
In Re the Arbitration between:

FMCS No. 07-52235-3

Flint Hills Resources,
Pine Bend, Minnesota,

Employer,

**GRIEVANCE ARBITRATION
OPINION AND AWARD**

and

USW Local 7- 662,

Union.

Pursuant to **Article XXII** of the Collective Bargaining Agreement effective June 16, 2003 through June 17, 2007, the parties have submitted the above captioned matter to arbitration.

The parties selected James A. Lundberg as their neutral Arbitrator from a Federal Mediation and Conciliation Service list of Arbitrators.

The grievance is properly before the single Arbitrator for a final and binding determination and there are no procedural issues before the Arbitrator.

The grievance was filed on September 21, 2005.

The hearing was conducted on July 12, 2007.

The record was closed upon receipt of briefs posted August 10, 2007.

APPEARANCES:

FOR THE EMPLOYER

Chad A. Horner
Koch Industries, Inc.
4111 East 37th Street North
Wichita, Kansas 67220

FOR THE UNION

Paul T. Lindgren
USW Local 7-662
2929 University Avenue SE, Suite 150
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ISSUE:

- *Whether the Employer acted appropriately or in an arbitrary and capricious manner, when it issued a verbal reprimand and declined to issue a P-Pay bonus to grievant, Tom Duea, due to a recordable injury incurred on August 9, 2005?*
- *Alternatively, whether the Employer had just cause when it issued a verbal reprimand and declined to issue a P-Pay bonus to the grievant, Tom Duea, due to a recordable injury incurred on August 9, 2005?*
- *If the Employer's actions were arbitrary and capricious or, in the alternative, without just cause, what is the appropriate remedy?*

FACTUAL BACKGROUND:

The grievant, Tom Duea, has been employed by Flint Hills Industries¹, the Employer, for a period of twenty four (24) years. Mr. Duea has worked in the *coker unit*, the *pumping department*, *water-plant and instrument control*. Presently, he is employed as an *insulator*. At the time of the incident that resulted in the discipline that led to this grievance, Mr. Duea was working as an *insulator helper*. Mr. Duea has only been disciplined once during his career at Flint Hills.

On August 9, 2005 Mr. Duea was given a work order to reattach an insulating blanket to one of the pumps. The insulating blanket he was assigned to work on was to be raised from beneath the pump and stretched around the rounded underside of the pump. The blanket was to be attached to the underside of the pump by securing it to the body of

¹ Flint Hills Industries is in the petroleum refining business and is located at Pine Bend, Minnesota.

the pump using wires that are wrapped around fixed studs on the pump and what looks like large rivets that are set at intervals in the side of the blanket. The pumps in this refinery are very large pieces of equipment and the insulating blankets are bulky and rather large. The insulating job was issued as a one person job.

The insulating blanket that Mr. Duea was to reinstall on August 9, 2005 had been exposed to rainy weather and was water logged, when Mr. Duea first examined it. Consequently, Mr. Duea sought and received help from Mr. Phillippi, who was the *number one insulator* working with Mr. Duea that day. Together Mr. Duea and Mr. Phillippi raised the blanket to within about two or three inches of the desired position. Mr. Phillippi was called away from the job to a different site when the blanket was near the desired level. Mr. Duea evaluated the situation and believed that he could complete the rest of the project alone. He simply needed to raise the blanket at each point where the wire was attached and twist the wire to secure it using a hand wire nipper. Mr. Duea successfully raised the blanket to the desire position at two points and was working on a third wire, when the wire broke and Mr. Duea's hands recoiled. When Mr. Duea's hands recoiled, the wire nipper in his hands struck him in the face causing a laceration of his lip.

It was Mr. Duea's belief that he had properly positioned himself to guard against an injury. He testified that he believed that his face was out of the line of fire, meaning positioned so that it would not be hit by a broken wire or the recoil of his hand nipper if a wire broke. Mr. Duea and all of the witnesses who addressed the issue of line of fire indicated that the line of fire was complicated by the fact that a hand tool was being used and ones hands are attached to the body. In simple terms, your body is always potentially in the line of fire when using a hand tool.

Mr. Duea called Mr. Phillippi and was taken to the dispensary to have the cut treated. Liquid stitches were applied to the wound.

At Mr. Duea's request, Mr. Phillippi contacted Mr. Quist, the maintenance supervisor, who investigated the incident. Mr. Quist met with both Mr. Duea and Mr. Phillippi and reviewed the events that lead up to the injury. An incident Analysis Summary was prepared on August 15, 2005 by Mr. Quist.

By written notice dated August 22, 2005 Mr. Duea was given a written "Verbal Reprimand" and advised that he would not receive a P-Pay bonus for the second half of 2005. The disciplinary notice advised Mr. Duea of the following:

On August 9, 2005, you received a recordable injury as a result of your behavior. While wiring up simulation on 37-P-1B, the wire broke causing your hand to come back towards you and in turn the wire cutter struck your upper lip causing a laceration. You did not anticipate the line of fire for this job, which was the root cause for the injury you suffered.

Your behavior in this incident was indicative of below expectations performance for a craftsperson. You violated the Pine Bend Work Rule #29 (Failure to observe commonly recognized safe working practices). Documentation of this reprimand will be placed in your personnel file. In making the decision to issue a verbal reprimand, Flint Hills Resources carefully considered your past employment record.

As a result of this incident, you are not eligible for a P-Pay bonus for the second half of 2005. In addition, any further incidents or violation of FHR policies, procedures, or rules may result in further disciplinary action up to and including termination of your employment with Flint Hills Resources.

The discipline was grieved by written notice dated September 21, 2005 and the grievance was denied.

SUMMARY OF EMPLOYER'S POSITION:

The Employer argues that the standard of review in this case should be whether the discipline it imposed upon Mr. Duea was arbitrary and capricious rather than whether the Employer had just cause to discipline the grievant. The collective bargaining agreement does not specifically state that the Employer may discipline for just cause. The only place in the collective bargaining agreement where just cause is cited is with regard to discharge at **Article XXVI**. Since the collective bargaining agreement does not require just cause for all forms of discipline, only for discharge, the standard of review should be whether the Employer's action was arbitrary or capricious. If the Employer's action was neither arbitrary nor capricious, the discipline should be upheld.

Regardless of whether the standard of review is just cause or arbitrary or capricious, the discipline should be upheld. The grievant admitted that he engaged in a volitional, unsafe act, while on duty. He continued to attempt to secure the insulating blanket to the pump without assistance on August 9, 2005, despite the fact that he previously sought help with the project because the water logged blanket was too heavy for one person to work with. He also failed to accurately calculate the line of fire, which led to his facial laceration. Fortunately, Mr. Duea's injury was not as serious as it could have been. The violation of basic safety principles by Mr. Duea is not disputed.

The Union does not seriously challenge the imposition of a verbal warning in this instance. The Employer imposed the verbal warning due to the fact that grievant engaged

in an unsafe practice while performing his work. The Employer has the right to discipline an employee who engages in unsafe conduct in order to protect its employee and the site.

The grievant was denied P-Pay because P-Pay is intended to be a reward for excellent performance. Mr. Duea has received P-Pay in every six (6) month period that it has been available, except the six (6) month period when he was disciplined for a “Below Expectations incident” on August 9, 2005. The Employer’s explanation of how P-Pay is earned (C-1) says “Employees who are moved to a Below Expectations rating or are involved in a Below Expectations incident during the 6 month period will not receive P-Pay.” Mr. Duea was involved in a Below Expectations incident on August 9, 2005 and, therefore, was not eligible to receive P-Pay.

The Union’s examples of instances where reportable injuries did not result in withholding of P-Pay were not similar to the incident involving Mr. Duea. In each of the instances cited by the Union, the injured employee did not act volitionally. For example, one employee was injured, when his knee buckled while walking. Another employee was injured due to equipment malfunction. Mr. Duea was injured because of an error in judgment. Mr. Duea’s injury was due to volitional, unsafe behavior. The Employer has consistently withheld P-Pay from employees who have engaged in volitional, unsafe behavior.

The Employer urges the Arbitrator to uphold the discipline and deny the grievance.

SUMMARY OF UNION’S POSITION:

On August 9, 2005 Mr. Duea’s conduct was prudent and consistent with the training he had received as an *insulator helper*. The grievant received a work order to

reinstall the insulating blanket on a pump. The work order said that the job was to be performed by one person. However, Mr. Duea realized that the insulating blanket was too heavy for one man to handle and sought assistance from a *number one insulator*. After the insulating blanket was raised to a level near but not at the desired level on the pump, the *number one insulator* was called to another job. There is no evidence that the *number one insulator* suggested that he would return to finish the job. There is no evidence that any procedures were changed after the incident. Mr. Duea simply completed the job, as he had been trained to do. Mr. Duea made a reasonable calculation that the insulating blanket had been raised and secured at a level where he no longer required assistance. He successfully moved and secured the insulating blanket at two points, before the third wire broke. Mr. Duea's action was both reasonable and consistent with his training.

The grievant is said to have failed to accurately calculate the line of fire. However, the Employer found it impossible to identify any position where the grievant would have been out of the line of fire. In fact, the Employer had to admit that the job Mr. Duea was performing could not be done without being in the line of fire. Mr. Duea was using a hand tool. When pulling on a wire with a nipper, a broken wire under tension will cause one's hands to recoil. Since the hands are attached to the body at the arms, the worker's body is always in the line of fire. It is unreasonable for the Employer to discipline an employee for being in the line of fire, when it is impossible for the Employee to remove himself from the line of fire, while performing the assigned work.

The Union demonstrated that the Employer has not always withheld P-Pay from employees who have recordable injuries. The following five examples of injured employees who received P-Pay were entered into evidence:

- U#1 An employee twisted his knee because he was carrying four nuts in each hand and started to fall. The incident occurred September 17, 2006.
- U#2 An employee injured his right ankle and fell to the ground. The incident occurred on May 4, 2007.
- U#3 An employee lacerated two fingers, when he grabbed a steel tape. The incident occurred on July 18, 2006.
- U#4 An employee was sprayed with gas and taken to the hospital. The incident occurred on June 18, 2006.
- U#5 An employee burned his right foot because of release of hot steam from a steam trap. The incident occurred on April 20, 2007.

The Union contends that Mr. Duea is a safe employee who has a stellar disciplinary record. While the Employer said that it considered the grievant's disciplinary history, they did not modify the discipline they imposed in a manner that reflects the grievant's otherwise unblemished twenty four (24) year record.

Grievant was not treated the same as other similarly situated employees under the same or similar circumstances. The Union demonstrated that on at least five other occasions employees who have had recordable injuries still received their P-Pay.

The grievant acted prudently on August 9, 2005. The Company imposed harsh discipline on him for failing to take a position out of the line of fire, despite the fact that the Employer could not identify where the employee would have been out of the line of fire. Furthermore, the Employer disciplined the grievant for failing to obtain assistance with the insulating blanket, despite the fact that the grievant did seek assistance but the employee who was helping him was called to work on another job.

The Employer did not have just cause to impose a verbal warning on the grievant nor did it have just cause to withhold P-Pay in the second half of 2005. Hence, the grievance should be upheld. The verbal warning should be removed from the grievant's file and he should receive P-Pay for the period of time that it was withheld.

OPINION:

The standard of review for the discipline is whether the Employer had just cause to impose a verbal warning upon Mr. Duea and withhold P-Pay for a six (6) month period. The collective bargaining agreement at **Article XXVI** says that the Employer must have just cause to discharge an employee. Since an employee discharge may result from a single serious incident or more commonly from a series of incidents that have been addressed progressively, the entire range of disciplinary actions that may result in a discharge must necessarily be for just cause. It would be inconsistent with the fundamental concepts of fairness that constitute the just cause standard to allow an employee to be repeatedly disciplined without just cause but eventually discharged based on a series of disciplinary actions, all or some of which were not for just cause, under a claim, for example, that the discharge was just because the employee received progressive discipline.

Mr. Duea was injured as a result of his failure to perceive the danger of continuing to raise the wet insulating blanket on August 9, 2005. Mr. Duea knew he needed assistance, when he started the project. There is no evidence that the job changed after Mr. Phillippi was called away. The insulating blanket that the two men were reinstalling, was still wet and very heavy. While the blanket was suspended from wires at a high level on the pump, the basic circumstances were unaltered. The blanket was still

saturated and too heavy for one person to manage. Mr. Duea testified that he reassessed the situation and believed that he could finish the job alone. He was wrong and his miscalculation resulted in an injury. Because the collective bargaining agreement allows employees to refuse work that is too dangerous, it is not reasonable to assume Mr. Duea had reason to believe he was required to complete the assigned task without further assistance from Mr. Phillippi. There is no evidence that Mr. Phillippi, a *number one insulator*, directed Mr. Duea to complete the job alone or protested being asked to help Mr. Duea with the project. The evidence strongly suggests that Mr. Duea's initial view that the project was a two (2) man job was correct and his reassessment was the result of a poor analysis of the nature of the work that remained, after Mr. Phillippi was called away from the work site.

The line of fire analysis is flawed. Based on testimony given by Mr. Quist, the Employer's primary witness, it is virtually impossible for an employee to use a hand tool and be out of the line of fire, because the hands are attached to the arms that are attached to the body. In the case of Mr. Duea, the material he was twisting using a nipper broke and caused a recoil type of reaction. As Mr. Duea's hands recoiled from the material he was twisting, they moved toward his body. Unfortunately the recoiling of Mr. Duea's hands resulted in the nipper striking his face and lacerating his lip. If a second employee would have supported the soaked insulating blanket and a wire broke in the process, the Employer would be unable to establish that the employee who was twisting the wire with a hand tool violated the line of fire rule. In this instance, the line of fire moves with the movement of the tool and ultimately comes back to the workers body at all times.

While a line of fire rule violation may not have been a fair assessment of Mr. Duea's conduct on August 9, 2005, his decision to continue to raise the wet insulating blanket after Mr. Phillippi was called away from the job did place him in danger of injury. The Employer had just cause to discipline Mr. Duea for continuing to work on a project alone, after he had correctly determined that the project could not be safely performed without assistance. The collective bargaining agreement at **Article XI -- Safety, Section (b)** says

An employee shall not be required to perform work under conditions which will unreasonably endanger his/her physical safety. If any employee in good faith believes that the conditions under which he/she is to work are unreasonably hazardous, he/she may decline the work assignment until an investigation has been made, and, if necessary, correction made....

Mr. Duea initially determined that the work he was assigned was unreasonably dangerous for one person to perform and he sought assistance. He received assistance, until Mr. Phillippi was called to a different job. There is no evidence that the project became safer because the insulating blanket had been raised to within approximately four (4) inches of the desired height. Mr. Duea had a contractual right to stop the work he was doing, until help returned, but he failed to exercise his right.

The Employer gave Mr. Duea a verbal warning, an appropriate level of discipline for a safety violation of this nature. The Employer argued that it took Mr. Duea's long service with no discipline history into account and issued the verbal warning rather than a harsher form of discipline. The verbal warning fit the nature of the rule infraction and no

evidence contradicts the representation that harsher discipline would have been imposed but for the grievant's excellent work history.

While the withholding of the grievant's P-Pay for a six (6) month period was a harsh penalty in this case, the Employer's action was consistent with its treatment of other similarly situated employees under similar circumstances. The Employer accurately distinguished the situations where employees were injured but still received P-Pay from Mr. Duea's situation. The five situations cited by the Union did not involve circumstances where the employee made a decision that created an unsafe circumstance. Mr. Duea's regrettable reassessment of the project he was assigned to work on August 9, 2005 resulted in the event that caused Mr. Duea's injury.

Employer Exhibit #1 clearly states "Employees who are moved to a Below Expectations rating or are involved in a Below Expectations incident during the 6 month period will not receive P-Pay." The rule is clear and the incident that resulted in Mr. Duea's minor injury was a "Below Expectations incident". Clearly, Mr. Duea is an employee who operates as a safe employee. He simply made a miscalculation on August 9, 2005. The Employer notified employees of the criteria it would use to determine who received P-Pay. Withholding P-Pay for a six (6) month period because of one "Below Expectation incident" is a harsh penalty but Mr. Duea was informed that such a harsh penalty would be imposed, if he had a "Below Expectation incident". The penalty is consistent with the policy and the manner in which the Employer has implemented the policy. This is not a situation where the employee was treated disparately.

The discipline imposed on Mr. Duea was for just cause and the grievance should be denied.

AWARD:

The Arbitrator finds that the Employer had just cause when it issued a verbal reprimand and declined to issue a P-Pay bonus to the grievant, Tom Duea, due to a recordable injury he incurred on August 9, 2005

The grievance is hereby denied.

Dated: August 24, 2007.

James A. Lundberg, Arbitrator