

IN RE ARBITRATION BETWEEN:

GREAT WESTERN RECYCLING INDUSTRIES

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 49

DECISION AND AWARD OF ARBITRATOR

FMCS CASE # 101001-60281-3

JEFFREY W. JACOBS

ARBITRATOR

January 10, 2011

IN RE ARBITRATION BETWEEN:

Great Western Recycling Industries,
and

DECISION AND AWARD OF ARBITRATOR
FMCS CASE # 101001-60281-3
Rick Harrington Grievance

IUOE, Local #49.

APPEARANCES:

FOR THE COMPANY:

Richard Ross, Attorney for the Employer
Nick Henjum, Metal Technician
Scott Helberg, Sr. V.P. of Operations
Jake Anderson, Operations Supervisor
Tony White, Site Manager
Linda Klapperich, Human Resources Mgr.

FOR THE UNION:

Mike Wilde, Attorney for the Union
Rick Harrington, Grievant
Kyle Jones, Business Agent/Recording Sec'y IUOE # 49
Don Mele, former employee of Great Western Recycling

PRELIMINARY STATEMENT

A hearing in the above matter was held on December 6, 2010 at the FMCS Offices in Minneapolis, MN. The parties presented oral and documentary evidence at that time. The parties submitted Post-Hearing Briefs dated December 27, 2010 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement dated July 6, 2010 through July 5, 2012. Article 14 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

ISSUES PRESENTED

1. Was the Grievant discharged for just cause? If not, what shall the remedy be?

PARTIES' POSITIONS

COMPANY'S POSITION

The Employer took the position that the discharge of the grievant was for just cause since he was caught sleeping on the job while operating a Badger Baler on August 18, 2010. In support of this position, the Company made the following contentions:

1. The Company is a recycling facility located in St. Paul. Great Western is a wholly owned subsidiary of Northern Recycling, along with 4 other companies: Phillips Recycling, American Iron and Steel, MRC and Toy's Recycling. Some of these are Unionized facilities.

2. The grievant is a metal technician and was responsible for operating the Badger Baler. The baler is a machine into which scrap metal is fed and put under tremendous pressure and squeezed into bales for transport. The machine can be very dangerous, even fatal to employees if it is not operated correctly and if proper safety procedures are not followed

3. The Company pointed to the provisions of the labor agreement as follows:

ARTICLE 12 – DISCIPLINARY ACTION

12.1 No employee shall be discharged or disciplined without just cause except that employees, during their probationary period may be discharged or disciplined with or without just cause and shall not have the right to file a grievance or pursue any arbitration in connection with their discharge or discipline.

12.8 Certain problems, conduct, behavior, attitudes and infractions of rules of conduct may result in immediate discharge without any prior disciplinary action. Examples of such conduct are listed below:

O. Sleeping on the job;

4. The Company asserted that the parties specifically negotiated this language into the Agreement to make it clear that sleeping was an offense that would get someone fired on the very first offense and would not be tolerated or subject to progressive discipline. Any prior practices, as will be discussed below, were thus pre-empted by this provision. Moreover, it has long been held that sleeping on the job, especially while operating a dangerous piece of equipment is regarded as a cardinal offense resulting in severe discipline or termination on the very first offense.

5. On August 18, 2010 the grievant was operating the Badger Baler when other employees noticed the grievant asleep at the controls. Mr. Omar Hernandez, a temporary employee, called Jake Anderson, Great Western's Operation Supervisor, on the radio and reported that Harrington was asleep in the Badger Baler, while it was running. At approximately the same time, Nick Henjum, a Metal Technician, had also noticed that the grievant was asleep and was on his way to the Yard Office to inform Mr. Anderson of the same thing. The two men apparently met each other and Mr. Anderson indicated that he had already been contacted about this incident and was on his way to investigate.

6. The Company asserted that when Mr. Anderson got to the top of the stairs he observed the grievant fast asleep at the controls of the machine and he called to him and tried to wake him but it was clear he was sound asleep. He snapped a picture of the grievant slumped over in his chair and testified that he was unresponsive. Another employee, Mr. Bleye was also there with him but unfortunately suffered a heart attack a short time before the hearing and was unable to testify. Had he testified though, the Company asserted that he would have corroborated Mr. Anderson's story. Mr. Anderson instructed Mr. Bleye to wake the grievant and he did so by apparently shaking him awake. When he awoke the grievant was visibly startled and had been clearly asleep.

7. The Company further pointed to the conversation that Mr. Anderson had with the grievant a short time later in the break area when the grievant acknowledged that "he had only been out for a short time." This is tantamount to an admission that he had in fact been asleep. Mr. Anderson told the grievant he would likely be fired for falling asleep but the grievant offered no explanation for why he was asleep, such as a reaction to a drug or some sort of other medical problem. The Company did not administer a drug test of any kind since there was no reason to do so in this instance. Moreover, this admission obviated the need for any further investigation, especially when coupled with the overwhelming evidence already known to the Company. There was no need for any further investigation and no more investigation would have changed the facts or the ultimate determination under the clear contract language here.

8. The Company asserted that the evidence was overwhelming that the grievant was in fact asleep and that he was apparently asleep for several minutes; certainly long enough for other employees to notice it and for Mr. Anderson to walk from the other building to investigate. This was also certainly long enough for a tragedy to have occurred if someone had been caught on the belt or dragged into the machine. While there was no apparent loss of production, the Company asserted that there certainly could have been.

9. The Company noted that when Mr. Helberg heard of this he was understandably disappointed because he knew he would have to fire the grievant even though he was a competent operator. Falling asleep on the job is simply too serious an offense to be allowed under any circumstances. The Company further asserted that the delay in serving the termination was a function solely of the grievant's schedule and the need to get the paperwork done. The Union's argument in this regard is thus a "red herring" and of no consequence to the outcome of this matter.

10. The Company cited several arbitral decisions in which the grievants involved were terminated even where they were only asleep for a few minutes. The Company also cited cases that discuss the severity of consequence where the safety of co-workers was at stake and noted that arbitrators tend to impose more severe penalties in those cases – such as here – where the safety of others is comprised or put at risk by the inattentiveness or sleeping by a grievant.

11. The Company countered the Union's claim of disparate treatment by arguing that the 3-day suspension given to a co-worker for sleeping while his crane was running was done during the negotiations for the new CBA. Under Board law, the employer is prohibited from taking any action that is inconsistent with existing practices during those negotiations. The Company asserted most strenuously that the essential feature of this case however is the fact that the parties specifically negotiated into their agreement the provision found at Article 12.8 cited above, which makes sleeping on the job an immediately terminable offense.

12. The Company noted that there is no requirement under the negotiated rule for anyone to be actually hurt nor any requirement that production be impacted. Sleeping on the job is a terminable offense whether there is an injury or a loss or disruption of production or not. Here however there was some evidence that cans were overflowing from the mouth of the baler. This is not only deleterious to production but could have caused an employee to get up to investigate why or to dislodge them and be injured. Under these circumstances the danger was obvious.

13. Finally, the Company countered the claim regarding drug testing by stating the obvious: the grievant was not discharged for being on drugs, he was discharged for sleeping. Further, there was never any allegation raised that he fell asleep due to some reaction to a medication or that he suffered from some medical condition – he simply fell asleep. The Company argued that this argument is curious in that it is a defense to a claim that was never raised and is just another red herring.

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

UNION'S POSITION

The Union took the position that there was no just cause for the grievant's termination and that the grievant was not truly asleep and even if he was it was only briefly and that no one was ever in danger. Further, the Company is guilty of disparate treatment since less than a year before this incident another employee was found to be sleeping and was given a 3-day suspension for almost the same offense. In support of this position the Union made the following contentions:

1. The Union noted that the grievant is a 15-year employee with a clean disciplinary record that even his managers characterized as a good employee, even superb, by his supervisors. He has never been warned about his conduct in the past and has a clean record before this incident.

2. The grievant had worked on the Badger Baler for several years. He was thus well aware of the need to follow approved safety procedures and to remain alert at all times not only for the safety of the other employees working around or near the conveyor belt and the inside of the baler but also for production needs. When the machine is on “manual” the bales must be baled by a set of controls the operator uses to properly bale the material for transportation.

3. The Union pointed out that Mr. Anderson never personally tried to wake the grievant and merely snapped a picture of him. The grievant was never even aware of the allegations against him until the following day. The Union argued that the decision to terminate him was already made even before the Company representatives met with the grievant on August 20th. This constitutes a clear failure of due process and should result in the discipline being overturned since it was clear that little or no actual investigation was done before the decision to fire the grievant was made.

4. The Union took the claim of failed investigation even further by pointing out that neither the HR Director nor Mr. Helberg ever met with the grievant before taking the step to fire the grievant. The short informal “meeting” with Mr. Anderson, even if it occurred as the Company claimed, a few hours after the alleged incident of August 18th did not constitute a true investigation. There was no Union representation there and not even a true allegation against him; Mr. Anderson may have mentioned an incident regarding the grievant sleeping. This can hardly be said to be a full and fair investigation of an incident resulting in the loss of job for a 15-year employee. A fair investigation requires that the facts be determined by a full and objective investigation before the termination action and that here the Company never even spoke to the grievant before firing him.

5. The Union questioned the credibility of Mr. Anderson who, the Union claimed, should have tried to wake the grievant when he was standing literally next to him, but did not. Further, the Union questioned why the “notes” he claimed he had about the conversation in the lunchroom were not introduced and implied that they did not exist.

6. The Union cited several cases holding that the failure of an investigation is per se violation of the notion of just cause and grounds to overturn the discipline. A more thorough investigation might well have shown that production was not affected nor was there any danger to any employees. Any of these factors, as well as others, might well have impacted the decision to terminate yet the Company did not do any of this. The Union and the grievant raised concerns about certain people who did not like the grievant and who might have had some reason to either fabricate or exaggerate their stories in an effort to get the grievant in trouble. A better, even a cursory, investigation might well have revealed this and led to a different conclusion.

7. The Union's main concern though was the claim of disparate treatment. Approximately one year before this incident another Great Western employee was found asleep inside the cab of a crane that is used to move heavy items in the yard. He too was asleep while the machine was running and even though the crane was in neutral it would not be out of the realm of possibility that his hand could have slipped and hit the controls to make it move. That employee agreed with the discipline and the underlying facts – there was no dispute about whether he was found asleep on the job while a machine was running. This could have resulted in serious injury to that employee or to others in the yard. He was given only a 3-day suspension. The Union asserted most strenuously that the Company has thus established a practice of not terminating employees for sleeping but rather a minor suspension.

8. Moreover, there was no notice of any change to this policy. Both Company witnesses who were cross-examined on this question acknowledged that neither of them posted any sort of notice in writing or gave notice to the employees or to the Union in any way that sleeping would now be treated differently than it had in the past or that it would now be an immediately terminable offense. The Union asserted that the Company in effect made sleeping a zero-tolerance offense punishable by termination in any and all cases even though the language of Article 12.8 does not call for that.

9. The Union countered the Company's claim that the contract somehow allows for the difference in treatment between this grievant and the other employee who was given only a 3-day suspension for essentially the very same conduct. The Employee handbook was not changed at all during the negotiation process and it provides that progressive discipline is not required in all cases and that certain offenses may result in immediate discharge. That was the same language in place the year before when the Company decided to impose a 3-day suspension for the crane operator who was asleep. No changes in that policy or in the employees understanding of what that offense would equate to were made at any time during the negotiations.

10. The Union argued that notice is at the very heart of employee discipline and if the Company desires a change in the consequences for certain actions especially when a lower consequence has been established by prior action, it must adequately and timely notify the employees and the Union of such a change. The Union claimed that it did not do so here and that the discipline must be reduced accordingly.

11. The Union also countered the claim that the new contract somehow allowed the imposition of immediate discharge and argued that the language of Article 12 clearly requires that discipline only be for just cause. Here even though sleeping is one of the listed offenses that may result in immediate discharge it is not required. Here too, the requirement of just cause would entail an analysis of prior discipline for the same or similar offenses as a measure of disparate treatment. As noted above, the Union argued that the prior discipline for the crane operator established a standard for this conduct that was not changed by the new contract or by communication from the employer.

12. The Union also cited prior arbitral awards where the employee was found to be asleep yet was not fired. The Union argued that sleeping while on duty is not regarded per se as an offence that automatically results in termination; as theft or intentional destruction of Company property might.

13. Moreover, even if the grievant was asleep no adverse consequences resulted nor was there any disruption of the operation as a result. The fact that no bales were found to be defective demonstrates that at best the grievant may have dozed off for just a minute or so since the badger makes 11 bales per hour. That is less than 6 minutes per bale and if he had been asleep for longer than that at least one of those bales would have come off the line without appropriate straps to hold it together. There was no evidence that any thing of the sort happened

14. The Union asserted finally that the penalty imposed here is far too great given the proven offense even if one does assume the grievant was asleep for a few minutes. The Company should have taken into account mitigating factors such as his otherwise clean record and his length of service into account. Even Mr. Helberg was upset when he heard of the incident since the grievant was regarded as such a good employee. All of the Company's witnesses acknowledged that the grievant was an excellent employee who was competent and reliable. These facts should be taken into account now even though the Company never did when it made the decision to discharge the grievant.

The Union seeks an award reinstating the grievant with all back pay and accrued benefits.

MEMORANDUM AND DISCUSSION

BACKGROUND:

The Company is a recycling firm that recycles scrap metal. One of the machines used to squeeze the metal into transportable bales is known as the Badger Baler. The evidence showed that metal is fed into the machine by conveyor belt and then a ram uses high pressure to shape the metal into bales. These bales are quite heavy and can weigh hundreds of pounds or more. The Badger has a control panel at the top of a set of steps and the operator typically stands or sits there and operates the ram that bales the material. There is a set of controls on a panel that includes a keyed ignition, a joystick that operates the ram and an emergency cutoff switch, known as the E-stop button. If there is an emergency the operator can hit the E-stop and shut the machine down immediately.

It is critical that the operator be alert at all times not only for safety reasons but also for production, i.e. if something jams or the bales need to be strapped. This is especially true if the machine is on “manual” as opposed to “automatic.” Here the evidence showed that the machine was on manual during the relevant times involved in this matter.

The badger can apparently make approximately 11 bales per hour. While there was some dispute about that at the hearing the preponderance of the evidence showed that this is the approximate capacity of that machine when it is baling the material being baled on the date in question. That would of course mean that a bale is created about every 5 to 6 minutes. There was also evidence to show that the bales must be strapped and that the operator needs to use the controls to apply the straps in order to keep the bales from falling apart. There was no evidence that bales were either defective or fell apart on the date in question.¹

On the date in question Mr. Henjum testified credibly that he observed the grievant asleep while at the controls of the badger and that he went to tell Mr. Anderson, his supervisor about this. He apparently passed Mr. Anderson on the way to the office and told him what he had seen. Mr. Anderson had however already been notified by another employee, Mr. Omar Hernandez, of this and was on his way to investigate.

The evidence showed that when Mr. Anderson got to the Badger and went to the control panel where the grievant was sitting he indeed saw the grievant fast asleep. He took a picture of him in that state. See Employer Exhibit 1. The evidence showed that the machine was running and that the conveyors that carry material to the ram portion of the machine were running but that the rams that form the bales were not running at the time the grievant was observed to be asleep. There were some cans that were backing up at the top of the baler causing an overflow. See, Henjum testimony.

¹ As will be discussed more below, the question here is not so much whether production was disrupted but rather whether it could have been and of course whether someone could have been hurt as the result of the grievant’s actions that day. While the Union seeks to apply a no harm no foul standard here, that generally does not apply to an employee falling asleep at the control of a machine that by all accounts can tear a man in half in a matter of seconds.

Mr. Anderson called to the grievant who did not stir at that point so he had another employee wake the grievant. That employee was unable to testify at the hearing due to a medical condition. There was a discrepancy in testimony about how long it took Mr. Anderson to walk over to the baler and observe the grievant. Mr. Anderson claimed that it was “all of 10 minutes... 5 to 10 minutes.” The Union contended this was not possible since bales would have been coming out unstrapped if that were the case given the production rate of the machine. On this record that exact time is not strictly material in that the remainder of the evidence showed that the grievant was clearly asleep, see below. Whether it was 5 to 10 minutes or 3 to 5 does not really matter all that much on this record since the machine’s conveyors were running and there was evidence that cans were overflowing at the top.

Mr. Anderson then contacted Mr. Helberg and Mr. White to report the incident. Mr. Helberg was upset when he heard of this since he knew that sleeping was a listed offense in Article 12.8 as a terminable offense. The evidence showed that the grievant was well regarded in his work and has a clean disciplinary record.

Mr. Anderson did not talk to the grievant at that time but apparently did speak to him some time later in a break area. He spoke to the grievant about the sleeping incident. The grievant acknowledged that he was really tired. The grievant did not deny he was sleeping at that time nor did he offer any explanation for why he was asleep. It should be noted that at no time has the grievant offered any explanation for why he was sleeping and did not do so at the hearing itself.

Mr. Helberg and Ms. Klapperich conferred about the incident and determined that the grievant had been asleep and that sleeping on duty was an offense they felt warranted immediate discharge as set forth in the list in Article 12.8, see above. The incident occurred on Wednesday, August 18, 2010. The grievant had already left the following day by the time the necessary paperwork was drawn up. He apparently leaves early on Thursdays to attend a car show and was not in the office at approximately 3:45 when the paperwork was completed.

Ms. Kapperich and Mr. White called the grievant into the office on Friday August 20, 2010 and gave him the termination notice for sleeping on the job earlier in that week. He offered no explanation for this but indicated that he did not recall sleeping the prior Wednesday.

The grievance ensued leaving several critical questions to be answered in order to determine the appropriate result here.

DID THE GRIEVANT FALL ASLEEP ON THE JOB?

There was no question on these facts that the grievant was asleep while on duty and while the baler was running. The picture Mr. Anderson took of him while sitting in the operator's chair was certainly compelling, especially when coupled with the testimony of several of the Company's witnesses. The Union asserted that the grievant was never aware of the allegations against him until he was terminated but this was not borne out by the evidence. The grievant acknowledged that Mr. Anderson spoke to him in the break room shortly after the incident and that Mr. Anderson told the grievant about the incident then. As noted below, the grievant was well aware of the allegations at that time and of the seriousness of this conduct. While this was not the perfect investigation, as discussed below, it undercut the grievant's claim that he was unaware of any of these allegations until he was called in on the Friday following the incident and told he was fired.

The grievant's own testimony regarding the incident was also telling in this regard. In response to direct questioning he acknowledged he "wished somebody would have woke me up" and that they could "[W]ake me up and tell me the machine's running and shut it off, and go to the office and write me up that day and I guess maybe I wouldn't be here today." These statements are quite telling in at least two regards: 1) it is clear that the grievant was sleeping, although other evidence was enough to establish that on this record, and 2) he was aware that sleeping was likely going to get him disciplined if not fired.

Further, it was clear that the machine was running and that the conveyor was operating while the grievant was asleep. As Mr. Anderson testified if someone had been caught by that belt and dragged into the machine the results would have been tragic. It is the operator's job to hit the stop button if something like that occurs and to watch to make sure co-workers are safe and that the machine is operating properly. While fortunately nothing untoward occurred, mainly because the co-workers saw that the grievant was asleep, something certainly could have happened while he was out. Moreover, while no production was apparently adversely affected there were cans overflowing at some point even though the bales were not affected. The claim that the grievant was only asleep for a few minutes is not a terribly savory one on this record as both production and safety could easily have been compromised during even a few minutes of sleep.

Even accepting the facts most favorable to the grievant, it was clear that he was asleep for more than just a few second or a quick moment. He was out for several minutes at least given the distance Mr. Anderson had to walk and time frames involved. During this seemingly momentary lapse something quite serious could have occurred. The Union first assailed the actions of Mr. Anderson when he first found the grievant. To be sure it was a bit disconcerting that the first act of the supervisor was to take a picture rather than to determine why the employee was slumped over in his chair, but on this record the clear evidence showed that the employee was indeed sleeping.² It was further clear that he acknowledged that later to Mr. Anderson when they spoke about it.

² It was a bit troubling that the supervisor's first inclination was to snap a picture rather than to find out if the employee had suffered a medical condition or had passed out due to fumes or some other sort of injury or just what had happened. The evidence was that the facility is quite loud and that there are a number of distractions, such as bugs and dust that might make it difficult to go to sleep. It was also a bit disconcerting that he failed to try to wake the employee himself. It is indeed fortunate for this employer that the employee had not in fact suffered a heart attack or some other medical emergency as the picture would likely have been Exhibit A in another sort of proceeding. On this record, it was clear that the grievant had simply fallen asleep.

The Union asserted most strenuously that Mr. Anderson's credibility is lacking and pointed to the lack of any notes, even though he claimed there were some, the fact that he took a picture rather than try to awaken a sleeping and possibly ill employee and the fact that the alleged statement that the grievant "was tired" was not in the termination notice. The question in this matter is *whether* the grievant was sleeping while on duty; not *why* he was sleeping.

Frankly, the great weight of the evidence showed that the grievant was indeed asleep. Had there been a claim that he suffered from a medical condition that caused this incident the Company's somewhat lax investigation might well have been problematic but the facts were persuasive enough to demonstrate by a preponderance of the evidence that the Company's claims were borne out. On this record that is enough.

WAS THERE A FAILURE OF THE INVESTIGATION SUCH THAT THE DISCIPLINE SHOULD BE OVERTURNED OR MODIFIED?

The purpose of an investigation is to determine the facts. The failure of an investigation occurs when the employer fails to properly or objectively do that or it is apparent that the employer took its action before determining all of the facts and circumstances involved or that it "shot from the hip" and made its determination despite evidence of permissible inferences contrary to a guilt determination against the employee. While one could divine many ways in which an investigation could go awry, those listed above are not necessarily an exclusive list, the essential feature of a proper investigation is whether the employer used a fair and adequate process to determine the facts giving rise to discipline.

The investigation that was done could have been done better. A more formal discussion with the grievant other than the somewhat quick conversation in the break room with Mr. Anderson following the incident might have been better than what was done here. It was apparent that the employer assumed what had happened based on what Mr. Anderson and others had observed that day, the statement made by the grievant himself and the photo that was taken.

While this was not a perfect investigation by any means the question is whether it was sufficient to pass muster under a just cause analysis. As noted above, the purpose of the investigation is to determine the facts in an objective way. There was no evidence that the employer made any of this up or that they drew impermissible conclusions from the evidence they did have. On this record, the Company's investigation and its efforts to determine the facts were adequate to show that the grievant was asleep.

The Union's claim of a bad investigation was raised in a somewhat backhanded way. The essence of the Union's claim is that the investigation might have revealed other reasons for the allegations or that it might have led to other defenses that could have been raised by the grievant to the charge of sleeping on the job.

It is for the employer to investigate the matter adequately in order to provide a preponderance of evidence to support their actions. If there is not sufficient evidence to sustain those charges they will be overturned or modified under just cause analysis.

It is for the Union however to raise defenses to those charges. Here that might have taken many different paths, as noted above. It is not for an employer to provide those defenses – although it generally behooves an Employer to perform as thorough an investigation as possible to either find or to dispel any other possible reasons for the actions that provide the basis for discipline. For example, an inadequate investigation can leave an employer open to a defense that was not investigated and leave it without evidence to refute such a defense if one is raised but an investigation is not fatally flawed if it simply does not refute defenses that are not raised. It is certainly in an employer's best interest to conduct a full and fair investigation in the event defenses are raised but an employer is not required to chase down evidence to refute defenses that are not raised in order to pass muster under just cause.

Here, significantly, the grievant did not raise any particular explanation for why he was asleep. Certainly if he had there would have been no effective way to rebut those claims since the employer did not conduct a drug test or any further medical examination or inquiry. On this record though the lack of a drug test was indeed something of a red herring in that the allegation was not that the grievant was on drugs but rather that he was asleep. The lack of an effective investigation or further inquiry could well have left the employer wide open to such a defense but none was raised here so nothing further need be said or determined about it.

The same could be said for a claim that the grievant suffered some sort of a medical condition that led to him passing out. Obviously if such a claim had been made the employer would have been left considerably flat-footed in the face of such a claim. Again though no such defense was raised. On this record, while the investigation was cryptic it was sufficient to show that the grievant was asleep as alleged and that the facts were indeed just as the employer alleged.

DISPARATE TREATMENT/CBA LANGUAGE

This whole issue was quite troubling. The evidence showed that the employer imposed a 3-day suspension on a crane operator approximately one year prior to this incident where the crane operator fell asleep in his crane while it was running. It was also clear that he acknowledged and admitted the Company's allegation that he was asleep and took the suspension without apparently grieving it. Why the company imposed only a 3-day suspension in that case even though sleeping on the job, especially under those circumstances is usually treated far more severely was never explained through the evidence in this matter. Suffice it to say that it did and that the Company felt it could not impose anything stricter than that during negotiations for the first labor contract between these parties. There was not for example any evidence on this record as to discipline prior to the crane operator's where the employer had imposed similar discipline in the past.

There was some merit to the assertion that the Company is seeking to impose what amounts to a zero-tolerance/strict liability type policy regarding sleeping without a clear notice to the employees that it would. Even though sleeping is generally regarded as a serious, possibly terminable, offense the evidence showed that on at least one prior occasion, and perhaps more, the Company has not treated sleeping as an immediately dischargeable offense but rather one that results in a suspension.³ The Union also argued that there was no subsequent notification that sleeping would now be treated differently than it had been in the past. Indeed, there was none.

Frankly, without the language found at Article 12.8 this case would now be over; the grievant would be reinstated with a similar suspension and appropriate back pay and benefits. Generally, an employer is not allowed to impose discipline for an offense and then impose something far greater for virtually the same offense later without a clear notice to the Union and affected employees of that change. Here other than the language in the contract there was no other notice to employees about this nor any posting of notice to the Union that sleeping would now be treated as an immediately terminable offense. As noted herein though, that language did not adequately warn the Union or the employees that sleeping would always result in immediate discharge in every case.

On the other hand, lest anyone think determinations like this are easy, without the prior incident involving the crane operator who also fell asleep at the controls of a running machine that could possibly have caused injury and/or damage, the grievant's discharge would likely have been sustained. Sleeping is serious, sleeping while co-workers could be in danger is worse and being unable to provide a rational explanation for why one was asleep is worse still.

³ The basis of the Company's argument that it could not impose anything more serious to the crane operator for his offense in August 2009 was that the Company could not change "past practice" during the negotiation period of the first collective bargaining agreement. While there was no evidence on this directly, the Company in its Brief acknowledged that it had information that there was "information available to the new management team was that in the past employees had received suspensions from work." The Company cited Board and caselaw to the effect that an employer is prohibited from altering established past practices and other terms and conditions of employment during the negotiation period for a new contract. While an employer may well be prohibited from changing certain terms and conditions of employment it could quite likely have discharged the crane operator for sleeping on the job as long as it can establish that the action was not motivated by anti-union animus or the employee's Union activity. There was no evidence on that score here but the argument that the Company was prohibited from terminating the crane operator on this record did not carry the day for the Company.

The Company pointed out that the essential bright line difference is the contract itself. It calls for progressive discipline generally but excises certain offenses from that requirement; sleeping is one of those. Further, as the Company noted, sleeping on the job, even in the absence of any rule, is generally regarded as a serious offense and one that generally results in discharge where the safety of co-workers is at stake. See, *City of Mount Vernon*, 127 LA 765 (Suardi, 2010). That is true enough but running counter to that is the evidence that a very similar offense occurred less than a year before this and was treated relatively lightly by the employer.

The Union pointed to a case involving an employee who was found sleeping on the job. In *SEIU and Abbott Northwestern Hospital*, FMCS #070725-58830-3 (Jacobs 2008) the employee was found sleeping in an unauthorized location and was given a final warning. However, the issue was not whether there was a rule against sleeping but rather whether there was a clear rule against sleeping *in the location* where he was. The employee went to an area he thought was acceptable to take his break and dozed off. He was not “working” at that time. Because the employer had failed to clearly notify him that sleeping *in the office* was against policy the discipline was overturned.

Here the question is different and is more akin to *SEIU and Fairview University Medical Center*, FMCS # 050425-55383-7 (Jacobs 2007) where the employee was discharged when she fell asleep in a patient’s room. The employee had been directed to watch a patient constantly due to the volatile nature of the patient’s condition and the need to watch the patient at all times. Despite being warned that very night not to doze off, the grievant did and was terminated. The termination was upheld on the basis that the grievant was aware of the consequences of falling asleep and the need to assure patient safety. While the Union could argue that the employee in *Fairview* got a specific warning; companies do not need to “warn” employees not to fall asleep on the job.

The question is really whether the language of the contract is clear enough to warn the employees that the listed offenses will automatically result in termination. As noted herein, this language does not do that as clearly as the employer suggests. It certainly obviates the need for progressive discipline but does not provide adequate notice that the listed offenses will, at least in the case of sleeping, given the prior discipline here, absolutely equal discharge. Neither does the language of Article 12.8 obviate the need for just cause analysis. Each case must therefore be determined on their individual facts using all of the traditional factors used to determine the appropriate level of discipline for each grievant and for each offense committed.

APPROPRIATE REMEDY

There was a considerable body of evidence mitigating in both directions in this case – some in favor of termination and some in favor of a far lighter penalty. As in every discharge case where just cause is the standard, a determination of the appropriate penalty and remedy is required.

What we are left with is a clearly established set of facts that the grievant was sleeping for reasons not entirely known. He claimed that he was tired and that may well have been all there was to it. Production was not affected and luckily no one was hurt even though both could have been.

This employer disciplined an employee less than one year before this incident and imposed a 3-day suspension for sleeping on the job even though the machine that employee was operating was running, albeit in “neutral.” That machine was a large crane that certainly could have done a lot of damage to property and people had he inadvertently hit the controls. The parties were locked in negotiations for the first collective bargaining agreement at the time of that prior discipline and felt duty bound by Board law not to alter existing practices. The Company’s intentions were pure and its actions certainly done in good faith. While it was trying to avoid an unfair labor practice, as there had been several filed by August 2009, and not upset matters during negotiations by terminating the crane operator, the contract language itself did not provide the clear notice the Company asserted it did, especially given the prior practice here and the fact that the grievant had been there so long.

When this issue arose the parties had already agreed that sleeping was exempt from normal progressive discipline. While Article 12.8 lists sleeping as one of the offenses that “may” result in immediate discharge, it does not require it. Certainly the parties could have drafted this language in such a way that the listed offenses would automatically result in termination. It does not. Instead it provides that the listed offenses “may result in immediate discharge without any prior disciplinary action,” thus exempting them from the requirement of progressive discipline.

Certainly there may be circumstances where sleeping would be terminable immediately. Certainly too the employer does not have to wait until a tragedy occurs before taking action. Each case though must be determined on the unique facts of that case; for an action to “automatically” result in termination there must be clear and unmistakable notice to that effect, either in writing or by prior action. Here there was not. Accordingly, the fact that this grievant was found sleeping on the job does not automatically result in discharge.

The analysis now turns to what to do with this grievant given these facts, his record, his proven offense and the underlying circumstances. The grievant is apparently well regarded and does his job well. Further, he has a long and clean record and that must be taken into account. Countering that is the clear evidence that he fell asleep while operating a very dangerous machine and that he placed co-workers in potential danger. This is not to be taken lightly at all.

Several options were considered. Termination was considered but rejected due to the lack of notice here given the history of similar offenses as noted above and the grievant’s work record. Reinstatement with full back pay as the Union suggested was out of the question. Even the prior incident resulted in discipline, albeit only a 3-day suspension.

Reinstatement with a similar suspension was also considered and rejected for several reasons. First, what the grievant did was more severe in that co-workers were next to a running machine. Even though the crane operator's actions could also have resulted in great tragedy this was worse in that the conveyors were running and people could have been in harm's way. People could have been hurt.

Second, while the contract language did not notify employees that they would be automatically fired in all cases for sleeping the arbitrator cannot ignore the language either. It places employees on notice that sleeping will be treated severely; possibly much more severely, than in the past. While the language does not say what the Company asserted; it is there and to gloss over it would be inappropriate – it is clear notice that the listed offenses are to be avoided – or else. The “or else” part is of course subject to the grievance process and just cause analysis but the message is clear. Accordingly, a slap on the wrist was not commensurate with the severity of this offense.

Other longer suspensions of varying periods were considered but rejected as those would have entailed some back pay and accrued benefits. Imposing a suspension for less than the period the grievant has been out of work requires the arbitrator to arbitrarily divine a suspension based on conjecture. While arbitrators are frequently called upon to fashion a remedy, as here, and frequently asked to determine alternate remedies, there must be a rational basis for coming up with one; otherwise one runs squarely into the admonition against dispensing one's own brand of industrial justice.

While it is somewhat unappealing, reinstatement without back pay or benefits along with a stern warning against ever committing this type of offense in the future seemed the only reasonable and justifiable solution here given these facts, the parties' history and this contractual language. While there was never any explanation for why the grievant fell asleep other than he was “tired” he must now know as a result of this decision this was a very serious offense and that it cannot happen again. Hopefully it will not and this will allow him to continue his otherwise good service to the employer. Hopefully too it will galvanize his commitment to remain alert at all times. Accordingly, the grievant is to be reinstated to his former position but without any back pay or contractual benefits.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART. The grievant is to be reinstated to his former position within 5 business days of this Award but without back pay or other accrued contractual benefits.

Dated: January 10, 2011

Great Western Recycling and IUOE #49 award – Harrington .doc

Jeffrey W. Jacobs, arbitrator