STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 386, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,	:	
Complainant,	:	Case V No. 17823 Ce-1535
vs.	:	Decision No. 12626-A
STOLPER INDUSTRIES, INC.,	:	
Respondent.	:	

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Kenneth R. Loebel, for Complainant.
Michael, Best & Friedrich, Attorneys at Law, by Messrs. James T. Harrington and John R. Sapp, for Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

A Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter; and the Commission having appointed Stanley H. Michelstetter II, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders pursuant to Section 111.07(5) of the Wisconsin Statutes and hearing on said Complaint having been held at Milwaukee, Wisconsin on May 13, 1974 before the Examiner; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Local 386, Allied Industrial Workers of America, AFL-CIO, herein referred to as Complainant, is a labor organization with offices in Milwaukee, Wisconsin.

2. That Stolper Industries, Inc., herein referred to as Respondent, is an employer engaged in manufacturing with offices and a plant in Menomonee Falls, Wisconsin.

3. That at all relevant times Respondent has recognized Complainant as the exclusive representative of certain of its employes including Alton Richardson, herein referred to as Grievant, for purposes of

collective bargaining and in that regard Complainant and Respondent have been parties to a collective bargaining agreement, which provides in relevant part:

"ARTICLE I

RECOGNITION -- MUTUAL SECURITY

. . .

MANAGEMENT CLAUSE

Paragraph 105 Except as otherwise herein provided, the direction of the working force, including the right to hire, transfer, suspend or discharge, or discipline for proper cause, and right to relieve employees from duty because of lack of work or for other legitimate reasons, is vested exclusively in the Company, provided that the Company will not use such rights for the purpose of discriminating against the Union or its members.

. . .

ARTICLE III

SENIORITY

. . .

LOSS OF SENIORITY

Paragraph 305 An employee shall lose his seniority for the following reasons:

. . .

Paragraph 305.2 When he shall have been discharged for cause."

4. That at all relevant times Respondent has had in effect the following relevant work rules:

TYPE "C" RULES

. . .

2. Insubordination -- refusal to carry out supervisory assignments.

. . .

5. Disorderly conduct on company property including the threat to do bodily harm.

. . .

7. Starting fights or fighting on company property.

. . .

VIOLATION OF "C" RULES

1. Discharge for first violation of any "C" rule. (Disciplinary action may be instituted in lieu of discharge depending upon conditions and severity of consequences involved by management discretion.)

5. That on January 30, 1974 Grievant immediately prior to the commencement of his scheduled shift attended a meeting sponsored by Complainant whereat he consumed two beers.

6. That, on January 30, 1974, at 4:44 p.m., Grievant, a second shift welder, reported for work and discovered at his customarily assigned work station that material had been left in his work area by employes from the previous shift which had not been removed by the second shift trucker, an hourly paid employe responsible for keeping the work areas of welders clear of such material.

7. That at all relevant times previous thereto there had been a dispute existing between second shift welders in the instant department represented by Complainant with Respondent concerning the alleged failure of the second shift trucker to perform the aforementioned duty because the instant department foreman, Mel Schulz, allegedly had assigned him piecework production and the alleged failure of such foreman to credit piecework welders with paid time for performing such truckers' duties.

8. That at or about 5:20 p.m., on January 30, 1974, a fellow employe spoke to Grievant about the aforementioned situation, and Grievant, as he discovered that a protective shield known as a rops had been left on the welding positioner, stated in effect that he was not going to remove the rops even if directed to by his foreman.

9. That Grievant immediately summoned his department foreman, Mel Schulz, pointed out the status of his work area, and demanded that Schulz get someone to clear up the area, whereupon a conversation to the following effect took place in the presence of Grievant's fellow employes:

Schulz: You have a trucker.

Richardson: He's over there finishing. I'm not a trucker. I have to do a lot of trucking. That's an everyday thing. You won't give me down time for it.

Schulz: All you have to do is ask for down time.

Richardson: I am sick and tired of moving the stuff from my area. I am not going to move it because I

am not a trucker. My position is that of a welder.

Schulz: If you don't move it, go home.

Richardson: I'm not going home. What are you going to do about it?

Schulz: You're drunk; you're not talking straight. You can't even stand up straight.

Richardson: I can't understand you half the time either, Mel Schulz. You never talk any sense.

Schulz: Let's be fair about it.

Richardson: Fair about what?

Schulz: I come through the department every night when I turn the lights off, and the place is usually cluttered up in three or four places. The last two or three weeks the place was cluttered up.

Richardson: What are you going to do about it?

Schulz: Why don't you come in and talk to the day shift foreman at 6:30 a.m.?

Richardson: I can't do that. You're scared of the day shift foreman yourself.

Schulz: Come on, let's go to the general foreman's office.

10. That Grievant thereupon grabbed Schulz by the shirt, popping off the second and third buttons from the top, and violently shook Schulz back and forth, stating in effect, "I'm going to get this straightened up" to which Schulz responded in effect, "Go ahead and try it."

11. That Schulz thereupon pushed Grievant away, and Grievant pushed back; both were then restrained by the employes present, at which time Schulz directed that Grievant be taken down the aisle to the general foreman's office.

12. That Schulz walked down such aisle toward the general foreman's office fifteen feet ahead of Grievant and two fellow employes and that while Schulz paused to talk to another employe, Grievant caught up to him and struck Schulz from behind once on the right ear and once on the right side of his neck, whereupon Schulz announced that Grievant was discharged.

13. That Schulz then followed Grievant and the accompanying employes to the general foreman's office which Grievant entered, and

Schulz remained immediately outside until general foreman Carl Duveneck arrived.

14. That Schulz and Duveneck entered the office while Duveneck asked what the problem was; Schulz stated that Grievant had been discharged, to which Grievant shouted that he was damned sick and tired of coming in and moving material every day, among vulgar accusations and threats; that Duveneck told Grievant to calm down and talk about it, whereupon Schulz interjected, "Carl, I don't care what you say, he's fired"; that Grievant jumped out of his chair and shouted an obscene denunciation; that Schulz said, "He's drunk" and Robert Hanrahan, Complainant's Chief Steward, asked Duveneck to tell Schulz to be quiet because he was agitating Grievant; that Duveneck, without knowledge of the aforementioned attacks on Schulz, stated that he couldn't tolerate any talk like this from Grievant and asked him to leave the premises; that Grievant jumped up again, demanding all wages due and owing to date and that Duveneck indicated he had no authority over the payroll and stated to Hanrahan that Grievant was discharged.

15. That by such act, Duveneck in fact discharged Grievant a second time or affirmed the prior discharge.

16. That thereafter Grievant left the plant, filed the instant grievance and exhausted all steps of the grievance procedure without resolution thereof.

That on the basis of the foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That, since the discharge of Grievant, Alton Richardson, was for proper cause in accordance with the provisions of the collective bargaining agreement existing between Complainant, Local 386, Allied Industrial Workers of America, AFL-CIO, and Respondent, Stolper Industries, Inc., Respondent has committed no unfair labor practice with respect to said discharge.

Upon the foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the Complaint filed in the instant matter be,

and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin, this 7th day of October, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II
Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Complainant alleged in its Complaint that an employe, Alton Richardson, was denied employment by Respondent in violation of the seniority provisions of the instant agreement. Respondent by Answer and stipulations made at the outset of hearing herein admitted the factual allegations constituting the alleged violations, but asserted the defense that Respondent had been discharged for proper cause within the meaning of that agreement. The Examiner, with Respondent's consent, placed the burden of proceeding with the evidence on Respondent. 1/

Burden of Proof

During the course of the hearing and by brief afterwards, the parties devoted a substantial amount of their argument to the question of upon whom the burden of proof rests. Although not necessary to the result herein, it is useful to expressly state the Examiner's theory thereof and the reasons therefor.

Section 111.07(3) 2/ provides in relevant part:

> "Any such proceedings shall be governed by the rules of evidence prevailing in courts of equity and the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

In Century Building Co. v. Wisconsin E. R. Board 235 Wis. 376, 382, 1291 N.W. 305, 6 LRRM 1134 (1940), the Court held that the aforementioned Section "imposes upon the party seeking to arouse the action of the board the burden of establishing his facts by a clear and satisfactory preponderance of the evidence". (Emphasis supplied) See also, Kenosha Teachers Union v. Wisconsin E. R. Comm. 39 Wis. 2d 196, 203, 291 N.W. 305 (1967). The statement made merely reiterates the rules of evidence prevailing in courts of equity that the complaining party has the burden of proving each and every element constituting his alleged cause of action, while the responding party must raise and carry the burden of proof as to any affirmative defenses he may have. 3/

1/ Appleton Memorial Hospital (12141-A) 5/7 and (12141-B) 5/74.

2/ Unless otherwise noted, all references are to Wis. Rev. Stats. (1971).

3/ Cause as an affirmative defense: Giese v. Boynton Cab Co., 237 Wis. at pp. 244-245 (1941); Johnson v. Green Bay Packers 272 Wis. 149 at pp. 160-161 (1955); Reinke v. Personnel Board 53 Wis. 2d 123 (1971).

Respondent has relied heavily on Briggs & Stratton Corporation, infra, for the proposition that under the instant agreement Complainant must bear the burden of proof as to lack of proper cause. However, in Briggs & Stratton Corporation (8570-A) 1/69 and (8570-C) 3/69 the complaining union alleged that an employe's seniority rights were violated when the employer discharged an employe on sick leave without just cause. Respondent-employer therein denied that it discharged the employe and alleged that she had quit. The examiner concluded that the respondent-employer had discharged her and that the discharge was for just cause, in that she had failed to notify the respondent-employer of her new address. The Commission without discussion of the burden of proof affirmed on the basis that the examiner acted properly on the evidence presented by the parties, irrespective of the position taken by the respondent-employer that the employe had quit. In affirming the Commission, the Court concluded that the parties in that case had raised an issue as to whether the discharge of the employe was for just cause and that the substantial evidence presented by the parties supported the view that she had been discharged for just cause. The Court recited what appeared from the allegations of the underlying complaint and had not otherwise been raised by the parties that,

> "it appears that the burden of proof under the statute is upon the party contending that an unfair labor practice has been committed. . . .
>
> "Under the issue in the proceeding, the burden was upon the petitioner to prove an unfair labor practice under Section 111.06(1)(f). . . . This, as respondent and defendant note, required proof of discharge without 'just and sufficient cause'." (Emphasis supplied) 4/

The Commission has distinguished Briggs, supra, on the basis that there was no agreement that the employer bear the burden of proof as to cause 5/ and held that where the underlying agreement provides that the employer bear the burden of proof, the employer must so bear. 6/

Under Wis. Rev. Stat. (1969) Section 16.24 7/ providing that no permanent employe be discharged except for just cause, the Wisconsin

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4/ Allied Industrial Workers of America, Local 232, AFL-CIO v. Wisconsin E. R. Comm. and Briggs & Stratton Corporation, No. 367-659, 78 LRRM 2449, 2455-2456 (Wis. Cir. Ct., Milwaukee County; 1971).

5/ Gehl Company (10891-A) 3/73 and (10891-B) 5/73.

6/ Abbotsford Public Schools Joint District No. 1 (11202-A) 3/73 and 11202-B) 5/73.

7/ Now renumbered Section 16.28 and unchanged in relevant part.

Supreme Court held that the State employer had the burden to prove that a discharge was for just cause when the discharged employe challenged such before the Personnel Board. [8/] Even though the parties in Briggs, supra, agreed otherwise, a collective bargaining agreement granting employes the right to their employment unless discharged for cause is an express agreement that the employer bear the burden of proof as to cause. Thus under the rule of evidence prevailing in the courts of equity, Respondent by adopting a proper cause standard for discharge has expressly agreed to bear the burden of proof concerning discharges under the instant agreement and therefore must establish such as an affirmative defense.

Evidence

The testimony adduced by the parties produced an irreconcilable conflict with respect to key facts and thereby raised substantial issues as to the credibility of witnesses. [9/] The testimony of both principals involved herein as to the conversation prior to any physical contact differs markedly with that of other employes present. The Examiner has credited the testimony of such other employes to the extent that they were observing the discussion leading to the assault. At the point Grievant grabbed Schulz by the shirt, such witnesses admitted that they were involved in a separate conversation and consequently not attentive to the incident. Grievant denied grabbing Schulz by the shirt at any time; however, the uncontroverted evidence is that Schulz's shirt was indeed missing two buttons after the alleged incident. Further, Grievant's testimony, as a whole, was self-contradictory, contradicted other credible testimony and was an otherwise incredible explanation of the evidence. On that basis, the Examiner has credited the testimony of Schulz with respect to the shirt-grabbing incident and the striking in the aisle leading to the general foreman's office.

Upon the basis of the credited version of the facts, the Examiner concludes that Grievant intended to and did refuse foreman Schulz's direction to take the rops off the positioner, intended to and did challenge the authority of Schulz and, when all else failed, grabbed Schulz in an attempt to start a fight. While the actions of Schulz in arguing with Grievant during this period may not have been the best

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[8/] Reinke v. Personnel Board 53 Wis. 2d 123.

[9/] During the course of the hearing, Respondent introduced evidence concerning a prior criminal conviction of Grievant. The Examiner reserved ruling with respect to the admissibility thereof, but now finds no need to make such ruling since such evidence, if admitted, would have no probative weight with respect to the instant Complaint.

approach, they do not constitute sufficient provocation for Grievant's two attacks upon him.

Nor does the Examiner find any excuse in Grievant's claims that his actions were in response to Respondent's racial discrimination or Respondent's violation of the instant agreement. Grievant's testimony, if believed, would establish that his actions were based solely upon his position with respect to the grievance concerning the trucker. Nonetheless his actions could hardly be characterized as a proper attempt to resolve his grievance in an orderly and peaceful manner pursuant to the agreement's grievance procedure. Accordingly, Grievant's discharge for striking foreman Schulz was for cause within the meaning of the agreement and is sustained.

Dated at Milwaukee, Wisconsin, this 7th day of October, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II
Examiner