STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TIMOTHY LIEN,		
Complainant,	:	Case XXXVIII No. 25207 Ce-1838
vs.	:	Decision No. 17414-A
LADISH COMPANY,		
Respondent.		

Appearances:

Mr. Stephen J. Hajduch, Attorney at Law, Suite 940, 735 West Wisconsin Avenue, Milwaukee, Wisconsin 53203, appearing on behalf of the Complainant.

Mr. Fred G. Groiss and Mr. David B. Kern, Quarles & Brady, Attorneys at Law, 780 North Water Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Mr. Timothy Lien having, on October 18, 1979 filed a complaint, amended on November 27, 1979, with the Wisconsin Employment Relations Commission, alleging that the Ladish Company has committed an unfair labor practice within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed William C. Houlihan, a member of its staff, to act as Examiner, and to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Section 111.07 (5), Wis. Stats.; and a hearing on said complaint having been held before the Examiner in Milwaukee, Wisconsin, on January 8, 1980; and a transcript of said hearing having been prepared; and the Respondent having submitted a brief on February 6, 1980, and the Complainant having submitted a brief on February 28, 1980; and the Examiner being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Timothy Lien is an individual, residing at 10239 South 12th Avenue, Oak Creek, Wisconsin.

2. That the Ladish Company is a corporation, which engages the services of employes, and which is located at 5481 South Packard Avenue, Cudahy, Wisconsin.

3. That Mr. Lien was a member of a collective bargaining unit, represented by Local 1509 of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers.

4. That Local 1509 and the Ladish Company were signators to a collective bargaining agreement, effective for the period July 26, 1976 through July 29, 1979, which agreement contained the following provisions:

ARTICLE I

. . .

MANAGEMENT'S FUNCTIONS

103. The right to hire, promote, discharge or discipline for cause and to maintain discipline and efficiency of employees is the sole responsibility and exclusive right of the Company, subject to

provisions in Article II, paragraph 213 hereof and other express terms of this Agreement. Any dispute as to whether or not Management's exercise of its right to discharge or discipline for just cause and to maintain discipline shall be subject to the Grievance Procedure contained in this Contract. The Company shall, in exercise of Management's functions subcontract work if it decides such subcontracting necessary for economic reasons, for the benefit of our customer requirements and the overall betterment of our employees and the Company. Company will keep Committee informed of such subcontracting.

. . .

ARTICLE II

DISCIPLINARY LAYOFFS AND DISCHARGES

213. The right of the Company to enact and enforce by discharge or other reasonable disciplinary measure, all published Company regulations and rules not in conflict with the express terms of this Agreement is recognized. In the event disciplinary action in the form of a layoff is to be invoked against any employee for violation of a Company rule, or for misconduct, the Chairman of the Bargaining Committee (or his designated representative who is a member of the Bargaining Committee) and the department committeeman will be notified before such disciplinary action is taken.

214. In all cases where the Company intends to discharge an employee, the employee shall be treated as being on suspension for a period not to exceed five (5) working days. During such period the Company shall, at the request of the Union, meet to discuss the facts involved in the case and the discipline to be invoked. If no such meeting is requested during such five (5) day period, the contemplated discharge shall become final and no further claim or grievance may be presented concerning such discharge. If such meeting is requested and the Company and the Union cannot agree on the disposition of the case, the Union may file a grievance with respect to the discharge commencing with the third step of the grievance procedure. The Bargaining Committee Chairman and Secretary-Treasurer of Local Lodge 1509 shall receive written notice of such suspension.

5. That Mr. Lien was covered by the provisions of the aforementioned collective bargaining agreement.

6. That on December 27, 1978 Mr. Lien caused a co-worker, Mr. David Coolidge, to be set on fire, on the premises of the Ladish Company, during working hours.

7. That the Ladish Company investigated the incident, determined Mr. Lien to be at fault, and, on March 19, 1979, discharged Mr. Lien.

8. That Mr. Lien grieved the discharge, and exhausted the contractual grievance procedure.

9. That the contractual grievance procedure does not have a provision for final and binding arbitration of grievances.

10. That the Company's discharge of Mr. Lien did not violate any of the provisions of the collective bargaining agreement.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That Timothy Lien is a person within the meaning of Section 111.02(1), Wis. Stats., and is, furthermore, a party in interest within the meaning of Section 111.07(2)(a), Wis. Stats., in this complaint.

2. That the Ladish Company is an employer within the meaning of Section 111.02(2), Wis. Stats.

3. That the Ladish Company did not violate any portion of Subchapter 1, of the Wisconsin Employment Peace Act (Sections 111.01 through 111.19, Wis. Stats.) in its discharge of Timothy Lien.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

That the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 27th day of April, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C Houlihan
William C. Houlihan, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On the morning of December 27, 1978, David Coolidge, a helper in the forge shop of the Ladish Company, received serious burns to his back, while sitting in a work area of the shop. Following an investigation into the matter, the Company discharged Timothy Lien, a co-worker of Mr. Coolidge, for horseplay and misconduct resulting in serious injury, in connection with the matter. The discharge was grieved through the contractual grievance procedure, which has no provision for final and binding arbitration. The propriety of the discharge is before this Examiner pursuant to the filing of an unfair labor practice by Mr. Lien.

Background

On the morning of December 27, 1978, one of the Company's "hammers" became inoperative. A "hammer" is really a unit of production equipment in the Company's forge shop, measuring some 20-25 feet high, and 14 feet wide, which is attended by a ten to twelve man production crew. The machine was shut down while a repair crew was summoned. Most of the members of the production crew went to the lunchroom, on break, while the machine was being repaired. Three members of the production crew, David Coolidge, Timothy Lien, and Barney McKehe remained in the production area.

Coolidge sat on a bench, and, in time, lapsed into a semi-conscious, or "daydreaming" state. At one point he looked up, and saw Mr. Lien standing immediately next to him. Moments later, he experienced a burning sensation on his back, and discovered that he was on fire. Mr. Coolidge was unable to extinguish the flames, but eventually did so with the help of a co-worker. As a result of this incident Coolidge suffered serious burns over a good portion of the right side of his back.

It was Coolidge's uncontroverted testimony, that, at the time he caught fire, only he, Lien, and Barney McKehe were in the proximate work area. It was his further testimony that one-half hour before he caught fire, Lien had tossed a lit cigarette in Barney McKehe's pocket. According to Mr. Coolidge, at the time of the incident, there was no machinery in operation which would have been capable of causing his burns.

The workmen who had migrated to the lunchroom, remained there for a period of about twenty minutes, and then returned to their worksite. As one of those men, Michael Gavin, was returning, he was approached by Mr. Lien, who asked what was going on. Gavin, who had been told by other workers that Lien had set Coolidge on fire, did not respond and instead walked away. As the men approached the work area, Gavin turned to Lien and asked if he did it. Lien responded "Yeah, but I didn't mean for this to happen". 1/

Both the Company and the police conducted an investigation into the matter. The police investigation led to the filing of a criminal complaint against Lien for Negligent Handling of Burning Material. On March 13, 1979 Mr. Lien, who was represented by counsel, plead "no contest" in the criminal action, resulting in a judgment of conviction. Lien was placed on one year probation, assessed a fine

---

1/ Tr. 45-46, 54.

and court costs, and directed to make restitution, in the absence of insurance.

The Company investigation, in which Mr. Lien refused to answer questions, led the Company to believe that Lien had caused the injury to Coolidge. Accordingly, the Company discharged Mr. Lien.

The Hearing

At the hearing, the parties stipulated a collective bargaining agreement into the record, and further stipulated to the fact that Mr. Lien was covered by its provisions, that the contractual grievance procedure had been exhausted, that there existed no contractual provision for final and binding arbitration, and that Mr. Lien was discharged on March 19, 1979. Counsel for Complainant then indicated that Mr. Lien would not be called upon to testify, and, if called adversely, would "invoke the constitutional guarantees against self-incrimination in this matter". 2/ Complainant then rested.

At this point in the hearing, Respondent moved for dismissal, arguing that the petitioner had failed to sustain its burden. That motion was denied by the Examiner, and Respondent proceeded to place its evidence into the record.

Positions of the Parties 3/

Respondent argues that the Complainant bears the burden of establishing a breach of the collective bargaining agreement, and failed to carry this burden. In support of this position, the Respondent cites Century Building Co. v. Wisconsin Employment Relations Board, 235 Wis. 376, 382 (1940); Kenosha Teachers Union Local 557 v. Wisconsin Employment Relations Commission, 39 Wis. 2d 196, 203 (1968); La Crosse County Institution Employees Local 227, AFSCME, AFL-CIO v. Wisconsin Employment Relations Commission, 52 Wis. 2d 295, 302 (1971). Respondent argues that its discharge decision should be sustained, absent a showing that it acted arbitrarily, discriminatorily, prejudicially, or with bias.

Respondent contends that, based on the testimony of Coolidge and Gavin, its decision to discharge is supported by the record. The conduct was proven and warranted discharge.

Respondent argues that the nolo contendere plea to the criminal charge should be considered evidence of misconduct and that the Complainant's refusal to testify should lead to an adverse inference. The Respondent cites the following cases in the latter contention: Grognet v. Fox Valley Trucking Service, 45 Wis. 2d 235, 239 (1969); Molloy v. Molloy, 46 Wis. 2d 682, 687, 688 (1970); State v. Postorino, 53 Wis. 2d 412, 417 (1972); Layton School of Art and Design v. Wisconsin Employment Relations Commission, 82 Wis. 2d 324, 365, N. 45 (1978).

It is the position of the Complainant that it satisfied its burden of going forward and that Respondent was properly compelled to then proceed to explain the basis for its discharge of Mr. Lien. Complainant goes on to argue that there is no proof that Mr. Lien ignited any flammable material, citing the testimony of Coolidge and Gavin to the effect that neither of them, nor anyone else, saw Lien start a fire.

2/ Tr. at 6.

3/ The original complaint made reference to an Unemployment Compensation proceeding and determination. The Respondent moved to strike this reference as irrelevant. The Examiner agrees with Respondent's contention in this regard and has not considered the Unemployment Compensation reference.

Complainant argues that no inference should be drawn from the nolo contendere plea, or from the exercise of the constitutional guarantee against self-incrimination.

Finally, Complainant argues that the Employee Handbook has no definition of careless use of flammable material and that employes are owed notice that certain types of conduct may have severe employment consequences.

Discussion

Burden of Proof

The Respondent has cited caselaw standing for the proposition that the complaining, or moving, party shoulders the burden of establishing that there has been a violation of the statute under which he seeks relief. While, as a general proposition, there can be little doubt that Respondent accurately states the law, this Examiner believes that the present case frames a situation where the burden is necessarily shifted to the Respondent.

In proceeding to establish its prima facie case, the Complainant was able to show that Timothy Lien was an employe of the Respondent Ladish Company; that Lien was covered by the terms of a collective bargaining agreement, one of whose provisions establish that the Company may "discharge or discipline for cause"; that Lien was discharged; and that Mr. Lien had exhausted his contractual relief. At this point, the Complainant rested, and Respondent moved to dismiss.

The heart of the case brought by the Complainant is that Lien was discharged without proper "cause", in violation of the collective bargaining agreement, under whose terms he worked, which constitutes a violation of Section 111.06(1)(a)(f), Wis. Stats. That claim cannot be considered meaningfully without a determination of the basis, or reason, for the Company's decision to discharge. The Company would have the Complainant demonstrate that the Company did not have "cause" for discharge. To sustain the Respondent's position in this regard is to require the discharged Complainant to come forward and demonstrate that the Company acted without "cause", at a time when the basis of the Company's discharge decision was not yet in the record. It is the Company's decision to discharge. The basis of that decision may, or may not, be shared with the affected individual.

An allegation that one party to a labor agreement has violated that agreement, thus giving rise to an unfair labor practice, is somewhat different in nature from other allegations of unfair labor practices. This is so, because the validity of the claim typically rests entirely upon an interpretation of a contract, which has been fashioned by the parties in collective bargaining, and which may place certain duties, liabilities, and responsibilities upon its signators, and those who labor under its provisions. The case at bar is an example of such a situation. If the Company discharged Mr. Lien without "cause", it has exceeded its contractual authority under Article I, Management's Rights. If, on the other hand, "cause" existed, the Company acted within its contractual discretion.

Disputes over the interpretation and/or application of the terms of collective bargaining agreements are most frequently resolved by arbitrators, selected pursuant to final and binding arbitration provisions of the agreements. There is no such provision in this contract, thus placing this Examiner in the role commonly occupied by the arbitrator. While the moving party in a grievance arbitration proceeding conventionally bears the burden of establishing his case, the discharge case is regarded as an exception. To cite Elkouri:

> Discharge is recognized to be the extreme industrial penalty since the employee's job, his seniority and other contractual benefits, and his reputation are at stake. Because of the seriousness of this penalty, the burden generally is held to be on the employer to prove guilt

of wrongdoing, and probably always so where the agreement requires "just cause" for discharge. (Elkouri, Frank and Elkouri, Edna, How Arbitration Works, 3rd ed., BNA, 1960, 1973).

This reasoning is persuasive, particularly in light of the fact that only the Company is in a position to outline the factors considered, and relied upon, in the decision to discharge.

Applying the foregoing analysis to the instant case, this Examiner concludes that the Complainant has established a prima facie case, and placed Respondent Company in the position of demonstrating the basis of discharge.

Respondent's Proof

The testimony of David Coolidge and Michael Gavin, standing uncontradicted on the record, is credited. This Examiner thus concludes that Mr. Lien was one of only two men who might have caused the fire, that Lien had previously tossed a lighted cigarette in the pocket of a co-worker, that Lien was standing next to Coolidge immediately before Coolidge caught fire, and that Lien admitted to Gavin that he had caused the fire.

Application of the "Cause" Standard

This Examiner believes that the Company has established by a clear and satisfactory preponderance of the evidence that Lien committed some act resulting in Mr. Coolidge being set afire. 4/ In light of the testimony, and credibility findings outlined above, no other conclusion is possible, notwithstanding the circumstantial nature of the evidence adduced.

Following the incident, the Company conducted an investigation into the matter, identified Mr. Lien as the one responsible for the fire, afforded Lien an opportunity to present that which he chose, and eventually discharged him.

At issue here is the propriety of a discharge meted out to an employe who set fire to a co-worker, on the job. No employer should be required to tolerate the presence of a worker who would inflict such grievous injury upon a co-worker. The Company has responsibility for the reasonable safety of those who it employs. To find that the Company cannot rid itself of a man who sets fire to his co-worker is to, in effect, find that the Company has been emasculated of all authority to preserve even minimal shop discipline for the sake of production and the most rudimentary of safety concerns. It would also condemn those who work in the physical plant to serious risks of physical harm being inflicted upon them.

The Complainant has alleged that the Employee Handbook provides inadequate notice of the seriousness of his offense. This argument is frivalous. Certain conduct is so inherently malicious and vile as to require no formal work rule proscribing it. Setting fire to a co-worker is such conduct.

Dated at Madison, Wisconsin this 27th day of April, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C. Houlihan
William C. Houlihan, Examiner

4/ In light of this finding, the Examiner does not believe it necessary to rule on the propriety of drawing inferences from the nolo contendere plea, or Complainant's refusal to testify.