

IN RE ARBITRATION BETWEEN:

IBEW LOCAL 160

and

XCEL ENERGY

DECISION AND AWARD OF ARBITRATOR

AAA # 65-300-00213-09

JEFFREY W. JACOBS

ARBITRATOR

July 6, 2010

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IBEW Local 160

and

Xcel Energy.

DECISION AND AWARD OF ARBITRATOR
AAA Case # 65 300 00213-09
Timothy O'Brien grievance

APPEARANCES:

FOR THE UNION:

M. William O'Brien, Attorney for the Union
Timothy O'Brien, Grievant

FOR THE EMPLOYER:

Michael Moberg, Attorney for the Company
Steve Christianson, Work Force Relations
Denny Kusz, Mgr. Substation Operations
John Knapp, Breaker Technician
Tim Peterson, Foreman at Sioux Falls Service Center
Stuart Helmer,

PRELIMINARY STATEMENT

The hearing in the matter was held on April 20, 2010 at the office of Briggs and Morgan, in Minneapolis, Minnesota. The parties submitted Briefs that were received by the arbitrator on June 8, 2010 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2008 through December 31, 2010. Article II provides for submission of disputes to binding arbitration. The arbitrator was selected from a permanent list administered by the American Arbitration Association. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES PRESENTED

Did the Company have just cause to terminate the grievant? If not what shall the remedy be?

EMPLOYER'S POSITION:

The Company's position was that there was just cause to terminate the grievant for his actions in this matter. In support of this position the Company made the following contentions:

1. The Company noted that the grievant has been with the Company for approximately 11 years but does not have a clean record. He had two prior instances of discipline, one in July 2008 when the grievant was given a written warning for improper conduct when he violated the Company's policy on excessive personal use of his computer. See Company Exhibit 6; Tr. 33-34, 118-119.

2. The other was in April 2009 when the grievant was issued another written warning for his interaction with a co-worker, John Knapp, who also was involved in the incident that gave rise to the discharge herein. In the April 2009 incident the grievant approached Mr. Knapp and accused him in a loud and confrontational manner of being an unsafe worker by failing to tie off a ladder. This conversation took place in front of several co-workers including some apprentices. Mr. Knapp was understandably concerned about this and the threatening and intimidating behavior the grievant displayed. Upon investigation the Company determined that the grievant's comments about Mr. Knapp were in fact wrong and that he had properly tied off the ladder. This discipline was not grieved.

3. The Company also pointed out that the grievant had displayed other types of intimidating and unusual behavior in the past all of which gave his co-workers concern about the grievant's propensity to actually do physical harm to people. At a safety meeting in January 2009 where both he and Mr. Knapp were in attendance the grievant continually flipped open a knife in such a way as to make it appear threatening. The grievant later denied that but co-workers and others who were there claimed that this is exactly what he did. This behavior was interpreted as threatening at worst and very odd at best since there was no reason to have the knife out at that meeting.

4. Further, the Company pointed to statements the grievant made on the very day the incident that gave rise to his discharge albeit somewhat earlier in the day about "going off" or statements like one never knows what might happen because he [the grievant] has some loose marbles upstairs" or words to that effect. These statements also made his co-workers very uneasy about just what the grievant might be capable of if he were angry or provoked.

5. The Company noted that it has a very strict “zero tolerance” policy against workplace threats and violence. Several Company witnesses indicated that one does not even joke about violence in this setting and that it is analogous to “joking” about having a bomb or weapon at a security line at an airport. The Company also asserted that while the grievant may have been “joking” his co-workers did not know that and, as will be discussed more below, these comments and prior instances of strange and threatening conduct give context to the events of June 26, 2009,

6. The Workplace Violence policy strictly prohibits any violence or threat of violence in the workplace and specifically prohibits any jokes or offensive comments about workplace violence as noted above. The policy provides that workplace violence includes: attempting to harm another, threatening to harm another, harassment or intimidation of another, bringing weapons into the workplace, and threats or any other statement or conduct that would cause a reasonable person to believe that violence is about to occur. See Company exhibit 3; Tr. 24-26. The Company noted that the policy itself explicitly states that “Xcel Energy will not tolerate workplace violence.” Company exhibit 3; Tr. 25. The Company also pointed to its Code of Conduct, which also repeats this policy and states that the Company “will not tolerate violence or threats of violence in the workplace.” See, Company exhibit 1 at p. 39.

7. The Company noted that the grievant was well aware of these policies and of the consequences he faced if he violated that policy. The grievant acknowledged receipt of these policies and admitted that he participated in Code of Conduct training in 2007, 2008 and 2009, just three months before his termination. Tr. at 28-30; Company exhibit 4. Further the 2009 training specifically instructed employees that harassing behavior, violence and threats of violence would not be tolerated and that termination can result as a consequence for violating these policies.

8. The Company and its witnesses gave an account of the events of June 26, 2009 and the Company asserted that theirs is the more credible version here. The Company asserted that the grievant, Mr. Knapp and a co-workers named Tim Peterson were in the office sitting in cubicles near the end of the day apparently finishing some paperwork and other last minute chores. The grievant had a bag and when he was dealing with that bag a large hunting style knife fell out of it. The knife was not the sort used by either the grievant or his co-workers in the performance of their duties but was rather a “Rambo-style” very large hunting or assault style knife with a large blade, perhaps 12 to 14 inches long with a handle that was 6 or 8 inches in length. Mr. Peterson submitting a drawing of the knife that was approximately the same size and scale of the one he saw that day that had to be on a 8 1/2 X 14 piece of paper due to its size.

9. Mr. Peterson was at the time sharpening his utility knife on a small sharpening stone at his desk and this was apparently the cause for the grievant to pull his knife out of its leather sheath and exclaim, “that’s not a knife, *this* is a knife.” This was an obvious reference to a line from the movie Crocodile Dundee where that line is used by the main character.

10. The Company then asserted that the grievant began waving the knife around as if he were performing Kung-fu maneuvers and that he eventually took a second knife out and began waving that around as well. The Company further asserted that the grievant was by this time in Mr. Peterson’s cubicle area and that both Mr. Peterson and Mr. Knapp were quite nervous about the grievant’s wild motions with these two knives in his hands.

11. Mr. Knapp then turned around not wanting to antagonize or even acknowledge the grievant any longer and had his back turned to the grievant while he continued his tirade. At one point the grievant made a lunging motion with the knives in his hand toward Mr. Knapp’s back as if he were going to stab him. While this may or may not have been in jest it was clear violation of Company policy and was quite concerning to Mr. Peterson who witnessed this and later told Mr. Knapp about what had happened.

12. The incident so frightened Mr. Knapp that he reported this to management. Management representatives discussed the incident but since several of the people involved were on vacation decided to wait until they returned to investigate further before driving to Sioux Falls, where the incident occurred.

13. The Company acknowledged that some of the initial documents were not complete and that the first set of cryptic notes did not have detail about the waving of the knife or the lunge at Mr. Knapp included. This was due to the brevity of the conversation and the lack of all the information since Mr. Peterson was on vacation and the conversation was on the phone and very short.

14. Later, upon further investigation and with a better chance to get all the facts, management learned that the grievant was waving the knives around and that he lunged at Mr. Knapp with them. The Company asserted that despite the first set of documents, the truth about what happened was what Mr. Peterson and Mr. Knapp testified to under oath at the hearing – that the grievant waved the knives around somewhat crazily, that he had been talking about “going off” that very day and that he made a lunging motion with two knives in his hand one of which was huge.

15. When the grievant was confronted about this in person he was less than truthful with investigators. He at first denied that the knife was as large as it was and described it as a fish fillet knife – this turned not to be true. He claimed that the knife had been given to him by a friend whose father owned and that he has passed and that the friend did not want it in the house. He then claimed he took it with him on vacation to a resort and left it there on purpose because that was the “tradition” at this resort – i.e. to leave knives for others to use.

16. One of the Company representatives actually went to that resort to check out the grievant's story and found that it too was not accurate. There was a fish cleaning house but beyond that the story fell apart. No knives were found there and no place really to leave a knife out for “the next guy” to use. Moreover, the knife in question and the bag it came from were no longer around.

17. The grievant also claimed that he did not notice the knife in the bag since it was so small and was in a side pocket. Yet the knife in question was undoubtedly very large such that one could not miss it being there. Moreover, the grievant claimed that he used the bag all the time yet for some unexplained reasons did not know that a knife with a 12 to 14 inch blade and a 6 inch hilt was in it. The Company asserted that these claims are simply fabricated and that from the very start the grievant began lying and misrepresenting his actions that day.

18. The grievant claimed he opened the bag to get some pictures he claimed he had on his computer and that was when the knife fell out of the bag. Yet Mr. Peterson and Mr. Knapp claimed they were never shown pictures of that nature. The Company asserted that the grievant's testimony was inconsistent, contradictory and self-serving. He was not truthful about the size of the knife, waving it around or lunging at his co-worker. Moreover, when he realized he was under investigation he began a trail of lies and hiding evidence by asserting that the bag and the knife were gone.

19. Significantly, the Company argued, the grievant claimed that he never waved the knives around nor that he ever lunged at Mr. Knapp, even in jest. Yet both eyewitnesses were quite clear that he did in fact wave the knives around and Mr. Peterson was unshakable in his story that he saw the grievant lunge at Mr. Knapp as if to stab him. The Company asserted that these statements can only be discounted if the arbitrator believes that these two perjured themselves in order to get the grievant fired. The grievant on the other hand has an incentive to lie and obfuscate in order to save his job.

20. Further, the Company asserted that the grievant was well aware of the seriousness of his actions and acknowledged that having a large hunting knife on premises and brandishing it the way he did was a very serious offense and would have made co-workers very nervous indeed. The grievant understood that having a hunting knife in the office violated Company policy, that waving knives around an office would violate the policy, and that making a stabbing gesture at a co-worker (even if done in jest) would also violate the policy. He further admitted that seeing a co-worker waving a hunting knife around in close proximity to others would make him very nervous. Tr. 311.

21. The Company further asserted that the grievant's claims that he is the subject of some sort of disparate treatment due to an ongoing dispute with his manager is likewise without merit. First, neither Mr. Knapp nor Mr. Peterson had anything to do with that. They gave credible testimony about the grievant's actions on June 26, 2009 and there is nothing on the record to show that they had any sort of dispute with the grievant to cause them to make up this entire story, which is what the grievant would have the arbitrator believe. Second, while the grievant had numerous complaints and grievances with his manager, the Union dropped these grievances. Finally, those that made the ultimate decision were not aware of any of the prior problems between the grievant and his manager – they based their decision on his actions and his record in this case.

22. Management took all of the information and believed the eyewitnesses rather the grievant. They further took his prior record and the obvious fact that he was not telling the truth during the investigation to investigators and apparently actively tried to hide evidence.

23. Finally, the Company cited several prior cases involving similar types of threats made by employees against co-workers where the arbitrators upheld the discipline. Some of these involved different employers while at least one was between these parties wherein the discharge was upheld after an employee made threats of violence against a co-worker. The Company further argued that even if the threat was a “joke” discharge is still appropriate where the threat involves a weapon and a credible possible threat is made against a co-worker. The Company argued that the degree of discipline was appropriate here given the threat, the fact that a weapon was involved and because of the grievant's overall record and actions in this matter.

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

UNION'S POSITION

The Union's position was that there was no just cause for the termination. In support of this position the Union made the following contentions:

1. The grievant is an 11-year employee of the Company with a good record except for a 2008 warning for personal use of his computer (which has nothing to do with these charges) and a 2009 warning for comments toward Mr. Knapp, who is the same employee involved in the incident that led to his termination. He amended his behavior as the result of the 2008 charge so the claim that the grievant would not benefit from progressive discipline is unwarranted. His work performance has never been called into question and he is well regarded as far as his work is concerned.

2. Further, the grievant's 2009 discipline was unwarranted, even though it cannot be grieved now. The grievant claimed that Mr. Knapp is an unsafe worker and that he confronted him about that because people will get hurt when co-workers do not follow appropriate safety rules. Mr. Knapp does therefore have an incentive to exaggerate his story and might well have a reason to want to get the grievant fired. See Tr. at 143-146.

3. The Union further asserted that there has been frequent friction between the grievant and Mr. Kusz and that he could well have exaggerated the story as told to him by Mr. Knapp and Mr. Peterson regarding the events of June 26, 2009. The grievant has filed a large number of grievances and this could well have tainted the investigation and the conclusions reached by the Company. In one memo, Company representatives labeled the grievant as a "habitual liar" and this was done even before the full investigation was completed. The Union contended that this shows a clear bias against the grievant and raised the possibility that some of the salient facts were either fabricated or greatly exaggerated in order to build a case against the grievant.

4. The initial reports as written down by Mr. Kusz did not reflect many of the details of the incident of June 26th, such as the piece about the grievant waving them around or the alleged lunge at Mr. Knapp during this event. This omission, according to the Union, was more than mere typographical error or innocent omission. In the Union's eyes, this was a reflection of the fact that these events did not happen, just as the grievant asserted, and that due to the bad blood between the grievant and his supervisors, they may have been added later.

5. The Union asserted that while some of the events of June 26, 2009 were accurately reported by Company witnesses other parts were not. The grievant watched Mr. Peterson sharpen a small knife in his cubicle as he, the grievant was packing up his things to leave for the day. June 26th as a Friday and it was late in the afternoon. As he did so the knife fell out of the grievant's computer bag onto the floor. The grievant was not aware it was there since he had put it there weeks before and forgotten about it. The knife had been given to him by a female friend whose father had recently passed away. The knife was his and she did not want it in the home with her minor children.

6. The grievant, in a moment of what he thought was mere jest, recalled a line from the movie "Crocodile Dundee" where in the protagonist is confronted on the streets of New York by thugs brandishing a knife. The hero of that movie then says, "That's not a knife, this is a knife," or words to that effect, and produces a large hunting style knife and scares the attackers away. At worst the grievant's actions were mere horseplay – there was no threat, there was no attempt to stab anyone and the eyewitness statements made at the time support the grievant's version of the incident by failing to ever mention either of these critical points.

7. The grievant said something to that effect as well and showed his knife to Mr. Peterson and Mr. Knapp who were in the cubicles adjacent to the grievant. The grievant denied that he pulled out two knives and further denied that he waved the knives around. He further denied "lunging" at or pretending to stab Mr. Knapp.

8. The Union asserted that the initial reports given to Mr. Kusz did not contained these details. Union Exhibit 2-B and 7. These reports were closest in time and were devoid of any mention of the waving or lunging incidents. These are therefore the most credible versions of the story; not the ones where details could well have been added later.

9. The Union further noted that despite the testimony that both Mr. Knapp and Mr. Peterson “felt threatened” by the grievant’s action neither took any action commensurate with that. They did not call 911 nor the Union hall nor even upper management that day. If indeed they had felt threatened as they claimed they would have done something more than they did. The fact that they did not demonstrates that they must be exaggerating or even fabricating all or parts of their stories. The Union further noted that there was even a discrepancy over whether the grievant was two cubicles or one over from Mr. Knapp. The grievant claimed that he was never even near Mr. Knapp to stab him and that the allegation he was attempting to threaten him is preposterous.

10. The Union further assailed the objectivity of the investigation and asserted that the Company was predisposed to termination from the very start of this process. The Company investigators labeled the grievant a “habitual liar” even before checking out his story and clearly were not conducting a fair investigation. They never credited his story that he simply left the knife at a resort where it was customary to leave knives behind so others can clean fish nor did they credit the part of the story whereby he got rid of the computer bag. The Union asserted that these conclusions were likely drawn because of the ongoing tensions between the grievant and his supervisors and the number of issues and grievances he was filing about various work related issues.

11. The Union argued that the Company’s workplace Violence Policy has not been negotiated with the Union, even though it perhaps should have been. Further, it does not establish the basis for discharge alone – that must be based on just cause and whether the degree of discipline is appropriate .

12. Finally, the Union asserted that even if the Company’s version of the events of June 26, 2009 are accurate, termination is far too severe a punishment for what was clearly a vain attempt at a joke between co-workers. The grievant is an 11-year employee with a relatively clean record. The Company’s arguments about the prior incident at the training session wherein the grievant was alleged to have been flipping his knife were merely weak attempts at character assassination.

13. The Union asserted that the grievant should not be fired for making a poor joke. There was no threat made or even intended here and there was certainly no showing that the grievant was somehow “uncorrectable or incorrigible.” The Union argued that arbitrators frequently reduce penalties, even where there are specific threats of violence if the situation warrants it. The Union asserted that the grievant is a good employee and that a veiled attempt at humor should not result in his discharge after 11 years. The Union acknowledged that his conduct may have been inappropriate and that some level of discipline may be appropriate under the circumstances but that discharge is simply too severe.

Accordingly, the Union seeks an award sustaining the grievance, reinstating the grievant to his former position and to make the grievant whole for all lost time and accrued contractual benefits.

DISCUSSION

Many of the salient facts of the case were hotly contested. It was clear that the grievant worked in various jobs for the Company for approximately 11 years before his termination in July 2009. Tr. 249-251. The record showed that the grievant had two written warnings before his termination. In July 2008, he was issued a written warning for his improper conduct when he violated the Company’s policy on excessive personal use of his computer. Company exhibit 6; Tr. 33-34, 118-119. This was directly related to the incident that led to the termination but was a part of his overall record.

More to the point on this record, the grievant received a written warning on April 10, 2009 for his unacceptable conduct toward his co-worker, Mr. Knapp, on February 12, 2009. The preponderance of the evidence showed that the grievant approached Knapp and accused him in a loud and somewhat confrontational manner of being unsafe and that he failed to properly tie of a ladder during a project. This conversation took place in front of several other employees.

Mr. Knapp disputed this allegation and asked for details. The grievant then tried to get the apprentices to agree that Knapp was unsafe. When no one responded, he told Knapp that he “stunk,” and that no one wanted to work with him. He also accused Knapp of being a snitch, all of which Knapp denied and was later determined, after an investigation, to be untrue. Knapp was upset about being mistreated by O’Brien, particularly in front of a group of apprentices in the crew quarters. Tr. 159-161.

The Company issued a written warning to the grievant even though he had been given a first such warning in April 2008. The grievant denied that he instigated this confrontation, Tr. at 263, but the evidence showed otherwise. The grievant initiated this conversation and acted inappropriately. The written warning was not grieved.

The Company brought up one other incident that was not the subject of discipline but did on this record provide a backdrop for incidents that were to come later. Both Mr. Knapp and the grievant attended a safety meeting with about 50 other employees on January 12, 2009 at Maple Grove. Company exhibit 8; Tr. 42-44. It is significant that this meeting was approximately 6 months before the incident in Sioux Falls that led to the termination which is at issue here. The evidence showed that the grievant took out a pocket knife and flipped it open and closed during a considerable period of time during most of the meeting. This made some feel uncomfortable at the meeting but there was no direct threat made with the knife and no further action was taken at that time. On this record this incident added little either way but was of some interest in context of later events and certainly explained why Mr. Knapp and Mr. Peterson were concerned about the grievant’s actions. While the grievant denied flipping the knife open and closed the evidence again showed otherwise. See Tr. at 204-205.

The grievant denied doing it but the overall record shows that he was. Taken in isolation one could certainly assume that the grievant was at best doing it unconsciously and that this was a nervous habit or done simply to pass the time. Thus, if one assumes this was the only incident between the two this would have been almost completely innocuous. It was not; and the totality of the evidence must be reviewed to get the full flavor of what was going on here. It was clear that it did have an impact on Mr. Knapp and that the grievant may well have known that. There was at least the barest hint he was aware that his actions were having a somewhat threatening or intimidating impact on his co-worker.

There was yet another incident where the facts showed that there may well have been some intent to either threaten or intimidate the grievant's co-workers. The evidence showed that on the same day as the incident that led to his discharge, the grievant had another strange sort of exchange with Mr. Knapp in the lunchroom. As the two were coming back from lunch, the grievant told Knapp a story about a fight his father had with a neighbor that involved the grievant getting hit on the head. He then made a comment about having some "loose marbles up there" and that a person never knows when he might "go off" like the neighbor who attacked his father. Mr. Knapp found this comment very strange indeed. The evidence supported the claim that the grievant's behavior toward his co-worker was strange at best and even intimidating at worst. Further, Mr. Knapp testified credibly as follows:

Q At some point during that day did Mr. O'Brien tell you some kind of a story that made you a little bit uncomfortable or that you found somehow a little bit odd?

A Yeah

Q. Would you describe what it was.

A We had kind of went to -- we had went to lunch. I think we were coming back from lunch or something, but Tim he started this -- it's kind of a strange story. He starts out talking about how he's working with his dad on a job somewhere, and he was in a trencher, and he was running it, and it was real noisy, and some neighbor come running out and was yelling at him or screaming at him or something, and then run in the trencher and grabbed him and hit his head against the side of the trencher wall and, you know, cab. His dad come out, and him and his dad they pulled this guy off. The next thing I know Tim I guess he says he had to go to the hospital or clinic or somewhere to make sure there is no damage. But then he made some comment, "Well, you know, you just never know when you're going to go off like that. Now I have got a few loose marbles up there because that guy really rattled me pretty hard." And I was just, okay, and that was about all I -- it was just a real short. It wasn't real long. It kind of sounded strange at the time. I couldn't understand why he wanted to tell me that." Tr. at p. 166.

While this story alone would have perhaps meant little had there been no other actions that day but in context it was clear that the story certainly meant something to Mr. Knapp and there was some merit to the Company's claim that the story was intended to have some meaning to him in at least an intimidating manner. This too gives some context to the incident some weeks earlier and shows that even though that incident alone might well have been totally innocent, it was clear that Mr. Knapp felt very uncomfortable around the grievant and that the grievant more likely than not knew that and continued his odd behavior toward Mr. Knapp for whatever reason.

The Union asserted that there was a separate history of sorts at work here between the grievant and his managers. The grievant had filed a number of grievances over work conditions and other contractual issues in the months before June 2009 and the Union asserted that he had become something of a thorn in the side of management such that they were looking for ways to get rid of him. Even more nefarious, was the intimation that some of the factual inconsistencies that will be discussed below describing the June 26th incident were instances of management and other personnel who simply did not like the grievant essentially making things up or even outright lying to create a story to have the grievant terminated.

There was evidence to suggest that the grievant had filed grievances and that the relationship between him and Mr. Kusz was strained a but due to this. There was not however sufficient evidence to show that either Mr. Kusz or Mr. Knapp or Mr. Peterson would intentionally perjure themselves in order to create such a story or that there was some sinister ulterior motive at play here that conspired to have these people fabricate their stories. Mr. Kusz testified credibly that he "deals with complaints and grievances all the time" that he does not "hold it against Tim [the grievant]". See Tr. at 142. Further, the evidence showed that the grievant is by no means the only employee who files grievances and that there are some who file more than he does, even though the grievant is in the "top five." Tr. 147.

It is thus against this backdrop that the incident at the end of the day on June 26, 2009 occurred. The evidence showed that the grievant, Mr. Knapp and Mr. Tim Peterson were all officed in the same area and that they sat in adjacent cubicles with walls about 3 to 4 feet high. Thus it was quite easy to see over these walls. Tr. 167-168, 214-217.

The record showed that the three men were getting ready to leave for the weekend and that Mr. Peterson was sharpening or cleaning a small knife in his cubicle. As the grievant as putting things away in his bag a large hunting style knife fell out of it. He had apparently noticed Mr. Peterson's knife and made a comment, "that's not a knife, this is a knife" or words to that effect. It was clear from the record that this was a reference to a line from a movie where the star is confronted by street thugs who pull a knife on him,. He has a much larger knife and he pulls his out and make that comment. It was clear from he record that the grievant was making a joke about the movie and about these knives. Frankly if that was all that had happened during this exchange the result here would have been radically different. The Union focused on the joking comment made by the grievant and indicated that this was simply a poor attempt at humor and that the grievant was merely making a joke from the movie *Crocodile Dundee*.

There was much more to this story than that line though and it is that set of facts that conspired to seal the grievant's fate here. It was not merely having the knife or even uttering the words he did when he first pulled it out of the bag; it was rather the subsequent actions in pulling two knives out waving them around and making a threatening gesture toward Mr. Knapp with it that were found to be far more significant. On top of that the grievant's actions in being less than truthful about what he did and then clearly attempting to hide the evidence that were also quite significant on this record. These matters will be discussed in more detail below but the mere utterance of a funny line from a movie was not that was at work.

There was considerable discussion about the size and shape of the grievant's knife. Mr. Knapp testified credibly that he saw it and the size of it alarmed him. He record shows that the employees do have knives on them when they work for work related purposes. These however are small utility or "Swiss Army" style knives with small, 3 to 4 inch blades. The grievant's knife was much larger and was what one witness described as a "Rambo style" hunting knife.

The grievant at first described the knife as a fillet knife but that was not shown to be accurate. Both Mr. Knapp and Mr. Peterson described it as a large hunting knife with a 12 to 14 inch blade and a 6 inch handle. Mr. Knapp drew a picture of it and was credible in his description of it. There was no work related reason to have the knife at work as this was not the sort of knife the employees used for any work related purpose. This was clearly a weapon rather than a knife used for anything work related.

Having said that though, the grievant indicated that he had been given the knife by a friend whose father had passed away. He had owned the knife and the friend did not want it around her children so she gave it to the grievant. He indicated that he had placed the knife in his computer bag and forgotten about it. When he was opening the bag to put other things in it the knife simply fell out onto the floor. The grievant indicated that it was then that the funny line occurred to him since Mr. Peterson already had a small knife out and was sharpening it.

This story does not on its face make much sense. By all accounts the knife was quite large. The grievant indicated that he used his computer bag quite frequently yet he indicated that he did not notice a knife of that size in his bag even though he was in and out of that bag several times per week. While this fact on its face does not go directly to the charges at hand it does call into question the grievant's veracity and his sincerity about knowing that he should not have had that knife in the workplace. Tr. 173, 210

Further, there was the most serious matter in this case regard the grievant's actions in taking out yet a second knife and waving both knives around in a "Kung-Fu" or "Ninja" fashion. Tr. 2167-168, 211, 215-216. The grievant denied that ever happened but both Mr. Knapp and Mr. Peterson testified that it did. On this record their version of the facts on this question is accepted as more credible. There was some evidence certainly that there had been friction between the grievant and Mr. Knapp in the past and that the grievant had even been disciplined for his actions toward him. There was some evidence that Mr. Peterson had told the grievant not to involve him in his grievances with the Company. None of these facts are sufficient to support the charge that these men would intentionally perjure themselves and place their won careers in serious jeopardy by lying about or fabricating these facts. Both were credible in their descriptions of these pertinent facts of the case and there was insufficient evidence to show that they were mistaken or lying about what they saw that day.

The Union made much of the fact that the initial reports given to Mr. Kusz about this incident did not mention the waving of the knives around. Tr. 196, Union Exhibit 2-B. To be sure, these reports could have been done better. The initial report does not mention many of the details that were provided later during the investigation. There was also a mistaken entry about where the grievant was. These details were clarified in later reports and were likely the result of trying to do this over the phone rather than in person; which was done later when the details were clarified and related more accurately.

If indeed Mr. Peterson and Mrs. Kusz had indicated that they saw the grievant waving the knives around and then making a lunging motion at Mr. Knapp, discussed more below, this frankly should have been written down. The fact that it was not in the initial telephone report does not mean it did not happen however, even though the Union suggests that these omissions point in that direction. Moreover, the testimony given at the hearing was both credible and consistent with the accounts given by both Knapp and Peterson during the investigation.

The evidence shows that indeed the grievant did wave these knives around in a threatening fashion and that this incident was reported to Mr. Kusz right away. He simply failed to write all of the details down and indicated that since several of the people involved were going on vacation that week he would investigate further before taking any action. On this record, there would have been little reason to conduct a further investigation at all unless he had been told about the knives, the waving and the possible threats with them. He must therefore have been told something serious had happened that involved a knife and the grievant's actions regarding that.

The evidence then showed that Mr. Knapp became concerned about the grievant's erratic actions waving the knives around. Mr. Knapp testified credibly that he was scared watching the grievant wave these dangerous weapons around, particularly given the prior incidents with the grievant earlier in 2009 and his comment earlier on June 26th about how a person never knows when he might "go off" and that he had "loose marbles" in his head. Mr. Knapp did not want to be attacked, and thought the best way to diffuse the situation was to sit down at his computer and ignore the grievant so as to avoid antagonizing him. Tr. 168-169.

Mr. Peterson testified credibly that he too was concerned about the grievant's actions and indicated that if this had been videoed "we would not be here today" and indicated that the grievant's actions were well beyond anything that was appropriate in the work place. Tr. at 210-211. Mr. Peterson moved out of his cubicle while the grievant was waving the knives around; indicating that he too was made uncomfortable with the grievant's antics. While there was some dispute about exactly where the grievant was standing the more credible testimony was that he was in Mr. Peterson's cubicle, which was in the middle of the three cubicles and that he was perhaps 5 or 8 feet from where Mr. Knapp was sitting. While he was not able to touch him since Mr. Knapp was facing away from the grievant while sitting at the his computer the distance was quite short.

Suddenly, Mr. Peterson saw the grievant move quickly across the cubicle to the waist-high wall divider, lunge at Mr. Knapp and make a stabbing motion with the hunting knife while Knapp was sitting in his chair with his back turned away from O'Brien. Tr. 207-208, 217-218. The stabbing motion was an overhead stabbing motion with the large hunting knife. Tr. 208.

Mr. Peterson then left to go back to the warehouse for a few minutes to finish up a task before he left for vacation. When he returned, the grievant was gone. Peterson told Knapp about O'Brien's stabbing motion at him and even though Knapp did not see the stabbing motion and was scared and concerned about it. Tr. 169-170. They decided that someone needed to call management about the incident. Mr. Knapp did so and contacted Mr. Kusz, as noted above. There was some evidence to suggest that despite the claim by the grievant that this was all a big joke, Mr. Knapp was quite upset. Tr. 123.

The Union noted that no one called the police or 9-11 nor did they contact management right away to report a threat. The argument was that there must not have been a credible threat since these things were not done right away. By the time Mr. Knapp knew about the grievant's actions however, the grievant had left the building. These facts do not undercut the version of what happened as related by Mr. Peterson and Mr. Knapp.

The grievant indicated that he never waved the knives around and that he did not have the second knife out. He further indicated that he never meant any harm to either of the other men and that the whole thing was a big joke. Union exhibit 2-B, which is the initial e-mailed report by Mr. Kusz to Mr. Christiansen.

However that story belies the fact that he clearly then got rid of both the knife itself and the computer bag in which it was packed. There was not credible reason given for why the bag was suddenly gone and the story about taking the knife to a fishing lodge and "donating" it to the other guests of the resort made almost no sense at all.

The evidence showed that the grievant claimed that the knife was gone by the time investigators met with him to discuss the allegations about June 26th. He claimed that he had taken the knife to a fishing lodge where he left it for others to use. He further claimed that it was customary at this particular lodge to leave knives around for others to use to clean fish etc. and that he had left it there for that purpose.¹ This part of the grievant's story was investigated by management by actually going to this resort to see if knives were in fact left lying around for the next person to use. No such knives were found and there was simply no credible evidence that people just left knives lying in the fish cleaning house for others.

On balance and reviewing the record as a whole, the Company's version of the facts here are found to be more credible and with more support on this record. Despite the initial inaccuracies in the e-mail sent by Mr. Kusz to Mr. Christiansen, the evidence showed that the grievant had a large hunting knife, that he should not have had this knife at work, that he brandished the knife along with another smaller knife in what may well have been in initial attempt at humor but that he took this "joke" to a far higher and more dangerous level. He waved the two knives around in such a ways that it made both co-workers quite uncomfortable and that he then made a mock lunging motion at Mr. Knapp. While the grievant may or may not have intended to do physical harm to Mr. Knapp, there was further credible evidence that joking like this with a large weapon grade knife in one's hand is akin to "joking" about having a bomb in your suitcase while standing in a TSA line at the airport – not funny.

The Union noted that the grievant's actions, even if the Company's version of the facts are taken as true, do not rise to the level of discharge. He meant it as a joke and some of the Company's representatives even acknowledged that initially it may well have been a joke, at least at first, and that they are going too far in punishing someone they perhaps do not like because of all the grievances he files and his odd mannerisms at work.

¹ For what it is worth, this "tradition" at this particular fishing lodge would be unlike any the arbitrator has ever heard of and he grew up managing one. This story simply was not credible and the implication was that the grievant knew that his actions were quite inappropriate and then attempted to secret the evidence by getting rid of the knife and computer bag

The Union further argued that the Workplace Violence Policy was not negotiated with the Union and that it does not govern the result here and that violation of the policy does not necessarily mean that a person should be fired. The Union further argued that the grievant's behavior may not have resulted in a violation of that policy under any circumstances.

The following exchange between the grievant and the Company's counsel is instructive:

Q Let's finish this up: You would agree with me under the Workplace Violence Policy that the Company has, that if an employee pulled a large knife out of a sheath in an office setting and waved it around in the office, that would violate the policy, wouldn't it?

A If somebody waved a knife around, yes, it would.

Q If an employee waved two knives around in an office setting, that would violate the policy, wouldn't it?

A Yes, it would.

Q If an employee had a large knife and made some kind of a lunging motion toward another employee with the knife, that would certainly violate the policy, wouldn't it?

A Yes, it would.

Q And if an employee saw someone else lunging toward another employee with a knife, it's not likely that the co-worker would know what was going through the person's head that was doing the lunging, right?

A I would say that is correct.

Q If someone were standing next to you and you saw somebody waving a couple of knives around in close proximity to you, that would make you pretty nervous, wouldn't you?

A If you actually saw somebody doing that, yes.

Q All right. And you wouldn't know for sure what the person's intentions were who was waving the knife around?

A Probably not unless they told me.

Q And you understand that even if a person took a knife out of the sheath, waved it around and then made a lunging motion even in jest, even jokingly, toward another employee with a knife, that that also would violate the Workplace Violence Policy?

A If somebody did that, yes.

It is clear that the grievant acknowledged that his actions were in violation of the Workplace Violence Policy. It is further clear that his actions in an apparent attempt to get rid of the most damning evidence, i.e. the knife and the computer bag, were a tacit acknowledgement on his part that indeed he did violate that policy and that his co-workers were justified in feeling threatened.

While the grievant did not do physical harm to either co-worker it is clear that his actions that day were, as Mr. Peterson described them, well beyond what was appropriate in the workplace.

The final question is what to do here in terms of a remedy. As noted above, had there been only the “this is a knife” comment the case would have been different. Had there been only the brandishing of the knife while talking to Mr. Peterson and Mr. Knapp the result would likely have been different. Even waving the knives around might have led to a different result had the facts been limited to that. Here though there was a mock lunging motion with a large weapon grade knife in the workplace toward a co-worker with whom the grievant had already had some personal problems. There was also the clear attempt to frustrate the investigation by getting rid of the knife and the bag and the clear credibility issues that as well as much of the grievant’s testimony called into question.

Accordingly, on this record, given the seriousness of the violation and the record overall, the result must be to deny the grievance and uphold the Company’s actions to discharge the grievant.

AWARD

The grievance is DENIED.

Dated: July 6, 2010

IBEW 160 and Xcel Energy – O’Brien award

Jeffrey W. Jacobs, arbitrator