

IN THE MATTER OF THE ARBITRATION BETWEEN

SHEET METAL WORKERS)	
INTERNATIONAL ASSOCIATION,)	
LOCAL 10,)	
)	
)	
Union,)	
)	
and)	
)	
JONES METAL PRODUCTS, INC.,)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

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On November 18, 2011, in Mankato, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by discharging the grievant, Roger D. King. Post-hearing written argument was received by the arbitrator on December 11, 2011.

FACTS

The Employer operates a metal fabrication business in Mankato, Minnesota. The Union is the collective bargaining representative of the non-supervisory employees of the Employer who are engaged in production and maintenance. The Employer and the Union are parties to a labor agreement, which has a duration from January 1, 2011, till March 31, 2013.

The grievant was hired by the Employer on May 4, 1992, and he was discharged on September 1, 2011. At the time of his discharge, he was classified as a "Welder-5 Fabricator," the highest of several Welder classifications. The grievant testified that he had served on the Union's negotiating committee for the two years before his discharge, a service he had performed once previously. He also testified that he became a Union Steward on June 1, 2011, and that he had no previous experience as a Steward.

On September 1, 2011, Christopher M. Zehm, Welding Supervisor, and Cheri D. Wencil, Human Resources Manager, issued the following Termination Notice to the grievant:

On Monday, August 29, 2011, [Robert J. Stencel, the Employer's Shipping Supervisor] became aware that data sheets he requested operators to complete had not been done, and he heard that you had told people not to fill them out. When Rob approached you, you did admit that you told employees they did not have to complete the form if they did not want to.

When you were interviewed by your supervisor and HR, you again stated that you did tell employees they did not have to complete the form if they did not want to. An investigation was completed. Based on the investigation, and your own interview, it was found that you did indeed tell some employees they did not have to fill out the form.

In your position as union steward, employees look to you for leadership. They come to you with questions, and look to you to set an example. By using your leadership position to tell employees they could choose whether or not to follow a supervisor's instructions, you undermined the authority of all supervisors on the floor.

The Jones Metal Products, Inc. Employee Handbook, dated January 2009 includes Standards of Conduct for all employees. These standards list examples of behaviors for which an employee may be disciplined up to and including termination. That list includes the following:

2. Insubordination which includes but is not limited to refusal or failure to perform reasonable, safe and proper work assignments as directed by a supervisor, manager or other representative of management; disrespectful, offensive or aggressive language or behavior directed at a supervisor, manager or other representative of management; or undermining the authority of a supervisor, manager or other other representative of management.

As I describe more fully below, the Union grieved the grievant's discharge, and, when the parties were unable to settle the grievance, they selected me as arbitrator to resolve it. On October 31, 2011, the Employer made a motion that I dismiss the grievance on grounds described in my rulings on that motion, which I issued in letter form on November 4, 2011.

I set out below the letter to the parties, which states my rulings on the Employer's motion to dismiss the grievance:

This letter states my rulings with respect to a motion made by the Employer to dismiss the Union's challenge (the "grievance") to the discharge of the grievant, in which the Union alleges that the discharge violates the labor agreement between the parties. The parties have agreed to my selection as arbitrator, in accord with the terms of the labor agreement.

The parties have also agreed to the procedure to be used for the presentation of evidence and argument relating to disposition of the motion to dismiss the grievance. Accordingly, you, as counsel for the parties, have each presented evidence and argument relevant to the motion by letter dated October 31, 2011, and have, by conference telephone call with me on November 2, 2011, presented further argument concerning the motion.

The evidence shows that on September 1, 2011, the grievant, who was classified as a Welder, received from Chris Zehm, his supervisor, a Termination Notice discharging him from his employment by the Employer for alleged insubordination. On September 2, 2011, Ricky Englund, a Business Representative for the Union, sent the following document to Pete Jones, the Employer's President:

Hello, Pete,

I am asking you to step in on the investigation of Roger King's wrongful termination. I have not done any interviewing of anyone myself, but what Roger has shared with Cheri and I, he was operating with in his rights of a Union representative, (shop steward) as spelled out by the National Labor Relations Board. I request that he return to work immediately while we work through this unfortunate misunderstanding. It needs to be known that the Union's position will be to move to immediate arbitration if we are not able to reinstate Roger, as well as file unfair labor charges with the National Labor Relations Board. Understand that if we can work through this, we can avoid the involvement of an arbitrator and keep the N.L.R.B. out of the matter. I look forward to a response, so that we can together, come to a positive outcome of both the employer and the employee.

Jones' response to Englund's email, which was also dated September 2, 2011, stated that the grievant had been properly discharged for insubordination. On September 12, 2011, Englund sent to the Employer a document entitled, "Grievance," in which he alleged that the discharge of the grievant was a wrongful termination and asked for his reinstatement with back wages and benefits.

The Employer makes two arguments that the matter is not arbitrable under the parties' labor agreement. The following provisions from the labor agreement are cited by the parties as relevant:

Article II. Recognition and Scope of Agreement

Section 2.01. The Company recognizes the Union as the sole and exclusive representative for the purpose of collective bargaining with respect to wages, hours and other conditions of employment for all production and maintenance employees of the Company.

Article IV. Management Rights

Section 4.01. Nothing in this Agreement shall be construed as taking away the unquestionable exclusive duty and right of the Employer to manage, develop and

direct its business and working forces. The exercise of such exclusive right shall not violate the spirit and intent of this Agreement. The Employer has the right to establish reasonable shop rules, as submitted.

Article VIII. Length of Service

Section 8.01. Length of service shall be computed from the date of employment or re-employment in the bargaining unit covered by this Agreement, referred to as the "Seniority Date." Department service shall be defined as the time an employee is assigned to a particular department. . .

Section 8.04. In cases of decreases of workforces, the Employer will lay off in inverse order from the seniority list within specific departments provided that the employee has the ability and fitness to perform the job in question efficiently.

Any displaced senior employee may exercise bumping to another department as long as the bumping employee possesses the ability and fitness to perform that job efficiently.

Employees will be granted preference in accordance with their department seniority. . .

Section 8.06. All length of service rights shall be forfeited for any of the following reasons: Voluntary quitting, discharge for cause, failure to report to work. or performs no work for the Company for twelve (12) months.

Article X. Grievance Procedure

Section 10.01. Should any difference arise between the Employer and the Union and its members as to the meaning and application of the provisions of this Agreement, an earnest effort shall be made to settle such difference immediately as set forth herewith following the grievance procedure outlined in this Article. All grievances must be submitted in writing within ten (10) days of their known occurrence except discharge which shall be three (3) days. . .

Section 10.06. The question of whether a grievance is arbitrable may be submitted to arbitration.

The Employer has adopted an "Employee Handbook," the current version of which is dated, "January 2009" and was in place before the parties executed their current labor agreement. The following excerpt is taken from a section of the Handbook, entitled, "STANDARDS OF CONDUCT":

. . . The following is a partial list of conduct considered to be inappropriate in the workplace. This list is not intended to be all-inclusive, but to provide some guidelines as to the expectation of employee conduct at Jones Metal Products, Inc. . . .

Examples of conduct that may result in disciplinary action up to and including separation of employment are, but are not limited to, the following:

[Twenty-five examples are given in the list, including one that describes insubordination.]

DISCIPLINARY ACTION

If an employee is found to be in violation of any policy or item included in the Standards of Conduct, or exhibits any other behavior determined to be inappropriate in the workplace, disciplinary action may be taken. Direct supervisors, managers and the Company President have the right to impose discipline upon an employee. It shall be left to the discretion of the manager and/or direct supervisor, in consultation with Human Resources, to determine the level of disciplinary action taken when such action is necessary.

Jones Metal Product, Inc. may discipline an employee by taking any one or more of the following actions: verbal warning, written warning, demotion, suspension, or separation of employment. These actions may or may not follow a progression, but will be appropriate to the severity of the offense. Some behavior may be grounds for immediate suspension or separation of employment.

First. The Employer argues that the Union failed to meet the time limit for initiating a grievance challenging a discharge, as established by Section 10.01 of the labor agreement, which states that all "grievances must be submitted in writing within ten (10) days of their known occurrence except discharge which shall be three (3) days." The Employer urges that the first written statement of a grievance was the document entitled "Grievance," which was sent to the Employer by Englund on September 12, 2011 -- more than three days after the grievant's discharge on September 1, 2011. The Union argues that the email sent by Englund to Jones on September 2, 2011, was effectively a grievance even though it was not entitled as such.

I rule that the email of September 2, 2011, met the definition of a grievance established in the first sentence of Section 10.01 of the labor agreement, "any difference . . . between the Employer and the Union" --

1) by alleging that the grievant's discharge was a "wrongful termination" and 2) by seeking his reinstatement, with arbitration if not obtained. This written challenge to the discharge meets the substantive requirements of a grievance, even though it is not entitled as such.

Second. The Employer makes the following argument. No provision of the labor agreement expressly states that the Employer must have "just cause" for discharge. Further, the Employer argues that the "Standards of Conduct" section of the Handbook, which I have set out above, gives broad discretion to the Employer to discipline employees -- 1) that "it shall be left to the discretion of the manager and/or direct supervisor, in consultation with Human Resources, to determine the level of disciplinary action taken when such action is necessary," and 2) that the choice of disciplinary action "may or may not follow a progression, but will be appropriate to the severity of the offense," and 3) that "some behavior may be grounds for immediate suspension or separation of employment."

Further, the Employer argues that the rules stated in the Handbook are reasonable rules and thus authorized by the labor agreement and that, though the Handbook was adopted unilaterally, the Union should be considered bound by it because the Union knew of its provisions at the time of the execution of the labor agreement.

The Union makes the following argument. Even though the labor agreement has no express statement that employees may be discharged only for just cause, that requirement is implied. If the Employer's interpretation were to prevail, all bargaining unit employees would become "at will" employees. The labor agreement and all its provisions establishing contractual terms and conditions of employment would then become meaningless because the Employer could terminate any or all employees for any reason or for no reason. The Union argues that unless the labor agreement is interpreted as including a just cause standard that limits the Employer's right to discharge employees the contract in its entirety will be made meaningless, contrary to principles of contract interpretation.

Both parties cite authorities in support of the positions they assert -- on the Employer's side, a Ninth Circuit case that finds no implication of a just cause standard in the particular labor agreement under consideration, based on the principle that such a standard must be expressly stated, and on the Union's side, a substantial number of arbitration decisions that find an implied just cause standard where none is expressly stated, in order to avoid a contract interpretation that makes meaningless the agreement being considered.

For the following reasons, I rule that the parties' labor agreement limits the Employer's right to discharge employees. Section 10.01 of the agreement shows clearly the understanding of the parties that a discharge can be grieved -- by setting a three-day time limit for the initiation of such a grievance. If a matter can be grieved, there must be a basis for the challenge that the grievance asserts, and, in challenges to discipline and discharge, presumably, valid cause for discharge must be shown, lest the right to grieve revert to a challenge of an "at will" discharge, undoubtedly, a waste of time.

In addition, I note that the underlined sentence from the following paragraph of the Standards of Conduct section of the Handbook establishes a standard for discipline by stating a limit on the Employer's discretion in its choice of disciplinary action:

Jones Metal Product, Inc. may discipline an employee by taking any one or more of the following actions: verbal warning, written warning, demotion, suspension, or separation of employment. These actions may or may not follow a progression, but will be appropriate to the severity of the offense. Some behavior may be grounds for immediate suspension or separation of employment.

The requirement that disciplinary action "will be appropriate to the severity of the offense," read in context with the right to grieve a discharge established in Section 10.01 of the labor agreement, is the equivalent of the "cause" standard implied by the contract-right to grieve a discharge.

After I issued these rulings on the Employer's motion to dismiss, the parties presented evidence relating to the grievance at a hearing held on November 18, 2011. At the hearing and in its post-hearing written argument, the Employer has renewed its argument that it had a right to terminate the grievant's employment at will. As I stated in my rulings on the Employer's motion to dismiss, both the labor agreement and the Employee Handbook recognize that the Employer must have just cause to discharge a member of the bargaining unit, and I adopt those rulings in this Decision and Award. Therefore, the primary issue before me is whether the Employer had just cause

to discharge the grievant. Below, I summarize the evidence about the circumstances that led to the grievant's discharge.

Stencel, the Employer's Shipping Supervisor, testified as follows. In the summer and fall of 2011, he supervised ten employees, two of whom were Forklift Drivers who stocked incoming production supplies in the Employer's warehouse and distributed them to production employees as needed. At that time, the Employer's facility was equipped with five forklift trucks ("forklifts"), but he was considering the purchase of a sixth forklift because some production employees had told him that they sometimes had to wait for the delivery of production materials by forklift. With the agreement of Richard C. Schaehrer, Day Shift Manufacturing Supervisor, Stencel decided to gather information from a sample of production workers to determine whether there was a need for a sixth forklift.

Stencel testified that, on August 15, 2011, he handed out to about fifteen production workers selected at random a blank form (a "Data Sheet," as he referred to it) that sought information from them about the length of time they had to wait for delivery of materials by forklift. He told those to whom he gave the Data Sheet that they should fill it out so that management could decide whether to buy a sixth forklift.

Stencel testified that about a week or two after August 15 he went back to retrieve the Data Sheets from the employees and that he obtained only nine that had been filled out. Some employees told him they had lost the form. He testified that an employee said he thought the grievant told employees not to fill

out the Data Sheet. Stencil then asked the grievant if he told employees not to fill out the form and the grievant answered "yes." Stencil also testified that he told the grievant he had just been trying to gather information about the need for a new forklift and that the grievant told him he did not know that. According to Stencil, the grievant said he told employees that they "did not have to fill out the form." Stencil informed Wencil what had occurred, and she began an investigation.

On cross-examination, Stencil testified that he thought "the issue was more serious" because the grievant was a Union Steward and that it would not be so serious if another employee had behaved as the grievant had. Stencil testified that he did not tell the production employees to whom he gave the Data Sheet that filling them out was mandatory, but that he told them "I need your help to give data to management." Stencil did not participate in the decision to discharge the grievant.

Wencil testified as follows. When Stencil talked to her about the incident, he said that the grievant told production employees not to fill out the Data Sheet. She decided to investigate. On August 29, 2011, at her request, the grievant attended a meeting with her, Stencil, Zehm and Schaehrer. The grievant did not request Union representation. She did not ask a Union representative to be present, and she did not tell the grievant that he could request such representation.

At the meeting, Wencil asked the grievant what he said to the production employees when they asked about the Data Sheets. She testified that the grievant said he told them they did not

have to fill out the form if they did not want to. She interviewed seven of the fifteen production workers who were asked by Stencel to fill out the Data Sheet, all of whom said the grievant had not talked to them about the Data Sheet. Wencil also testified that she understood from talking to Stencel that he intended his request to the production workers that they fill out the Data Sheet to be mandatory.* Stencel testified that, when he asked production workers to fill out the Data Sheet, he did not tell them it was mandatory to do so, but that he did tell them to fill out the form, saying I need your help in collecting data for management.

Wencil testified that the decision to discharge the grievant was made jointly by her, Zehm and Schaehrer, that they thought the grievant's statements to production workers about the Data Sheet were serious insubordination because his statements countermanded Stencel's instructions, thereby undermining his authority as a supervisor, with consequent impact on many employees.

Schaehrer testified that he participated in the decision to discharge the grievant, and that, for reasons similar to those

* I note that counsel and witnesses for both parties often used the word "mandatory" when discussing whether Stencel told production employees that filling out the form was required. It does not appear, however, that Stencel used that particular word when he discussed filling out the Data Sheet with them. Hereafter, when I describe testimony relating to Stencel's discussions with the production workers, I may use the word "mandatory" as was done at the hearing -- as an abbreviated way of describing whether Stencel told the production employees that filling out the form was required.

testified to by Wencil, he thought the grievant's behavior was serious insubordination. On cross-examination, Schaehrer testified that in making the decision to discharge the grievant, he considered the grievant's status as a Union Steward, insofar as it made him a leader, in the view of other employees. Schaehrer testified, however, that, even if the grievant had not been a Union Steward, he would have decided to discharge him for insubordination.

The grievant testified as follows. On about August 17 or 18, 2011, six employees approached him with questions about the Data Sheet -- two Forklift Drivers, two reserve Forklift Drivers, and two production workers. They were concerned that the information being collected on the Data Sheet was going to be used in discipline for late forklift deliveries. The grievant testified that he told management employees at the investigation meeting on August 29, 2011, that he asked the production workers who brought the forms to him whether Stencil said they were required to fill out the form, and that they said Stencil asked if they "would fill these sheets out." Zehm testified that during the investigation meeting of August 29, 2011, the grievant said he did not think that Stencil told employees that filling out the form was required.

The grievant testified that he told management at the investigation meeting of August 29, 2011, that he told inquiring employees that he did not know if they should fill out the form. He denied to management that he told the employees not to fill out the form, but he conceded that he said it was up to the

employee whether he would fill out the form. According to the grievant, the management employees at the meeting then told him he was being suspended for investigation and escorted him out the door. The grievant testified that, after the six employees asked him about the Data Sheets, which occurred about August 17 or 18, 2011, he tried to contact Stencel to find out more about the Data Sheets, but that he was unable to locate Stencel.

The grievant testified that he did not think he was being insubordinate in his response to those who asked about filling out the Data Sheet and that he thought that, because they had not been ordered to fill it out, they could decide to do so or not.

DECISION

Just cause and progressive discipline. The following discussion gives a fair summary of what is "just cause" as defined in American labor law. The essence of the employment bargain between an employer and an employee (or a union representing an employee) is that the employer agrees to provide the employee with pay and other benefits in exchange for the agreement of the employee to provide labor in furtherance of the employer's enterprise. When the employer and the employee (or a representing union) have also agreed that the employer may not terminate the employment bargain except for "just cause," they intend that discharge will not occur unless the employee fails to abide by his or her bargain to provide labor in a manner that furthers the employer's enterprise.

The following two-part test of "just cause" derives from that intention:

An employer has just cause to discharge an employee whose conduct -- either misconduct or a failure of work performance -- has a significant adverse effect upon the enterprise of the employer, if the employer cannot change the conduct complained of by a reasonable effort to train or correct with lesser discipline.

Under this two-part test, an employer must establish

1) that the conduct complained of has a serious adverse effect on the employer's operations and 2) that the employer has attempted to prevent repetition of the conduct by training and corrective discipline, thus seeking to eliminate any future adverse effect from the conduct before taking the final step of discharge.

The application of the first part of this test requires a determination whether particular conduct is significantly adverse to the enterprise. Some conduct may create such a threat to the enterprise that discharge should be immediate and need not be preceded by an attempt to change the conduct by training or progressive discipline, as required under the second part of the test. Such serious misconduct may be so adverse to an employer that the employer should not be required to risk its repetition. Thus, an employer should not be required to use training and corrective lesser discipline in an effort to eliminate the chance of repetition for most thefts, for some use of drugs or alcohol (subject to statutory limitations) or for gross insubordination -- behavior so extreme that it threatens the authority of management to operate the enterprise.

Some misconduct or poor performance is only a slight hindrance to good operations. For example, a single instance of tardiness will not have a significant adverse effect on the operations of most employers. Conduct, however, that is only

slightly adverse when it is infrequent, may have a significant adverse effect on operations if it occurs often. Thus, tardiness and absence that become chronic will usually cause a serious disruption to operations, and, if progressive discipline does not eliminate such poor attendance, it will accumulate in its adverse effect and constitute just cause for discharge.

In the present case, resolution of the grievance requires, primarily, a determination whether the grievant's conduct in responding to inquiries about the Data Sheets was insubordination so serious that the Employer should not be put at risk of its future repetition.

I make the following additional findings of fact and reach the following conclusions. When employees asked the grievant about the Data Sheets on August 17 or 18, 2011, he was uncertain how to respond. He asked them whether Stencil had said that they were required to fill out the form. The grievant told the investigation meeting on August 29, 2011, that, from the responses he received to that question, he did not think that Stencil had told employees that filling out the form was required. The grievant's uncertainty whether Stencil had told the employees that they were required to fill out the form led to his response -- that the production employees could decide for themselves whether to fill out the form. I find that the grievant's response was not appropriate at that time because it was based on incomplete knowledge whether Stencil told employees that they were required to fill out the form. The grievant testified that he made his response without talking first to

Stencel, though, after making the response, he tried unsuccessfully to find Stencel to discuss the matter. If the grievant had talked to Stencel before responding to the inquiring employees, he would have found out that Stencel thought he had made known to the employees that filling out the form was required.

At and before the investigation meeting of August 29, 2011, Stencel indicated to Wencil, Zehm and Schaeherer that he told the production employees that they were required to fill out the Data Sheet. Because they thus had more complete knowledge of Stencel's intention, Wencil, Zehm and Schaeherer determined 1) that the grievant had countermanded an order from Stencel when he told the production employees that it was up to them whether to fill out the form, and 2) that, therefore, the grievant had been insubordinate. Implicitly, however, those determinations must also be based on the assumption that the grievant knew that Stencel told the production employees that filling out the form was required.

The evidence convinces me that the grievant's response to the production employees was based on incomplete knowledge whether Stencel told them that filling out the Data Sheet was required. As the grievant testified, he asked the production employees whether Stencel said they were required to fill out the form, and, from their responses, he thought that Stencel had not told them that filling out the form was required. The grievant should have told the production employees that he would have to check with Stencel before he could answer them, and

he should then have made sure that he found Stencel to clarify Stencel's intention.

It appears, therefore, that the grievant did not intend to be insubordinate in his response to the employees who sought his advice. Nevertheless, he was at fault for responding to them without first getting clarification from Stencel -- an error possibly attributable to the grievant's inexperience as a Steward. The grievant's conduct, though in error, was not the same as insubordination. Insubordination is serious misconduct, not only because of its effect on operations, but because it is, by definition, intentional. As an intentional behavior, insubordination may carry the threat of repetition. Here, the grievant's fault in responding to the inquiring employees before asking Stencel if he had required them to fill out the Data Sheet can be corrected with instruction from the parties.

I conclude that there was not just cause to discharge the grievant because the error that led to his premature response to the inquiring employees can be corrected with instruction and lesser discipline than discharge.

The Union seeks reinstatement of the grievant and an award of back pay. It is difficult to provide a just remedy in a case such as this -- in which the grievant, though not insubordinate, was at fault for having responded to the inquiring employees without adequate knowledge of Stencel's intention. The award below directs the reinstatement of the grievant, but, because he was at fault for responding with incomplete knowledge, it does not order back pay.

AWARD

The grievance is sustained in part. The Employer shall reinstate the grievant to his employment without loss of seniority and without back pay. The time between his discharge and his reinstatement shall be considered a disciplinary suspension without pay.

March 19, 2012


Thomas P. Gallagher, Arbitrator