr. Lee told him however. The grievant indicated that he had been told previously to screen the salt and was later told that the customer would be in to get it that day. The grievant indicated that his understanding of the order was that he was to finish screening the salt and then move it inside due to the impending rain.

The order was communicated by radio. The evidence showed that others can hear these types of orders on their radios but there was no convincing evidence that anyone else actually did hear it or that if they did that they paid it any particular heed. No one other than the grievant and his supervisor testified as to what the order was or could verify what exactly the order was.

The evidence did show that the grievant continued to screen the salt as he believed he had been directed to do so. There was no evidence that he was intentionally disobeying an order. The evidence showed that he thought he was to continue to screen the salt and then move it inside only after the screening was completed. The evidence was not clear as to whether the supervisor told the grievant to move the fine salt first.

The evidence further showed that the grievant began moving the salt inside and moved the coarse and semi-coarse piles first since they were apparently larger. What was clear was that the grievant did not finish moving the fine salt pile and that at the end of his shift it was left outside. What was also clear was that despite having a two-way radio at his disposal the grievant did not report to the supervisor that he had not completed moving the fine salt inside as he had been directed. Neither did the grievant mention this to anyone when he was punching out. He did not seek out the supervisor to tell him that the fine salt was still outside and to have the second shift operator move it.

There was some dispute about whether the managers were aware that the fine salt pile was still outside. It was clear that the pile was in the open. The schematic drawing provided by the parties, Joint Exhibit P, showed that it would have been obvious to anyone who happened by that the fine salt pile was still outside. A Union witness testified that he told Mark and Steve LaLiberte that the pile was still in the yard. Management witnesses denied they knew it was there and would have certainly directed someone to move it as rain was predicted. The totality of the evidence showed that management did not know the pile was out there, or at least did not for whatever reason notice it, or they would have directed someone to move it inside. Neither did the evidence support the Union's claim that the salt might have been damaged anyway since the roof frequently leaked. This argument was something of a red herring. The evidence showed that the fine salt pile in question was to be delivered dry and it strains credibility that this pile would have been moved to a place where it would have gotten wet anyway or that the Company would have condoned that somehow.

The Union alleged that the fine salt may not have been damaged as much as the Company alleged and further made some oblique references to the actual location from which the salt had been mined. It frankly was not entirely clear what that assertion was about or how it might affect this matter.

The evidence showed that in fact the fine salt was damaged and that the customer who eventually did come the following day complained that it was wet. Apparently the salt was used but there was some concern raised about it by the customer. It was only due to the longstanding relationship between the Employer and the customer that the salt was accepted.

Neither was there any evidence that the disciplinary action here or in the past was motivated by a desire to fire the grievant due to his wage. There is a two-tier wage system and the grievant with his long tenure is in the higher wage tier. Other than the bald allegation that the motivation may be to rid the Company of relatively high wage earners there was no evidence to this effect.

The Union also raised the issue of disparate treatment of similarly situated employees. The Union pointed to one employee who refused to walk across the street to perform a task who was not disciplined. The evidence showed however that the employee in question refused to do this work on the basis that the job was unsafe. There was very little evidence about that incident but the totality of the evidence showed that the employee did refuse on the basis of safety and the Employer eventually accepted this explanation and did not impose discipline on that employee.

Of greater concern was the allegation that other employees, including a Union witness at the hearing, have failed to perform tasks and were not disciplined. The evidence showed that in the past some employees have failed to perform directed tasks but have not been disciplined. The Employer countered though by pointing out that in those cases the employees in question have at least notified the Employer of the oversight thus taking those situations out of the same realm as this one.

The totality of the evidence reveals that the grievant's error here was not so much related to the failure to move all the salt inside but rather that he was negligent in failing to notify anyone of that fact. He was attempting to perform the work. There was no evidence whatsoever that he refused to perform it; thus making it clear that this is not insubordination.

He simply ran out of time and, as noted above, there was no evidence that he was slacking off or performing other non-directed work nor was he intentionally slowing his work pace in order to avoid doing the work. He had every intention of completing the work; it just took longer than he had that day.

It was clear that his error in failing to notify the supervisor was this was not intentional but was rather more than likely an oversight. Still though the grievant had a radio and had multiple opportunities to advise his supervisor that he had not gotten to the fine salt pile and to get the second shift loader to move it to protect it from the impending rain. The grievant must know that this kind of carelessness cannot be repeated since his record does not warrant many more “second chances.”

Clearly if this had been the only offense the grievant had ever committed there would not be sufficient cause to discharge him. It is frankly the grievant's record that is troublesome. The Union argued that many of the prior offenses were unjustifiable and that the grievant should not have been disciplined. The difficulty with that arguments is that he was and those matters were not grieved and are part of the grievant's official record. There was however some merit to the argument that the grievant's “problem” is that he deviates from his designated tasks not so much to be malicious or disruptive but rather to help the Employer and to do the job better. The true issue with that is that he appears to be something of a “cowboy” and launches off into tasks that are not part of his job duties or attempts to substitute his judgment for that of management.

Frankly there is merit to both sides here. The Employer argued that it followed its discipline policy, Joint Exhibit C, and imposed discharge only after the 4th offense as set forth in that policy. The Employer further argued that it followed appropriate progressive disciplinary steps and that it has given the grievant ample warning and ample opportunity to correct his behavior. The Employer further showed that it placed the grievant squarely on notice that any further failure to follow supervisory directives would result in his discharge. See Joint Exhibit I.

The Union on the other hand makes a valid point that for some reason the grievant's troubles began only 9 months ago and that it is too harsh to fire him even though his record is not perfect. He has 31 years of service and the commentators all indicate that a grievant's tenure and record of service are valid factors to consider in determining the appropriate disciplinary remedy by arbitrators. Further there is contractual support for the arbitrator to fashion a remedy and reduce the penalty.

Finally, the Union made the point that even though the grievant has been disciplined several times in the recent past, the incidents virtually all show a person that is at all times trying to do something good for the Company, as opposed to one who is intentionally disregarding or even undermining those interests. At worst the grievant simply made an invalid assumption here that someone would see the pile of fine salt and move it when the next shift came on.

This is an exceedingly close call. The totality of the evidence on this record shows though that the grievant's actions on July 28, 2008 did not rise to the level of an intentional disregard for the supervisor's directives and could well be characterized as carelessness in neglecting to communicate with the supervisor. As such when applying the discipline policy discharge is not the appropriate remedy here.

Upon a review of the disciplinary policy and the relevant contract language was what finally swayed the decision in favor of reinstatement but without back pay or accrued benefits.

First, the contract specifically provides at Article VI that "the umpire shall have the discretion to reduce or not require the Company to pay the compensation for the time lost."

Further and more to the point, the discipline policy relied upon by the Company as the basis or imposing discharge provides in relevant part as follows:

GROUP I	First Offense	Second Offense	Third Offense	Fourth Offense
Insubordination	One week Off	Two weeks Off	Discharge	

GROUP 3

Mistakes Due To Carelessness	Warning	Three Days Off	One Week Off	Discharge
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It is clear that insubordination is treated far more harshly and provides for discharge for only three offenses as opposed to four offenses for carelessness. Moreover, the policy states that “The Company will apply the penalties for infractions of each rule separately, (i.e. straight across the row, except where it is demonstrated that different infractions are the result of the same problem.)

The initial discipline was given in December 2007. Joint Exhibit L. The stated violation was Failure to Communicate with supervisor. The grievant was given a warning, which is the stated discipline for either a Group 1 or Group 3 offense.

The second discipline was given in February 2008 and was for the stated reason of Failure to Follow Supervisors Directives. The grievant was given a one-week suspension, implying that the Company treated this as insubordination. Joint Exhibit K.

The third discipline was in March 2008 for the stated offense of Mistake Due to Carelessness and failure to report damage. This was the damaged rented loader incident as discussed above. The discipline was a warning. This implies that the Employer treated this March 2008 incident as a first offense under the Group 3 offenses. See Joint Exhibit J.

The fourth discipline was in May of 2008 and was again for Failure to Follow Supervisors Directives. This related to the grievant’s attempt to repair a broken chute which was not part of his job, and for then leaving it hanging in a precarious position. He was given a two-week suspension, which implied that the Company treated this as a second offense under a Group 1 offense. See Joint Exhibit I.

The offense in July of 2008 was stated as a Failure to Follow Supervisor's Directives but, as noted above, the facts showed that the grievant's offense was in fact one best characterized as a mistake due to carelessness. There was no evidence of an intentional disregard for the order given that day, and insubordination requires such an element.

While the Union argued that several of the prior disciplinary actions may also have fallen into this category, and perhaps they should have, the arbitrator cannot overturn or amend those prior disciplinary actions now; they are part of the record and they are what they are. The arbitrator does however have the jurisdiction under the contract to determine the appropriate level of discipline for the July 2008 incident.

Thus under the strict terms of the discipline policy discharge is not appropriate under these facts. The question then is the remedy to be imposed. This again is an extremely close call for the reasons stated above. The grievant does have an unfortunate history of taking actions on his own and of carelessness.

There is some risk in reinstatement frankly as the grievant's recent history demonstrates that this penchant is getting worse rather than better. Some thought was given to all options here, i.e. reinstatement with full back pay, reinstatement without back pay and reinstatement with a suspension of less than the full period of time the grievant has been off work.

Reinstatement with full back pay would be inappropriate. The grievant's actions were not only negligent but could have cost the Company a valued customer. There was no clear evidence of what the actual cost was of the salt that was ruined or whether there was an adjustment in the price paid by Mr. Olson for the salt he recovered but there was certainly that potential as well as the loss of good will. This was a serious oversight and it was troublesome that the grievant would simply walk away without telling anyone that he ran out of time to put the fine salt away.

Reinstatement with a suspension to correspond to the penalty grid set forth in the discipline policy was rejected as well. The discipline policy was not negotiated but was rather unilaterally imposed so the arbitrator is not constrained by the strict terms of that policy. Furthermore, the grievant's actions were more serious given his record than a one or two week suspension warrants.

The most appropriate remedy under the facts and circumstances on this record is reinstatement without back pay or accrued contractual benefits. That will be awarded.

Further, the grievant's record is ordered to be amended to reflect that the discipline imposed herein is a disciplinary suspension for the length of time between his termination and reinstatement hereunder. Some arbitrators frequently impose a so-called last chance warning in such a case. That is not for an arbitrator to decide however. The Employer may chose to treat it as that in the event further disciplinary action is necessary but that is left to the Employer to determine and such a condition is not imposed as a part of this Award.

Accordingly, for the reasons set forth above, the grievant is to be reinstated within five (5) business days of this Award but without back pay or contractual benefits of any kind.

AWARD

The Grievance is SUSTAINED IN PART AND DENIED IN PART as set forth above. The grievant is to be reinstated within five business days of this Award but without back pay or contractual benefits of any kind as set forth above.

Dated: January 19, 2009

Jeffrey W. Jacobs, arbitrator

Cutler Magner and USW award