

**IN THE MATTER OF ARBITRATION
BETWEEN**

St. Croix Electric Cooperative

Employer,

and

**OPINION AND AWARD
(Jennings Termination)**

FMCS Case No. 11-59209-6

January 30, 2012

**International Brotherhood of Electrical
Workers (IBEW) Local 953**

Union.

**A. Ray McCoy
Arbitrator**

Appearances

For the Employer: St. Croix Electric Cooperative

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Jurisdiction

The FMCS notified the arbitrator of his selection by letter dated October 14, 2011. The Parties selected Tuesday, November 20, 2011 as the hearing date. The hearing took place as scheduled in the board room of St. Croix Electric Cooperative located at 1925 Ridgeway Street, Hammond, Wisconsin 54015. The Parties agreed the matter was properly before the arbitrator for resolution. The Parties were given a full and fair opportunity to present their respective cases including the examination of witnesses and introduction of documents in support of their positions. The Parties elected to give oral closing arguments in lieu of post-hearing briefs. The record was therefore closed on November 20, 2011. The Parties define the scope of the arbitrator's authority as follows:

“The sole function of the arbitrator shall be to interpret the express provisions of this agreement and apply them to the facts of the grievance, and if he/she determines that the agreement was breached he/she may award an appropriate remedy.” (*Agreement Between St. Croix Electric Cooperative and I.B.E.W., Local 953, For the Period of November 1, 2009 through October 31, 2012, Article 5, Section 5.3(a), p.7. Hereinafter “Agreement”*)

Issue

Whether the Employer had just cause to discipline the Grievant? If not, what should be the remedy?

Relevant Contract Language

Article III Management Rights and Union Security

Section 3.1 Management Rights

- (a) The cooperative retains all the rights and functions of management, except to the extent that they are expressly and specifically modified or limited by the written, specific provisions of the agreement.

- (b) Some of the rights retained by the cooperative include, but are not limited to, the control and supervision of all operations and the direction of all working forces including the right to hire, determine job qualifications, and job requirements including residency requirements; the size and character of the working forces; to establish reasonable work rules including drug and alcohol testing and schedule of work; to create and combine positions; to eliminate positions subject to required effects bargaining; to promote, transfer, schedule and assign employees; to suspend, demote, discharge and take other disciplinary action against employees providing just cause exists; to maintain efficiency of operations; to take whatever action is necessary to comply with state or federal law; to introduce new or improved methods, products, services, or facilities; to determine the size of the work force to be utilized and the number and kind of classifications to perform services; to determine the method and means and personnel by which operations are to be conducted; to take whatever action is necessary to carry out the functions of the cooperative in situations of emergency. All of the aforesaid management rights are vested exclusively in the cooperative except as modified by the provisions of this agreement.

Cooperative Employee Handbook

Article 204.00 Expected Conduct

Each Employee is expected to act in a way that provides for a safe, non threatening work environment suitable for all employees. Employees shall follow the guidelines set forth by the cooperative on expected conduct. Each employee shall be respectful, courteous, non-threatening to other staff members, customers and the general public. Each employee is expected to provide a fair day's work and make themselves available to report for overtime duty as necessary. Employees shall be responsible for all Cooperative tools; equipment and property assigned to their care and notify their supervisor immediately of any damages that may occur. Employees shall report any injury or accident to their supervisor immediately. Employees shall follow the safety manual and wear all of the personal protective equipment that is required for each procedure. It is also the responsibility of the employee to inform the Cooperative of any changes to the data in their personal information file as soon as possible, including but not limited to, change of address, driver's license status or tax deductions.

Article 206.00 Prohibited Conduct

Below is a list of prohibited conduct items to be used as a guide. These items are just examples of what not to do and are not limited to other inappropriate behaviors that may arise.

- Violating safety rules
- Willfully or carelessly damaging Cooperative property, tools or equipment
- Falsifying documents, reports, or records
- Entering desks, files, cabinets or computer programs that are not assigned to you.

Article 303.00 (B) (4)
Scope of Activity

Employees shall pay for the cost of repairs or replacement of equipment, damaged or broken during its use by the employee. Also, it is understood that misuse, excessive use or abuse of the privileges by an employee shall be cause for the loss of privileges for the employee involved and further discipline up to and including termination.

Article 309.00 (B)
Non-employee Access

Visitors are not to be allowed to wander the facility without an escort from a cooperative employee.

Article 404.00
Reporting Safety Violations

Any employee may report a safety violation. If you witness what you believe to be a safety violation, you may call your supervisor if you feel the act needs immediate attention, or fill out the Safety report for unsafe equipment, procedures, acts or behaviors form no later than the end of the business day. This form is kept on the top of the vehicle maintenance files in the lineman's room.

Findings of Fact

The Grievant, Mr. Charles Jennings, served as a journeyman lineman with St Croix Electric Cooperative. All employees are assigned weekend work from time to time. The work often includes simple cleaning duties such as stacking and sorting supplies and/or equipment. The Grievant's supervisor assigned him to work on Saturday, August 27, 2011. The supervisor gave the Grievant a written list of tasks to perform that day. The list included, among other things moving reels of coil and pallets from one area of the property to another. This work, for

the most part, would require the use of a forklift. The Employer provided forklift training to the Grievant and other of its employees. The safety concerns associated with the use of the forklift as a work tool is reflected in the Employer's "Forklift Operator Plan." The Plan states at the outset:

"This written Forklift Operation Program establishes guidelines to be followed whenever any of our employees work with powered industrial trucks at this Cooperative. The rules established are to be followed to:

1. Provide a safe work environment
2. Govern operator use of powered industrial trucks
3. Ensure proper care and maintenance of powered industrial trucks

The procedures here establish uniform requirements designed to ensure that powered industrial truck safety training, operation, and maintenance practices are communicated to and understood by the affected employees. These requirements also are designed to ensure that procedures are in place to safeguard the health and safety of all employees.

It is our intent to comply with the requirements of OSHA's 29 CFR 1926.600, 1926.602 c, and 1926.441 for construction activities. These regulations have requirements for powered industrial truck operations, including that for battery care and charging. We also comply with applicable requirements of design, construction, stability, inspection, testing, maintenance, and operation of ASME/ANSI B56.1-1969, Safety Standard for Low Lift and High Lift Trucks." (Employer Ex. 1)

As the Employer's safety compliance officer testified each employee who is required to use the forklift is trained, certified and reevaluated approximately every two or three years. The Grievant received the required training and passed all evaluations related to the training in 2007. The Grievant was retrained in May 2009 and completed the forklift driver skills training again in 2010. The Grievant understood that use of the forklift required completion of the training program outlined in the Forklift Operator Plan. The Grievant understood that visitors and especially children were not allowed to operate or play with the Employer's forklifts or other machinery. Nevertheless, the Grievant brought his teenage children to the workplace on August 27, 2011 and again on August 28, 2011 and allowed them to play on and operate the forklift. The Grievant allowed them to do so without supervision.

The Employer's Forklift Operation Plan represents its proof of compliance with OSHA guidelines but also its understanding that the forklift has been shown to be a very dangerous piece of equipment especially when used improperly or by an inexperienced and untrained individual. The Employer's video surveillance system enabled the Grievant's supervisor to review his activities on that weekend. The cameras provided alarming evidence of the Grievant's children essentially using the forklift as a toy and doing so unsupervised. The Grievant also participated by riding on the forklift with both children riding as passengers. There is footage of the Grievant's children riding on the forklift, driving the forklift, driving a plow and a pickup truck. The Grievant's children were not harmed. The surveillance video also revealed that the Grievant operated the forklift contrary to his training and understanding of proper procedure. In addition, the Employer discovered that the Grievant realigned several of the surveillance cameras for his purposes that weekend. The realignment in some cases helped conceal the activities of the Grievant that weekend. The Grievant did not inform his supervisor that he altered the position of the cameras. The Grievant did not complete the assigned tasks, did some of the tasks contrary to instructions and caused damage to the property. In fact, the Grievant could be seen moving reels in such a manner as to hide damage to a wall of one building.

The Grievant left a note for his supervisor describing some of the damage to one of the gates. However, upon closer examination, the supervisor learned that the entire wiring mechanism of the gate had been damaged rendering the electrical function of the gate inoperative. The Grievant failed to describe the other damage done to the property that weekend and failed to inform his supervisor that he allowed his children to accompany him and to use the forklift and other equipment. Once the supervisor was alerted to the repositioned camera and damage to property, he conducted a more complete examination by reviewing surveillance video footage from the weekend and thoroughly examining the areas of the property where the Grievant and his children spent time that weekend. When the supervisor initially confronted the Grievant, the Grievant said he had only allowed his son to sit on the forklift and move it ten feet.

The Employer suspended the Grievant without pay pending further investigation. Following a more detailed review of the surveillance video and surveying the property for

additional damage, the Employer concluded that the Grievant should be terminated and did so on August 31, 2011.

The Grievant had three instances of prior discipline. The supervisor issued a written warning to the Grievant on May 21, 2010. The written warning said the Grievant was insubordinate had lost his temper and used abusive language toward a co-worker. In September 2010, the supervisor issued a second written warning to the Grievant for treating his co-workers in an insubordinate manner, losing his temper and using abusive language. The Grievant received his third written warning on May 3, 2011. This time the warning was for adding software to the company laptop computer assigned to him in violation of the policy against doing so. The Grievant added software that prevented others from seeing his search history. The software deleted cookies and temporary internet files.

Following his termination, the Grievant sent, the president of St. Croix Electric an email dated August 30, 2011. In the email, the Grievant says:

“Here’s your confession. Do what you gotta do. In order to save some poor soul up there from having to watch 8 long hours of camera tapes today, I figured it would be easier for everybody if just come clean. My boy spent all day with me, _____ (Grievant’s daughter) even asked later in the afternoon if she could come help and my wife brought her up to office so she too could see the big spools of wire. I allowed each of them to take turns driving the forklift picking up empty pallets as I reorganized the cold storage shed and swept the floor. I let them pick up wire spools also and move them, they helped me immensely and got they a big kick out getting our rows of wire spools straight and in neat lines. I even took them on ride on the plow when I drove it down the hill to get forklift unstuck out of the sand. In no way were they ever in danger and if I did not believe they were mature enough and disciplined enough to follow exactly what I told them I would not have allowed their attending me with the clean up tasks. Regardless of the amount of time my kids were allowed on the forklift, the gate damage and forklift being stuck was all my doing, and solely my fault... Yes, admittedly I figured that their helping me and riding on forklift would not be something management would condone, but NEVER in my wildest dreams would I ever have guessed that ya’ll would have been so worried about your precious liability as to go to this extreme... Yes, there were cameras that were moved. Yes, I had difficulty moving them and positioning them in the direction I sought. No, I had nothing then nor have I now anything to hide so far as my boy keeping me company while we cleaned up the grounds. (Employer Exhibit 9)

Positions of the Parties

Employer's Position

1. The Grievant has three prior disciplinary items on his record.
2. The Grievant was given a set of written instructions to carry out on a weekend at the Cooperative.
3. On that weekend, the Grievant disabled security equipment, allowed his children on the premises and allowed them to operate forklifts and other machinery.
4. The Grievant and/or his children damaged a gate and a part of one of the buildings.
5. The Grievant left a note describing some of the damages but did not disclose other damage to Employer property resulting from his weekend with his children on the premises.
6. The Grievant failed to reveal that his children were on Cooperative property with him that weekend.
7. After reviewing security film footage it became clear that the Grievant permitted his children to use the forklift unsupervised.
8. The Grievant used incredibly poor judgment. The Grievant put his children in a dangerous and unsafe condition.
9. The children are not employees, if one of the children had been injured the Cooperative would have been responsible.
10. The fact that a parent would allow the children to be in that situation was also troubling.
11. Warnings are irrelevant when you damage equipment and try to cover them up. He deliberately obscured video footage of the property. Trust is an issue and a warning will not help. He showed judgment incompatible with continued employment. In addition, he has three instances of past discipline. His disciplinary record shows a lack of respect for management policies.
12. The prior discipline was not grieved and the Union should not question the legitimacy of

those written warnings today.

13. The Grievant also substituted his judgment for that of his supervisor as shown by his rearranging the tasks assigned to him and substituting his own judgment as to what should be done. This is another example of his continued insubordination.
14. Progressive discipline was applied here given his repeated disregard for the wishes and instruction of management.
15. Management needs to expect that employees will not deliberately place the Employer's assets at risk and place his children at risk. No progressive discipline should be required under these circumstances.
16. The Employer did not prejudge before gathering all of the facts and conducting an appropriate investigation.
17. The Grievant was suspended before undertaking an investigation and the fact finding was consistent with contract requirements.
18. The discipline should be upheld.

Union's Position

1. The Employer mischaracterizes the Grievant's work history.
2. The Employer failed in its primary responsibility and that is to exercise just cause in making its decision to terminate the Grievant.
3. The Employer does not have a policy against visitors being on the premises.
4. The Employer has employees sign a "hold harmless agreement" and allows them to use its equipment for personal use.
5. The Employer did not interview the Grievant before deciding to terminate or to determine whether the Grievant actually wrote the email including a confession.
6. The Employer did not discipline the employee who observed the Grievant's children on the forklift even though it has a policy requiring employees to report safety violations.
7. Use of surveillance video cameras for disciplinary purposes is a mandatory subject of bargaining.

8. The Employer did not give a notice to employees that it would be using video surveillance equipment as part of its disciplinary process.
9. It was never proven that the Grievant violated any type of policy the Cooperative had by having his teenage children at work with him.
10. The prior discipline in no way relates to the reasons that the Grievant was disciplined this time.
11. The Employer did not use progressive discipline.
12. The Grievant corrected his actions in light of past discipline.
13. The Employer did not conduct a fair and proper investigation.
14. The Employer's evidence consisted of hearsay, video footage and a six minute conversation with the Grievant.
15. The Grievant did not try to conceal anything. He left a handwritten note.
16. The Employer did not give the Grievant an opportunity to explain himself.
17. The Employer did not treat the Grievant equally because it did not administer discipline to the only person who saw the Grievant in the workplace with his children that weekend.
18. The Employer did not discipline other employees who caused damage to property.
19. The Union agrees that the Grievant exercised poor judgment in allowing his children to work with him.
20. But the Employer made an unjust decision when it decided to terminate the Grievant for allowing his children to spend time at work with him.

OPINION AND AWARD

The Parties' Agreement reserves unto management the right to "suspend, demote, discharge and take other disciplinary action against employees providing just cause exists." (Agreement, Section 3.1(b), p. 5) The only task for the arbitrator is to apply the definition of just cause to the facts uncovered at the hearing and in doing so, answer the question whether the Employer exercised its right in accordance with the Agreement. The burden imposed on

the Employer here is simply to demonstrate that its decision to terminate the Grievant was based on provable violations of work rules, policies and/or expected employee conduct. The Grievant did not participate in the hearing of this matter. The Union did not call any witnesses in support of its case. Nevertheless, the Employer is still obliged to satisfy the burden imposed upon it by the Agreement to demonstrate that it had just cause to terminate the Grievant's employment.

The Employer marshaled overwhelming evidence that the Grievant behaved contrary to work rules, policy, good judgment and common sense. As stated above, the facts are clear and unchallenged. The Grievant violated the Employer's safety policy by allowing his children to operate and play on forklifts and other equipment. The Grievant caused and concealed damage to the Employer's property as a result of improper use of the forklift. The Grievant did not follow the procedure for having visitors on the premises. The Grievant failed to complete the tasks assigned and altered the assignment as he saw fit in disregard for written instructions provided. The Grievant altered surveillance cameras on the premises for his own purposes. The Grievant initially claimed he only allowed his son to sit on the forklift and to move it ten (10) feet but the video surveillance tapes proved the Grievant lied about the extent of his son's use of the forklift. The Grievant left a note regarding some of the damage he did that weekend but did not describe all of the damage and sought to conceal some of it. Finally, the Grievant confessed to all of the above.

The Union argues that termination is unwarranted even in light of the prior disciplinary record of the Grievant. The Employer on the other hand, argues that termination even without consideration of the Grievant's prior discipline is the only option. The arbitrator is clear that his task is not to substitute his judgment for that of the Employer but to evaluate whether the Employer followed the requirements of the Agreement. The Agreement simply requires just cause for the discipline.

In this case, the evidence overwhelmingly supports a finding of just cause. Arbitrators more often than not recognize that employers must comply with federal occupational safety and health laws and regulations. They must put in place policies that not only protect them from liability by protecting employees from death or serious injury. In this case, the

Employer has established a procedure for the use of forklifts that is designed to protect their employees from death and serious bodily harm. Employees, as was the case with the Grievant, are trained, tested and retested in an effort to make certain they understand and follow safety protocols with regard to the use of forklifts. The Grievant took it upon himself to disobey that policy to ignore his training and even more disturbing to engage his minor children in his misconduct. The video footage shows the children operating the forklift and doing so improperly. It shows the Grievant in a different area of the plant while the children are operating the forklift and essentially using it as a toy. It shows all three riding on a forklift at the same time. The Grievant, when describing his own conduct, doesn't appear to understand the seriousness of his breach. He states: "Yes, admittedly I figured that their helping me and riding on the forklift would not be something management would condone, but NEVER in my wildest dreams would I ever have guessed that ya'll would have been so worried about your precious liability as to go to this extreme." The Grievant describes what his children were doing that weekend as "riding" on the forklift. The video footage shows the Grievant driving with his children hanging off of the forklift. It shows one child driving a forklift while the other is riding on the back. It shows the use of the forklift as a toy to push a large wooden spool across the property. It shows a complete disregard for the safety of the children, the Grievant's own safety and the Employer's property. Moreover, to simply respond that he understood the conduct would not be condoned but did not think termination would result shows a misunderstanding of the training and re-training on use of the forklift alone. If the Grievant can so easily set aside his training, the Employer's rationale for providing such extensive training and act in such a cavalier fashion about his conduct including putting his children at risk of serious injury or death, then it makes sense that the Employer would opt for termination rather than progressive discipline.

What the Employer described was a lack of good judgment on the Grievant's part. The Arbitrator agrees. The Grievant's conduct in many ways defies common sense. Beyond placing his children in jeopardy, the Grievant altered the position of several surveillance cameras but failed to explain this action. In his lengthy confession, he states:

"Yes, there were cameras that were moved. Yes, I had difficulty moving them in the direction I sought. No, I had nothing then nor have I nothing now to hide so

far as my boy keeping me company while we cleaned the grounds. However, to provide you my purpose in their adjustment would expose and bring harm to everyone save the one you seem to frequently protect and I sought to expose.”

What defies common sense is why the Grievant felt it was within his right to move the cameras for a purpose of his own in the first place. Secondly, the Grievant appears to believe that he was doing something that was important but refuses to explain what that is and who would be harmed by revealing his purpose. The Grievant, in short, appears to feel that he can do as he pleases on the Employer’s property and with the Employer’s equipment and while he might risk discipline that he should not be discharged. Thirdly, the Grievant failed to reveal his misconduct when initially confronted so appears to harbor the attitude that he will do as he pleases and reveal details only if caught and then will reveal only those details that will help him avoid serious discipline. There is simply no rational basis for overturning the Employer’s decision to terminate given these facts. More importantly, these facts reveal that the Employer’s decision to terminate was indeed supported by just cause. The Agreement does not require the Employer to apply progressive discipline and even in those contracts where the Employer is specifically restricted from using termination as a first resort, it is generally acknowledged that some types of misconduct are worthy of discharge without resort to progressive discipline.

Here there simply is no basis for arguing that the Employer should have applied progressive discipline. The Union sought to paint a picture of unequal treatment. It did so by arguing that other employees who committed safety violations were not terminated. In particular, the Union argued that a driver who did not exercise proper caution upon exiting the property caused an accident which totaled a passenger vehicle. Based on the testimony, it is clear that what happened there was indeed an accident. In this case, however, the Grievant acted intentionally and with total disregard for his training, the welfare of his children and relevant policies. When faced with an employee who fully understands what is expected and required but nevertheless takes it upon himself to use the workplace for his own personal interests, to alter assignments as he pleases, to rearrange company property at will and to ignore stated policy in furtherance of his own goals, there simply is little support for applying progressive discipline. That is especially true here where the Grievant already has a record of discipline.

The Union claims that the Grievant's prior discipline was totally unrelated to his conduct here. However, what is consistent about the Grievant's most recent misconduct and his prior discipline is that in each instance, the Grievant took it upon himself to intentionally ignore workplace rules and to act to further his own personal goals. Two of the prior incidents were described as insubordination. Everything about the Grievant's actions under consideration here indicates that he learned nothing from the earlier warnings regarding insubordination. He chose to alter the assigned tasks for that Saturday, bring in his children and leave them from time to time completely unsupervised in violation of the Employer's policy regarding non-employee visitors. That policy specifically states in bold: "Visitors are not to be allowed to wander the facility without an escort from a cooperative employee." (Employer Exhibit 10) The Grievant not only allowed his minor children to wander the facility without an escort but to drive and ride on a forklift without any consideration for the inherent dangers in doing so and with complete disregard for the Employer's forklift safety policy. The Grievant demonstrated from his insubordination in this instance that he learned nothing from the written warnings.

The Grievant was disciplined for adding software to the company laptop so that it was impossible to trace the websites he visited. Here, the Grievant altered surveillance cameras for his own purposes which also required him to use computer equipment not assigned to him as well as to physically reposition camera equipment. Here again, the Grievant shows a continuing habit of taking matters into his own hands for ambiguous purposes which represents both insubordination and a total disregard for the Employer's right to manage the workforce and provide for a safe work environment.

While the arbitrator finds that the Grievant's misconduct here sufficient to support a termination decision, it is also clear that the Employer did resort to progressive discipline but with it did not produce the desired results. The Grievant's lack of honesty and obfuscation regarding his own conduct as evidence by his so-called confession provides a fairly clear picture that progressive discipline would like be inadequate to drive home to seriousness of the Grievant's misconduct or be likely to lead to his rehabilitation. Just cause to terminate as the arbitrator applies that term to the Parties' Agreement, means clear and convincing evidence in support of its decision. The arbitrator is convinced even beyond a reasonable doubt, which is not

the standard applied here, that the Employer's decision to terminate this Grievant meets the just cause standard in the Parties Agreement and is supported by clear and convincing evidence.

Award

The Grievance is DENIED. The Employer had just cause to terminate the Grievant.

Respectfully submitted,

/s/A Ray McCoy
Arbitrator

Date: January 30, 2012