

**IN THE MATTER OF ARBITRATION
BETWEEN**

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL No. 49,**

Union,
and

SCOTT COUNTY,

Employer.

**ARBITRATION DECISION
AND AWARD
BMS Case No. 07-PA-1166
(Discharge)**

Arbitrator:

Andrea Mitau Kircher

Date and Place of Hearing:

September 27 and 28, 2007
Shakopee, Minnesota

Date Record Closed:

November 7, 2007

Date of Award:

December 7, 2007

APPEARANCES

For the Union:

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For the Employer:

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INTRODUCTION

The International Union of Operating Engineers, Local No. 49, (“Local 49” or “Union”) represents employees in certain job classifications, including Equipment Mechanic, who are employed by Scott County (“County” or “Employer”). The Labor

Agreement (“Contract”), Joint Exhibit 1, identified by the parties as the document controlling this matter, was effective January 1, 2004 through December 31, 2006.

The Employer discharged the Grievant¹, and this grievance was timely filed by the Union. The parties were unable to resolve the grievance, and the matter was referred to arbitration. The parties selected the undersigned as the arbitrator from a list provided by the Minnesota Bureau of Mediation Services.

A hearing was held at on September 27 and 28, 2007 at the Scott County Government Center in Shakopee, Minnesota. At the hearing, the arbitrator heard sworn testimony subject to cross-examination and accepted exhibits into the record. The parties elected to submit post-hearing briefs, and the record closed upon receipt of the briefs by U.S. Mail, November 7, 2007.

ISSUE

Did the Employer have just cause to terminate the Grievant’s employment? If not, what is the appropriate remedy?

FACTS

The Grievant was hired as an Equipment Mechanic by the Employer in July of 1999. His job required him to maintain, inspect, diagnose and repair gas and diesel powered motor vehicles and equipment for the County.² Equipment owned by the County uses diesel fuel that is dyed red, in compliance with a federal taxation system exempting counties from paying tax on certain types of fuel use.³ The Grievant was discharged effective April 2, 2007. He was not discharged for disciplinary reasons, but

¹ The parties requested that the Arbitrator grant a protective order to avoid using the Grievant’s name in this document preserving the privacy of the Grievant’s medical condition and medical records discussed during the hearing.

² Employer Exhibit 4, Job Description.

³ Testimony (“T.”) Highway Division Engineer Greg Felt.

because the Employer concluded that his allergy to red-dyed diesel fuel interfered with his ability to do the work required.

A. Red-dyed diesel fuel spills on the Grievant and he seeks a change in work duties.

During a meeting on November 14, 2006,⁴ the Grievant reported that he was allergic to red-dyed diesel fuel. He advised his supervisor and others at the meeting that he had gone to the emergency room at St. Francis Regional Medical Center (“Hospital”) after work the previous day because of an incident where another employee had spilled some red-dyed diesel fuel on his arm.⁵ The incident occurred when the Grievant and another mechanic, Doug Schmidt, were changing the fuel filter on a tandem axel dump truck. The Grievant was under the truck on a creeper. Mr. Schmidt dropped the fuel filter as he was handing it to the Grievant, and the red-dyed diesel fuel in the filter spilled on the Grievant’s arm. He stated that he had a severe reaction, causing his arm to swell up “almost an inch and a half bigger than it is.”⁶

At the meeting, the Grievant also advised Highway Operations Division Engineer Greg Felt, that he did not want to work on diesel fueled vehicles.⁷ The Grievant claimed that Joe Kane, Mr. Felt’s predecessor, had previously agreed to that limitation. Mr. Felt contacted Mr. Kane the next day and testified that Mr. Kane told him there was no such agreement, that he had no knowledge of the Grievant’s allergy to red dye, and would not have hired him if he had known of it.⁸

⁴ The following employees attended the meeting that had originally been convened for another purpose: Greg Felt, Highway Operations Division Engineer in charge of field operations; Gary Bruggenthies, Business Manager for the Public Works Department; Ron Rob, an operations supervisor; and Pete Shutrop, a Steward for Local 49.

⁵ T., Felt; Employer Ex. 1.

⁶ T., Grievant.

⁷ Employer’s Ex. 1

⁸ T., Felt and Employer Ex. 1

B. The Employer attempts to meet various legal requirements necessary when an employee is injured at work.

Mr. Felt advised the Grievant to get medical documentation about his allergy and proper treatment for it. The Grievant was also directed to fill out an accident report for purposes of the Worker's Compensation system.

An Accident/Incident Report was prepared and the Grievant signed it on November 20, 2006. The report indicates that the Grievant described the injury as causing inflammation to his right hand and that the spilled fuel caused him "trouble breathing".⁹ This report was sent to Kara Dubbe, the County's Occupational Health Nurse.

Ms. Dubbe filed the report with the Minnesota Department of Labor and Industry, as required, and tried to follow up with the Grievant who had agreed to send medical reports to the County concerning his condition by November 27, 2006. She experienced considerable difficulty. First, the Grievant did not provide any documentation in November despite repeated requests. Second, the Hospital had no record of having seen the Grievant in November. At the hearing, the Grievant could not explain why the Hospital reported he was not treated there on or about November 13.¹⁰ Second, the Grievant did not actually see a doctor as requested by the Employer, until January 29.¹¹ That physician, James Johanson, M.D., of the Park Nicollet Clinic, wrote a note to the Employer stating that the Grievant attributed a rash on his arm to red dye used in diesel fuel. Dr. Johanson advised the Employer that he had observed a rash and that the

⁹ Employer Exhibit 5a and 5b, Employer Ex. 1. Later, at the pre-termination hearing, the Grievant claimed that the respiratory problem, a more serious symptom, was caused by a cold, not the red dye. Employer's Ex. 21.

¹⁰ T., Grievant.

¹¹ During these two months, he continued working with a temporary adjustment in his duties to limit his exposure to diesel fuel, according to the Employer. The Grievant disputes this, claiming that during this period his work was substantially the same as it had always been.

Grievant should not work with this chemical. When Ms. Dubbe tried to understand what specific restrictions the doctor intended, he advised her that the Grievant should see an allergy specialist to confirm this allergic condition.¹² Management decided, based on Dr. Johanson's note, that the Grievant should be placed on medical leave, because his normal work required some exposure to the irritant Dr. Johanson said he should avoid.¹³ The County placed the Grievant on Medical leave on February 2, 2007.

The Employer attempted to make a study of what alternative duty was available so that the Grievant could continue his employment in the face of his doctor's statement that red-dyed diesel fuel should be avoided.¹⁴ Pam Johnson, Labor Relations Director, discussed options with Ms. Vermillion, Mr. Felt, and County Engineer Mitch Rasmussen.¹⁵

The Grievant saw allergy specialist, Brenda Guyer, M.D., at the Park Nicollet Clinic on February 13, 2007. Dr. Guyer concluded that the Grievant had contact dermatitis related to diesel fuel that has been dyed red. Her conversation with the Grievant led her to believe that he had brief exposures to red-dyed diesel fuel¹⁶ and had symptoms affecting his hands even when wearing polyvinyl gloves.¹⁷ After corresponding with Occupational Health Nurse Dubbe, who wanted a detailed recommendation, Dr. Guyer provided the following information to the County:

- The Grievant should avoid red-dyed diesel fuel.
- There is no cure for contact dermatitis
- Repeated exposure is expected to result in more extensive skin disease.
- Avoidance is the only treatment.

¹² Employer Exhibit 6, Notes of Kara Dubbe.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ T., Pam Johnson and Employer Ex. 11.

¹⁶ Employer Ex.12, Letter from Dr. Guyer to County.

¹⁷ *Id.*

- Shoulder length gloves should be used for any contact with red-dyed diesel fuel.
- Contact with red-dyed diesel fuel, even using protective gloves, should be limited to less than two minutes less than five times daily, or should be avoided completely.
- This medical restriction is considered permanent.
- Grievant does not have a disability.¹⁸

Based on this information, Ms. Dubbe advised Director of Public Works Lezlie Vermillion that permanent restrictions had been established by Dr. Guyer for the Grievant and asked her to evaluate operations in Public Works to determine if these restrictions could be accommodated on a permanent basis.¹⁹

C. The Employer looks into possible solutions to the conflict between the needs of the Department and the needs of the Grievant and decides to discharge him.

Director of Public Works Lezlie Vermillion and Highway Operations Division Engineer Greg Felt believe that all of the employees in the Highway Shop should be able to work on all of the equipment.²⁰ There are six Equipment Mechanics and 70 per cent of shop time is spent on vehicles that use red-dyed diesel fuel.²¹ The Grievant's preferred solution to his problem, that he not work on this equipment, was deemed unworkable. There are occasions where it would be necessary for whichever mechanics are on duty to repair a diesel vehicle, such as when snow plow equipment goes down and must be repaired at any time of day or night.²² Further, although in the past the Grievant worked primarily on non-diesel equipment, there has been a shift in departmental needs. Some of the gas fueled vehicle work is now being contracted out, and more heavy duty diesel

¹⁸ Employer Ex. 12, 14, 15. and Employer's Brief dated November 5, 2007, at 3-4.

¹⁹ T., Vermillion.

²⁰ T., Felt, and T., Lezlie Vermillion

²¹ T., Felt

²² T., Vermillion.

vehicles are being used, so more of the mechanic's work is now focused on diesel equipment.²³

Ms. Vermillion sought input from supervisors Ron Robb and Gene Busacker and Shop Lead Worker Dale Vinkemeier, all long term employees, to determine whether the Grievant's medical restrictions could be accommodated on a permanent basis.²⁴ They advised her that it would not work well, causing less efficient work flow. Also, there would be times when there was not enough work to keep the Grievant fully occupied under that plan.²⁵

Additionally, Mr. Felt looked into the possibility of using fuel that had not been dyed red and dealing with the tax issues differently. This solution was not viable, however, because County buses frequently fill up at diesel pumps operated by the City and the City of Shakopee would have to agree to the same methods. The City did not wish to cooperate because it would be too costly for them to change all their accounting procedures, pay for the fuel first and then get a rebate from the federal government for that portion of fuel used by off-road vehicles. Using red-dyed diesel fuel avoids this process.²⁶ This possible solution also proved unworkable.

Eventually, the Employer decided to terminate the Grievant, effective April 2, 2007, due to his inability to perform the essential functions of the Equipment Mechanic position and the County's inability to accommodate his permanent physical restrictions in

²³ T., Johnson and Vermillion.

²⁴ T., Vermillion

²⁵ T., Vermillion and Felt.

²⁶ T., Felt.

his Mechanic job.²⁷ No other County jobs were then available for which he was qualified.²⁸

UNION POSITION

The Union argues that the Grievant performed satisfactorily for over 7 years as an Equipment Mechanic and worked with vehicles and equipment powered by red-dyed diesel fuel throughout his employment with no ill-effects until one incident occurred in November of 2006. The Union points out that the Grievant continued to work in the shop with no further harm until he was placed on medical leave, February 2, 2007, and the Employer produced insufficient evidence to establish that any backlog or difficulties occurred because of his work during that period.

The Union claims that it was unreasonable for the County to ignore OSHA standards which indicate that when a quantity of an irritant like red-dyed diesel fuel is splashed on anyone, a skin reaction may result; the treatment is to avoid contact with the skin, and this can be accomplished by judicious use of protective equipment, including shoulder length gloves. The Union argues that if the doctors and the Employer had used the OSHA information, the Grievant would have been able to avoid skin contact with the irritant, and no change in job duties would have been necessary. The Union maintains that the Employer has not established that one incident of skin rash over a period of seven years should become just cause for discharge.

EMPLOYER POSITION

The Employer argues that it terminated the Grievant only after careful consideration of the medical documentation in conjunction with the duties of Equipment

²⁷ Joint Ex. 3, Letter of Termination from Vermillion to Grievant.

²⁸ T., Johnson.

Mechanics in the Public Works Shop. The Employer emphasizes the risk of harm to the Grievant of more extensive skin disease and the risk to the Employer of potential liability if he continues to work on diesel-powered vehicles and equipment. The Employer claims that he would not be able to do the work required by persons in this job class and still limit contact with red dyed diesel fuel to less than two minutes at a time and less than five times per day in accordance with his medical restrictions. The Labor Relations Director discovered no other available jobs for which he was qualified, and the Employer argues that it was necessary to discharge the Grievant.

DISCUSSION AND DECISION

The term “just cause” has been defined many times, and in 2002, the Minnesota Supreme Court affirmed the following definition:

The term “cause” generally means a real cause or basis for dismissal as distinguished from an arbitrary whim or caprice. That is, some cause or ground that a reasonable employer, acting in good faith in similar circumstances would regard as a good and sufficient basis for terminating the services of an employee...

Hillgoss v. Cargill, 649 NW. 2d 142 (Minn. 2002).

Using the above definition as a starting point, I find no evidence of “bad faith”. But I do find evidence that there is more than one reasonable choice the Employer could have made; so my job is to determine whether there is sufficient evidence that the Employer’s discharge decision was made for a good reason and that it met due process safeguards under the Contract. The Union raises no substantial claim about the process leading to termination, claiming that the decision to terminate the grievant was unfounded.

In explaining why it discharged the Grievant, the Employer emphasizes that it has an obligation to provide a safe work environment for its employees. It is axiomatic that the Employer has a duty to make certain its employees are capable of performing their jobs without risk of harm to themselves or others. *Elkouri and Elkouri, How Arbitration Works*, at 1040-1043, BNA, 6th Ed., 2003. In order to accomplish this goal, employers are entitled to rely on the good-faith medical advice of their doctors. There is no evidence that either of the physicians seen by the Grievant provided information to the Employer in bad faith. Dr. Guyer, the allergy specialist chosen by the Grievant, not the Employer, met with him in February. Based on information obtained from the Grievant, she diagnosed the Grievant's condition as an allergy to red-dyed diesel fuel. According to her letter to County Occupational Health Nurse Dubbe, dated February 13, 2007, the Grievant told Dr. Guyer that he had reacted to diesel fuel containing red dye on two occasions, and "symptoms have occurred when wearing polyvinyl gloves that ended at his wrist."²⁹ Dr. Guyer communicated with the Employer at the request of the Grievant, and advised the Employer that the Grievant should avoid contact with red-dyed diesel fuel. She advised the Employer that there is no cure for contact dermatitis, and avoidance is the only treatment. The Grievant apparently also told Dr. Guyer that he had only "brief exposures" to the offending chemical, so she advised that he should avoid the chemical and wear protective gloves for brief exposures.³⁰ When Ms. Dubbe asked for a more specific definition of "brief exposure", Dr. Guyer complied by setting out a work

²⁹ Employer Exhibit 12.

³⁰ *Id.* Dr. Guyer did not opine on the "breathing trouble" reported by the Grievant in the initial incident report, because the Grievant did not mention it to her. In response to Ms. Dubbe's question about whether the Grievant's condition constituted a "disability" pursuant to the Americans with Disabilities Act, she concluded it did not.

restriction recommending that when the Grievant cannot avoid brief exposure, he should wear “shoulder length gloves” and limit exposure to red diesel “to two minutes at a time no more than five times per day.” It was not unreasonable for the Employer to rely on Dr. Guyer’s recommended work restriction. No doctors other than Dr. Johanson and Dr. Guyer commented on the medical aspects of the case.

Ms. Dubbe forwarded information about Dr. Guyer’s medical restrictions to Operating Engineer Felt and the Grievant’s supervisors who conferred and concluded that the restrictions would interfere with the core duties of an Equipment Mechanic’s job. Mr. Felt testified that it would take a minimum of 15 minutes to change necessary fuel filters, not two minutes. Further, he explained at some length about the fact that a number of the Grievant’s duties, as set out in the job description, presented the possibility of contact with red dye, not just changing fuel filters. Based on the physician’s written opinion and facts about the operation of the Highway Shop from the people who worked there, the Employer decided it must terminate the Grievant’s employment.

After the decision was made and at the arbitration hearing, the Union argued capably on behalf of the Grievant that he could have continued in his job working on diesel-fueled vehicles using shoulder length protective gloves. A Union witness described an alternative method of changing fuel filters that might lead to less likelihood of spilling fuel. Another witness described the Employer’s fears of accidental contact with diesel fuel in the shop as overblown. The Union provided information from the OSHA regulations describing diesel fuel as an irritant to everyone’s skin, not just the Grievant’s, and suggesting shoulder length protective gloves for those exposed to it at work. This evidence makes it clear that the Employer could have made other choices.

Nonetheless, the Employer is entitled to rely on the physician's opinion about health related restrictions for the Grievant. Her opinion is not unreasonable given the facts the Grievant reported to her. First, he reported that he had diesel fuel reactions on two occasions with serious symptoms even while wearing gloves; second, he told her that his exposures to the irritant would only be "brief".³¹ Dr. Guyer's recommendations were not different than the OSHA based materials safety data provided by the Union.³² Both suggest shoulder length protective gloves while working with this skin irritant. The Grievant's time limitation restriction added by Dr. Guyer is based on the facts the Grievant reported to her.

The Employer has authority to determine that all of its Equipment Mechanics must be able to work on equipment and vehicles powered by red-dyed diesel fuel, especially where 70% of all shop time is charged on diesel type equipment. Further, emphasis on diesel work is increasing over time according to the head of the Public Works Department, and a substantial number of the duties listed on the job description might lead to contact with red-dyed diesel fuel in the shop.³³ If the Grievant's condition limits the time he is able to do the work required, the Employer has no obligation to accommodate his difficulties throughout his employment unless his condition constitutes a "disability" under the law.³⁴ Thus, the Employer may rely on the physician's medical restrictions for the Grievant, consider its own business needs, and take the position that the Grievant no longer meets the criteria for the job. This decision does not violate the just cause provision of the Contract.

³¹ See, letter from Dr. Guyer to Kara Dubbe, February 13, 2007. Employer Exhibit 12.

³² See, Union Exhibits 3a and 3b.

³³ T., Vermillion and Felt.

³⁴ Neither party claims the condition meets the legal definition of "disability" under the state and federal anti-discrimination laws.

AWARD

The Grievance is denied.

Dated: December 7, 2007

Andrea Mitau Kircher
Arbitrator